SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

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JAMES S. HINMAN and
DONALD M. THOMPSON,

Petitioners,

-against-

Hon. DONALD J. MARK, in his capacity
as Justice of the Supreme Court and
Hon. THOMAS VAN STRYDONCK, in his capacity
as Administrative judge of the Seventh Judicial District,

Respondents.

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Brief of the
New York State Defenders Association
New York State Association of Criminal Defense Lawyers
and
National Association of Criminal Defense Lawyers

Amici Curiae

Jonathan E. Gradess
New York State Defenders Association
194 Washington Avenue Suite 500
Albany, New York 12210
(518) 465-3524

Stephanie J. Batcheller
Of Counsel

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Statement of Interest of *Amici Curiae*

This case presents important legal questions about the independence of trial courts to act in a politically insulated fashion with regard to matters that are appropriately before them in accordance with the New York State Constitution and controlling statutes. It places under scrutiny the power of the Chief Judge and the Chief Administrative Judge to regulate matters which have not been placed within their jurisdiction by the constitution or any legislative enactment. It embodies the fundamental rights of parties under the New York and federal constitutions to quality representation regardless of ability to pay.

The mission of the New York State Defenders Association [NYSDA] is to improve the quality and scope of publicly supported legal representation to low income people. NYSDA is a not-for-profit membership association of more than 1300 public defenders, legal aid attorneys, assigned counsel, and private practitioners throughout the state. It operates the Public Defense Backup Center with funds provided by the state of New York.

The Backup Center offers legal consultation, research, and training to the more than 5,000 lawyers who serve as public defense counsel in criminal cases across New York, provides technical assistance to counties with regard to public defense, serves as a clearinghouse for defense services information, and conducts public education efforts concerning the criminal legal system. New York State contractually obligates NYSDA, through the Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." NYSDA has issued numerous reports identifying problems in the state's criminal legal system and has provided, often by invitation, comments to various entities dealing with criminal justice issues.

NYSDA's unique perspective on the issues presented in this matter arises from its close association with assigned counsel programs throughout the state. In recent years, NYSDA has come to recognize the crisis in assigned counsel services as a crucial factor undermining the integrity of the criminal justice system. The number of attorneys financially willing or able to take appointed work has reached record lows. More dangerously, the quality of representation has likewise reached an all time low. Attorneys who do this work are forced to cut corners in representation and more often than not fail to competently consult, investigate and advocate in these cases. In light of these events, the power of the trial courts to independently consider the cases properly before them, including the consideration of whether the undertaking of an assigned case is worthy of extraordinary compensation, without fear of political retaliation is essential to the fair and effective administration of justice.

The New York State Association of Criminal Defense Lawyers [NYSACDL], formed in 1986, is a statewide organization responsive to the needs of private practitioners as well as public defenders, and is dedicated to assuring equal protection of individual rights and liberties for all. The NYSACDL is one of the National Association of Criminal Defense Lawyers' largest affiliates.

As a significant part of its mission, NYSACDL works to promote the proper administration of criminal justice; to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases; to protect individual rights and improve the criminal law, its practices and procedures; to enlighten the public as to the point of view of criminal defense lawyers and the issues in which they are concerned; to promote the exchange of experience, of legal precedent and of the research among defense lawyers in the state, by

providing a network of communication; and to coordinate all efforts with the national and local bar associations that are concerned with criminal justice.

On issues related to the need for adequate compensation to ensure the effective representation of individuals represented by assigned counsel in New York State, NYSACDL has been a leader in urging the courts to fairly exercise their authority under assigned counsel statutes and to award fair compensation where fair compensation is due. In the matter at bar, the trial court issued a legitimate compensation order well within the power delegated to it by the legislature which was subsequently undermined in a preemptive order by a judge in the same court under the alleged authority of an administrative rule. This action by the administrative judge was wholly improper as it was made pursuant to an illegitimate court rule. Such an attempt by the Office of Court Administration to regulate proceedings not delegated to it by the legislature reflects a dangerous precedent of administrative control over trial court autonomy in adjudicating matters properly before it.

The National Association of Criminal Defense Lawyers [NACDL] is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,000 direct members -- and 80 state and local affiliate organizations with another 28,000 members -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

Recently, NACDL joined with the above organizations and others in citing the failure of New York lawmakers to ensure that assigned counsel are adequately compensated and how this has impaired the quality of representation of individuals who cannot afford to hire lawyers.

There is concern that where the compensation of counsel is left to the discretion of an administrator not connected with a case, or otherwise in a position to observe the nature of the representation involved, effective representation may be chilled by fear that the ability to cover the costs will be undermined by political factors unrelated to the assignment. A similar trend has emerged with the administrative undermining of physicians' orders by managed health care programs rendering primary care in some instances well below the professional standard. This type of dollar management has no place in our legal system and must not be permitted to be put into practice in New York.

These organizations come together now in support of a careful examination of the New York assigned counsel system and the ways in which its effectiveness is being eroded by the failure to provide adequate resources and compensation. The experience of these organizations with, and study of, the New York State criminal legal system, and their role in providing support to public defense teams, gives them a unique perspective and a strong interest in the principles involved in this case. These principles will be weakened or destroyed by the reversal of the trial court ruling that assigned counsel was entitled to extraordinary compensation pursuant to County Law § 722-b.

THE TRIAL COURT'S ORDER OF EXTRAORDINARY COMPENSATION WAS A LEGITIMATE EXERCISE OF POWER UNDER COUNTY LAW SECTION 722-b AND NOT SUBJECT TO ADMINISTRATIVE REVIEW PURSUANT TO AN UNCONSTITUTIONAL RULE PROMULGATED BY THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

1. *Introduction and Question Presented*

The question presented by these proceedings is whether the Chief Administrative Judge is legally authorized to regulate the statutory power of the trial courts to order extraordinary compensation under County Law § 722-b. As will be shown, the Chief Administrator has no legal authority to promulgate or enforce a rule that permits the reversal or modification of a trial court order on what is clearly a substantive issue rightfully before it without a specific grant of such authority by the legislature. Furthermore, Respondent's zealous reliance on *Werfel v Agresta*, 36 N.Y.2d 624 (1975), is misplaced not only because this case is dubiously applicable to any interpretation of the powers of the Chief Administrator, but also because the decision fails to support the legitimacy of the rule. The context of the challenged rule's promulgation and its negative impact on the right to counsel and administration of justice also provide policy reasons why this illegitimate rule must not be allowed to stand.

2. *The Review of 722-b Compensation Orders: Case Law Analysis*

a. The Misplaced Reliance on *Werfel v Agresta.*

In 1975, the Court of Appeals considered for the first time whether there was any available appellate review of compensation orders in assigned counsel cases under § 722-b. *Matter of Werfel v Agresta*, 36 N.Y.2d 624 (1975). In the particular case, the petitioner was

an assigned attorney challenging the inadequacy of a compensation order. The Court ruled that the fixing of compensation for assigned counsel pursuant to County Law §§ 722 and 722-b is one of numerous responsibilities of courts and judges, characterizing this as something akin to an "administrative" function as opposed to a procedural or substantive function. *See Werfel, supra,* at 627 ["These responsibilities *might be* characterized as 'administrative'"(Italics supplied).]. It is significant that the Court qualified its characterization as opposed to finding this function unequivocally administrative in nature.

This choice of language reflects the Court's struggle to distinguish the compensation procedure from the dispositional proceedings on the merits. The use of the word *administrative* within quotes was an indication that the Court was searching for a term that encompassed a case management function, analogous perhaps to scheduling issues pursuant to speedy trial restrictions. For example, although generally the courts' calendars may be regulated by court administration [22 NYCRR 80.3(a)(1)], the docketing of certain case matters is a management function controlled by the particulars of each case. Certainly it could not be asserted that the Office of Court Administration could *sua sponte* modify a trial court's ruling in response to speedy trial demands of a particular case. These are fact-finding functions within the direct jurisdiction of the trial court. Likewise, court administrators lack authority to modify compensation awards, a fact-finding function statutorily vested in the trial court.

Based on this distinction, the Court in *Werfel* found there was "no basis for justiciable review" of an order of compensation issued by the trial court. Neither it nor the Appellate Division had authority to review any applications related to trial court orders of compensation to assigned counsel. In this regard, it is worthy of note that *Werfel* addressed

the jurisdiction of the Appellate Division to entertain an Article 78 proceeding to review the compensation order at issue. It is thus even more significant that *Werfel's* qualified use of the word administrative was over a dissent that argued if the matter were truly *administrative* in nature an Article 78 would in fact lie permitting judicial review of the scope of the trial court's power to grant or deny extraordinary fees, a point obviously dismissed by the majority.

In *Werfel*, the Court suggested in *dicta* that the petitioner might seek adjustment of the allowance "by application through the several layers of judicial administration, that is to the appropriate Administrative Judges and even to the Administrative Board of the court system." *Werfel v Agresta*, at 627. It is this comment that has led to much confusion over the authority of the administrative arm of the unified court system to regulate assigned counsel compensation under the County Law.

Since the issue of administrative review was not before it, the Court of Appeals did not elaborate on the extent to which relief might be sought through the "several layers of court administration" within the unified court system. However, a review of the statute which created the Administrative Board of the Courts and set forth its powers reveals that any attempt by the courts to regulate in this area would have been precluded at the time *Werfel* was decided.

According to the statute in existence at the time, the Administrative Board of the Courts was permitted to regulate standards and policies for general application related to the administrative supervision of the courts only insofar as such rules were "not inconsistent with any statute or rule of civil procedure, and *subject to the reserved power of the legislature provided for in section thirty of article six of the constitution*". (Italics supplied) Judiciary

Law article 7-a, §212(5) [L1962, ch 684 *repealed* L. 1978, ch156, § 6]. Later, in 1972, when the powers of the state administrator were expanded to an advisory position, this officer was not given any additional regulatory authority beyond what was previously vested in the administrative board and delegable to the administrator. L. 1972 ch. 496. Again, in 1974, when the Office of Court Administration was established and vested with the powers formerly exercised by the judicial conference, the powers and duties set forth in § 212 of article 7-a were unaffected, thereby continuing the restriction on the regulation of any practice controlled by statute and subject to the reserved power of the legislature. L. 1974, ch. 615. These constraints rendered any attempt by the courts to regulate the compensation of assigned counsel under County Law article 18-B invalid.

Ultimately in 1977, the Office of the Chief Administrator was created with its statutorily enumerated and clearly defined powers and duties. Structurally, any potential ambiguity was eliminated. The administrative functions having been provided for in article 6, § 28 of the Constitution and enumerated in Judiciary Law § § 211 and 212, all remained subject to the retained powers of the legislature in article 6, § 30, and left little question as to what constituted administrative functions under the control of the Chief Administrator. None of these functions include the power to regulate the compensation of counsel in assigned cases.

Most significantly, in 1978, section 722-b was amended to clarify that the power to order compensation to counsel in assigned cases rested with the *trial court* with no contemporaneous indication that such power was subject to review or modification of any kind whatsoever. L. 1978, ch. 700. This amendment, passed not long after *Werfel* and clear on its face, underscored that the authority for granting extraordinary compensation rests

exclusively with the *trial* court. *See* Statutes § 94[The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction] *and* § 193, [A material change in the phraseology of an act is generally regarded as a legislative construction that the law so amended did not originally embrace the amended provisions, especially if it follows soon after controversies have arisen concerning the interpretation of the original statute]; *see also Matter of Vouchers for Compensation*, N.Y.L.J. 12/8/00 (Kings Co. Fam. Ct.) *citing Matter of Wilson*, 60 Misc.2d 144 (Monroe Co. Ct. 1969)[Trial court's discretion applicable to all of the statutory limits, otherwise the legislature could, and no doubt would, have clearly and simply added language to restrict the trial courts' authority]. The import of this amendment is further illustrated by the First Department's voluntary relinquishment of its own contractual review power over extraordinary fee orders in the wake of this legislative pronouncement. *People v Elliot*, 98 Misc.2d 424 (Sup.Ct. NY Co. 1979) at 425-426; *noting People v Perry*, 27 A.D.2d 154 (1st and 2d Depts. 1967).

Thus, reliance on the equivocal language of *Werfel v Agresta* to support the validity of administrative modification of a 722-b fee order is misplaced. Whatever ambiguous authority this case may have once had has long been superseded by the subsequent constitutional and statutory provisions.

Aside from the conflict between the ambiguous language of the decision and the controlling statutory structure, the anachronistic quality of *Werfel* is further illustrated by its comments regarding the willingness of attorneys to participate in assigned counsel programs for less than fair compensation based on the "highest traditions of the profession" [*Id.* at

627]. As noted in *People v Fortune*, 178 Misc.2d 499 (Sup. Ct. Bronx Co. 1998), the truth is that the need for individual assigned counsel services to supplement those of institutional providers has increased prodigiously in the last three decades and the lack of a realistic fee schedule has become a uniform complaint throughout the country.

b. The Controlling Authority of *Byrnes v. Monroe County*.

In *Byrnes v Monroe County*, 129 A.D.2d 229 (4th Dept. 1987), the Appellate Division Fourth Department was faced with determining the constitutionality of a departmental court rule requiring the approval of the supervising judge of the criminal courts as a prerequisite to payment of excess compensation to attorneys representing indigent defendants. The Court held that such a rule was in "direct and irreconcilable conflict with and had to yield to" the statute authorizing the "trial court" to provide excess compensation for the attorneys. *Byrnes* at 231.

In this decisive ruling, this Department rejected any suggestion that "trial court" as used in the statute [722-b] referred to all courts at the trial court level, including the Supervising Judge of the Criminal Courts. In doing so, the Court found that any rule authorizing review of an award by a trial court, even by an administrative judge, would be in contravention of County Law article 18-B and thereby invalid. This position has not ever been modified nor overruled by the Court of Appeals nor the legislature.

In 1990, in *Kindlon v Rensselaer County*, 158 A.D.2d 178, the Appellate Division, Third Department heard a similar challenge by an attorney to an order issued by the Presiding Judge of the Third Department that modified a trial court award of extraordinary compensation in an assigned counsel case pursuant to a departmental court rule. The result

in *Kindlon* was the same as that in *Byrnes*, although the reasoning was based more on the timing of the rule than statutory supremacy.

In *Kindlon*, the Chief Judge of the Court of Appeals and Chief Administrative Judge filed an *amicus* brief taking the position that any rule promulgated by the Third Department pursuant to the authority delegated under 22 NYCRR 80.3, investing the Presiding Judge with the power to review compensation awards in 722-b cases, would be a valid exercise of authority delegated to it by the Chief Administrator. In deference to the Chief Judges' position, the Third Department wrote:

> While the Legislature may have the power initially to delineate rights and duties with respect to administrative acts [§ 722-b], it cannot by statute foreclose the ultimate authority of the court administrators in the exercise of their supervisory powers derived from NY Constitution, article VI, 28. *Id.* at 180-181.

Whatever the moment of this observation, the Third Department ultimately determined that any supervisory power the Chief Judges might have over the compensation of assigned counsel under the County Law, this supervisory power had not been effectively delegated to the Presiding Judge of the Third Department. This was because the local rule at issue was not in existence at the time when the purported delegation of authority took effect. Therefore, the rule was deemed procedurally invalid. There being no other existing authority to permit review of the trial court order, the county was precluded from challenging the award of extraordinary compensation. Apparently, no review of this decision was sought in the Court of Appeals.

The *Kindlon* court was silent as to the availability of review by the appropriate administrative judge independent of the local departmental rule. However, later, in *People v Ward*, 199 A.D.2d 683 (3d Dept. 1993), the Third Department again reached the conclusion

that the Appellate Division lacked the authority to hear such an appeal, this time mentioning the possibility of administrative review by the appropriate administrative judge as previously suggested in *Werfel v Agresta*, *supra*.

No other courts have advanced the *Kindlon/Ward* line of reasoning, including the Court of Appeals. *Matter of Director (Bodek)*, 159 Misc.2d 109 (Sup Ct., NY Co. 1993), *adhered to on reconsideration* 159 Misc.2d 42, *aff'd* 207 A.D.2d 307 1st Dept. 1994) *aff'd* 87 N.Y.2d 191 (1995), *supra*. Even the Third Department itself recently seems to have abandoned its position that there may be some administrative review available. *People v Herring*, 279 A.D.2d 765 (2001) *app.den.* 96 N.Y.2d 711 (2001). Despite the advent of the original Rule 127.2 in 1991, the fundamental rule in *Byrnes* has been followed in recent years rejecting any review, administrative or otherwise, of an award for extraordinary compensation by anyone other than the trial judge under both 722-b and 722-c of the County Law. *See also People v Brisman*, 173 Misc.2d 573 (Sup Ct., NY Co. 1996);

In 1995, the Court of Appeals confirmed that there was no authorized review of a trial court's order of compensation pursuant to County Law article 18-B. *Matter of Director (Bodek)*, *supra*, 87 N.Y.2d 191 (1995). *Bodek* involved a motion for reconsideration pursuant to Rule 127.2 in its original form of an order for extraordinary fees for expert services pursuant to County Law 722-c. The trial court's decision in *Bodek*, later affirmed by the First Department and the Court of Appeals, entailed a detailed examination of the law and policy surrounding the statute and the power vested solely in the trial court to make decisions related to extraordinary awards. Again, the prevailing conclusion as delivered in *Byrnes* was reached: the trial court acted on its sole authority the merits of which were not

subject to review by either direct appeal, article 78 review or administrative review. *See Matter of Bodek*, 159 Misc. 2d 109, *aff'd* 203 A.D.2d 307 and 87 N.Y.2d 191, *supra*.

The Court of Appeals issued a *per curiam* order in *Bodek*. With regard to the possibility of participation by the administrative arm of the courts in resolving conflicts arising from these compensation orders, the majority wrote, again *in dicta*,

> To the extent that the trial courts' unreviewable discretion produces truly anomalous consequences or patterns of abuse in particular situations, the problem can and should be addressed through the available administrative tools. *Bodek*, 87 N.Y.2d at 194.

This language does not pronounce, nor could it, a general power of review of compensation orders by court administrators. Rather, it signifies that if there is evidence in particular situations that evinces "truly anomalous consequences" or a "pattern of abuse" indicative of an abuse of power, not merely an abuse of discretion, there are certain "administrative tools" available to correct the situation. For example, a challenge could be brought under of the Rules of Judicial Conduct.

Justice Bellacosa's concurring opinion illuminates the issue. He pointed out that *while it might seem fitting that there be some review procedure established* in these matters,

> unless the *legislative and* the judicial branches exercise their available and appropriate regulatory powers (*see, e.g.*, NY Const, art VI, 28; Judiciary Law 212) *to promulgate effective mechanisms* for some review of such matters, a provider may be unilaterally rewarded far in excess of extant statutory or rule authorizations and limitations. (Italics supplied) *Matter of Bodek*, 87 N.Y.2d at 197.

By this, it is clear that the Court considered and was forced to recognize that until the legislature acted in a fashion that would permit review of these trial court orders, no review can be conducted. Otherwise, the Court would have unequivocally held that the chief

administrator was unconstrained in his authority to regulate the review of 722-b compensation orders.

Such judicial restraint is in full accordance with the provisions of the New York State Constitution and the doctrine of separation of powers. The power of the legislature to specifically vest regulatory authority over the assignment and compensation of counsel in the counties and the trial courts under County Law article 18-B-- to the exclusion of the Office of Court Administration-- is derived directly from article 6, § 30 of the Constitution, adopted in 1961, 16 years before the adoption of art.6 § 28.

In light of the numerous amendments throughout the years to the County Law, the failure to alter 722-b to provide for the review of trial court compensation orders manifests the legislature's intent that these determinations remain outside the general administration of the courts. This intent is further indicated by the failure to vest such review authority in the administrative arm of the courts under the Judiciary Law. *See* Statutes § 74[A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended].

People v Brisman, 173 Misc.2d 573, [*supra*] followed on the heels of the Court of Appeals decision in *Matter of Director (Bodek), supra*. In *Brisman*, assigned counsel submitted a voucher for services and expenses together with an application for enhanced hourly fees based on extraordinary circumstances as provided in County Law 722-b. The trial court granted the application and signed an order awarding hourly fees in excess of the statutory maximum allowance. Thereafter, the administrator of the assigned counsel plan

contacted the Administrative Judge of the Supreme Court, Criminal Branch alleging the absence of statutory authority to grant extraordinary fees and asserting purported policy reasons dictating against such an award. Subsequently, the trial court was notified that the voucher was processed at the statutory rates pursuant to the direction of the Appellate Division, First Department asserting an absence of the authority to pay the enhanced fees. The *Brisman* trial court then adopted the various correspondence as an application for reconsideration pursuant to then Rule 127.2. After a lengthy examination of the statutory history, case law and public policy, the court concluded there was no legal authority for review of an award for extraordinary fees granted pursuant to County Law 722-b either by appeal, CPLR article 78 proceedings or by court administration. *See People v Brisman*, 173 Misc.2d 573 at 576, n1 *citing Mater of Director (Bodek), supra*. Therefore, there was no authority for the First Department to facilitate a modification of the award. On reconsideration, the trial court rejected the arguments for denying the award and renewed its order for the payment of extraordinary fees.

As recently as January of this year, the unreviewability of 722-b compensation orders was once more upheld in a well written opinion by the Third Department in *People v Herring*, 279 A.D.2d 765 (2001) *app.den.* 96 N.Y.2d 711 (2001) [*supra*]. In *Herring*, the Third Department rejected an attempt by Broome County to invoke appellate review and downward modification of an order-- after reconsideration-- granting extraordinary compensation. Rejecting appellant's argument that this appeal should lie because they were seeking a ruling that the County Court was acting outside the scope of the statute, the Appellate Division, citing the Court of Appeals decisions in *Matter of Werfel v Agresta* and *Matter of Director (Bodek)* held that such orders were not amenable to judicial review. As

noted earlier, in *Herring*, the Third Department apparently abandoned its previous *Kindlon/Ward* observations regarding the possibility of administrative review.

Based on these decisions it is clear the courts have adhered to this Department's conclusion in *Byrnes* that there is no authority to delegate a power of substantive administrative review of the assignment and compensation of attorneys under County Law article 18-B.

Perhaps most revealing is the conduct of OCA itself in this regard. In 1995, the same year that the Court of Appeals declined to grant an authorized review of article 18-B compensation orders in *Bodek*, a measure was introduced into the legislature at the request of the Office of Court Administration that would have amended § 722-b to provide for review of a compensation order in the appropriate department of the Appellate Division. *See* Senate Bill 4481[1995-1996]. In the accompanying memorandum, it was noted that

> This measure does not propose any change in the rates of compensation and reimbursement. It merely supplies a procedure by which affected interests may contest a trial court's exercise of discretion to approve or disapprove vouchers claiming compensation or reimbursement in accordance with those rates. … *This will fill a void in the present statutory framework*". (Italics supplied) Bill Memorandum S4481 (1995-1996), Attached as Exhibit A.

The absence of review procedures having been recognized, together with the failure of the legislature to enact this bill, or any similar one since, makes it quite clear that there is no existing authority for administrative review of these compensation orders.

3. *The Powers of the Chief Administrator: A Legislative Historical Review*

a. The Enumerated Powers

The office of the Chief Administrator was established by Constitutional Amendment in 1977, two years after the decision in *Werfel v Agresta, supra*. New York State

Constitution article 6, § 28. Prior to that time, the power to regulate the unified court system was vested in the Judicial Conference of the Administrative Board of the Courts, served by a state administrator. The powers of these offices have consistently been subject to the reserved power of the legislature of article 6, § 30 of the constitution and neither were ever vested with the authority to modify a trial court's order of compensation for counsel under County Law article 18-B. *See generally* Judiciary Law §§ 211 and 212; *former* Judiciary Law Article 7-A, L. 1962, ch. 684, *repealed* L.1978, c. 156, § 6].

The powers of the Chief Administrator are specifically enumerated in §§ 210 and 212 of the Judiciary Law. In addition, certain powers are vested in the Chief Administrative Judge as delegated by the Chief Judge of the Court of Appeals. Article 6, § 28(b); Jud. Law § 211. Other than the powers specifically authorized in these sections, the legislature has unequivocally retained the authority to regulate court practice and procedures in article 6, § 30 of the constitution.

With regard to the authority of the Chief Administrator to promulgate rules related to assigned counsel compensation, the intent of the legislature to retain its authority is unequivocally evinced by an examination of all statutes related to the designated authority of the Chief Administrative Judge and those related to the assignment of counsel in the various courts throughout the state. A review of these statutory powers together with those powers delegable by the Chief Judge in Judiciary Law § 211, and enumerated in 22 NYCRR 1.1 and 80.1, reveal that the office of the Chief Administrator is simply the administrative arm of the office of the Chief Judge. As such, this administrator can have no greater power to regulate than the Chief Judge of the Court of Appeals who has no power to regulate the exercise of judicial authority under County Law article 18-B. *See generally* Judiciary Law § 211.

Judiciary Law § 212 sets forth the legislated functions of the Chief Administrator in supervising the administration and operation of the courts. Pursuant to this section, the authority to regulate the practice in the courts is restricted as follows:

> [The Chief Administrator may] adopt rules and orders regulating practice in the courts *as authorized by statute* with the advice and consent of the administrative board of the courts, *in accordance with the provisions of section thirty of article six of the constitution*. (Italics supplied) Judiciary Law § 212(2)(d).

The enumerated powers under § 212 are varied, but like the administrative powers of the Chief Judge set forth in § 211, all relate to the general administration and operation of the unified court system. These powers include: budget assessment and preparation; monitoring the function of the courts within the unified court system and making recommendations for change where indicated; establishing court terms and parts and designating deputy administrators (except in the Appellate Division and Court of Appeals) and temporary judicial assignments; maintaining rules necessary to execute the functions of the office; promulgating rules of conduct for all judges within the unified court system and establishing educational and training programs for all personnel of the unified court system; establishing a panel to issue advisory opinions related to ethical and proper judicial conduct; preparing and prescribing forms to be used in the criminal courts pursuant to CPL. 10.40 and to track family offense proceedings in Family Court; reviewing practices within the unified court system related to the fair treatment of crime victims; establishing a system for the posting of bail by credit card; expending funds made available by political subdivisions to maintain adequate jury facilities. *See generally* Judiciary Law § 212.

The power to adopt rules regulating practice in the courts may only be exercised as authorized by statute and in accordance with article 6, § 30 of the constitution, in which the

legislature retains its power to regulate the courts. Judiciary Law § 212 (2)(d). The Chief Judge's powers are similarly restricted by this constitutional provision. Judiciary Law § 211(1)(b). Significantly, § 212(1)(s) restricts the power of the Chief Administrator to delegating only those powers possessed by the office in accordance with the law. While it has been suggested that the general administrative powers of the Chief Administrative Judge are broad, the recurrent qualification that requires the administrative powers of the courts to yield to the authority of the legislature under article 6, § 30 is unequivocal. Thus, where authority to regulate in a particular area has not been specifically granted under article 6, § 28 and its related statutes, there can be no interpretation of the enumerated powers that would contravene the provisions of another proper legislative enactment. *See* Statutes § 74, *supra*.

b. The powers of the Chief Judge and Chief Administrator are Subject to the Retained Power of the Legislature under art. 6, § 30 of the Constitution.

Even pursuant to its nominally broad powers under article 6, § 28, the Chief Administrator has no constitutional nor statutory authority to override another valid constitutional delegation of power under the guise of "court administration". In this regard, Respondents suggest that because the legislature has given them "complete" administrative powers then the legislature cannot restrict those powers. Thus it appears that Respondent's take the position that the legislature's consistent retention of authority, under art. 6, § 30, over practice and procedure in unified court system since its inception in 1961 is meaningless, despite the repeated declaration of this retention of power in article 6 § 28(b) as well as § § 211(1)(b) and 212(2)(d) of the Judiciary Law.

The only cases that touch upon this concept are cases dealing with non-judicial personnel, control over which is manifestly vested in the Chief Administrator under § 212. *See e.g. Met Council v Crosson*, 84 N.Y.2d 328 (1994)[Specifically enumerated powers of

Chief Judge and Chief Administrator to appoint and remove nonjudicial officers of the court overrode the New York City Civil Court Act that vested authority in the administrative judge to appoint and remove Housing Judge, nonjudicial officers]; *Bartlett v Evans*, 110 A.D.2d 612 (4th Dept. 1985)[County Clerk's power under County Law to appoint Court Clerks must yield to the exclusive powers of Chief Administrator to regulate nonjudicial personnel practices] *citing Durante v Evans*, 94 A.D.2d 141 (3d Dept. 1983); *Corkum v Bartlett*, 46 N.Y.2d 424 (1979)[power to regulate administrative practices extended to power to approve a classification plan for nonjudicial employees of the unified court system]. All of these cases address powers related to nonjudicial personnel of the unified court system that are statutorily vested in court administration pursuant to Judiciary Law §§ 211 and 212 as derived from article 6, § 28 of the constitution. However, regulation of the assignment and compensation of counsel is not a power conferred as an administrative responsibility under the Judiciary Law as is the hiring and classification of nonjudicial personnel. Therefore, absent a similar grant of authority with regard to assigned counsel the Chief Administrator can claim no similar power.

Nowhere in any of the enumerated powers of the Chief Judge or Chief Administrator is there a grant of authority to regulate the assignment or the compensation of counsel. This is not surprising in that an application for compensation by assigned counsel is not, by definition, a function related to the administration and operation of the unified court system as a whole. Rather it is a function of the trial court to determine the fair value of services rendered which necessarily encompasses case sensitive issues related to the effective assistance of counsel. Respondents have suggested that because consideration of compensation of court appointees is codified in 22 NYCRR 100.3(C)(3) [also Code of

Judicial Conduct Canon 3] under "administrative responsibilities" and that "court appointees" by the Chief Administrator's definition includes assigned counsel, that the administrative arm of the courts is thereby endowed with the power to review and modify, even *sua sponte*, an order of compensation under County Law § 722-b. *See* Brief of Respondents, pp. 9-10. This is a patently fallacious argument since a rule cannot define its enabling statute. Moreover, this is not what Rule 127.2 purports to do. The Rule at issue does not purport to ensure that judges are abiding by 22 NYCRR 100.3(C)(3), rather, it acts to nullify a trial court order of compensation without regard to allegations of granting compensation "beyond the fair value of the services".

To the contrary, it would appear that the sole purpose of Rule 127.2 is to establish a mechanism by which the administrative arm of the courts can regulate the expenditure of county funds, thereby actually preventing a trial court from fulfilling its ethical obligation to grant compensation that would provide "fair value for services rendered" and no more. *See* 22 NYCRR 100.3(C)(3) and Code of Judicial Conduct, adopted April 13, 1996, Canon 3(C)(3).

In reality, the administrative and ethical obligations cited by the Respondent's reinforce the Court of Appeal's reasoning in *Bodek, supra*, as to the fact there is no available appellate or administrative review of article 18-B compensation orders but there are "administrative tools" by which "truly anomalous consequences or patterns of abuse" may be addressed. If there is an indication that a compensation order violates Canon 3(C)(3) in that it purports to compensate a court appointee "beyond the fair value of the services rendered" then a remedy is readily available through an inquiry into the judge's actions either by OCA

or by the State Commission on Judicial Conduct and raising the possibility of sanctions. Jud. Law § 42.

As noted previously, it would be highly inappropriate to suggest that the enumerated powers of the Chief Administrator are subject to an interpretation of the word "administrative" derived from a case decided two years prior to the constitutional amendment and the statutes that created the office of the Chief Administrator or by the language contained in an administrative rule subject to the parameters of the enabling law. Therefore, the exercise of any such review and nullification power must be specifically derived from other sources.

c. The Absence of Provisions for Review of Compensation Orders or Placing Compensation of Counsel Under the Control of the Chief Administrator in County Law art. 18-B Demonstrates the Intention of the Legislature to Retain and Exercise its Power Under Art 6, § 30 of the NYS Constitution

Under article 6, § 30 of the New York State Constitution, the legislature has retained the authority to regulate the practice and procedure in the courts despite the delegation of some of that power to the Chief Judge and the Chief Administrative Judge. Further, in accordance with article 6, § 28 of the constitution and § 212(2)(d) of the Judiciary Law, the Chief Administrator may only exercise that power which has been properly delegated or assigned in accordance with the law. Thus, in the absence of legislation that specifically grants the Chief Judge or Chief Administrative Judge the authority to regulate compensation orders, the authority of the legislature to vest control of the compensation of counsel is absolute. An examination of the relevant statutes indicates that the legislature has affirmatively vested the Chief Administrator with the power to regulate the assignment of counsel in cases where counsel is assigned under § 35 of the Judiciary Law. By the same

token, the legislature has manifested the same affirmative intent to withhold power from the Chief Administrator over the assignment and compensation of counsel under article 18-B of the County Law.

The legislative history of § 722-b reveals that this statute has been amended nine times over the years yet no power of review of a trial court's compensation order has ever been authorized. In comparison, the legislative history of § 35 of the Judiciary Law distinctly demonstrates the legislative intent to vest control over the operation and administration of state paid assigned counsel programs in the Chief Administrator and the administrative offices of the courts. Under the circumstances, no reading of the County Law section can serve to endow the administrative offices of the courts with power to regulate the compensation of assigned counsel without effectuating an unauthorized amendment to article 18-B.

Upon examination of the overall structure of the assigned counsel system related to assignments and compensation of counsel in criminal, adult family court and surrogates proceedings pursuant to article 18-B, it is plain that the legislature did not intend to provide for oversight by the administrative arm of the courts, but left the whole of the administration and operation of the programs to the counties and the assigning trial courts. In fact, the *Werfel* Court itself noted "*It is of course irrelevant that in other contexts statutes provide expressly for review of fee allowances to counsel, assigned or otherwise* (e.g., Family Ct. Act, 245, subd [b]; Judiciary Law, 474)". (Italics supplied) *Werfel*, *supra*, at 627. If *Werfel* is to be considered as controlling, this language unequivocally establishes that whatever powers court administrators may have by virtue of other valid statutory provisions, the County Law provisions stand alone. The simple fact that the Office of Court Administration

is empowered to regulate attorney compensation issues under other statutory provisions does not empower it to regulate attorney compensation under § 722-b.

d. The Chief Administrator's Power Under Section 35 does not Extend to Article 18-B.

Article 18-B was enacted in 1965 in response to the Supreme Court's mandate in *Gideon v Wainwright* [372 U. S. 335 (1963)] and the Court of Appeals' ruling in *People v Witenski* [15 N.Y.2d 392 (1965)]. The constitutional and statutory rights to counsel are basic to our system of justice. Even though it was anticipated that some state funds would be employed to meet the requirements of *Gideon* and *Witenski* by virtue of a revenue sharing initiative, under the statutory scheme, the counties were given complete authority over the choice of plans to implement and were entirely responsible for the funding and management of the program. County Law § 722, *et seq; see also* Governor's Memorandum in Support of Bill, L. 1965 Ch. 878.

Judiciary Law § 35 followed the County Law provisions a year later [L. 1966 Ch.761] and reflected the recognition that the State had an obligation under the federal and state constitutions to provide counsel to certain individuals whose liberty was at stake in civil matters in which the counties had no jurisdictional interest. *See* Budget Report on Bill A4670, Bill Jacket L. 1966 ch 761. In doing so, the legislature specifically vested in the administrative board of the judicial conference the power to establish, administer and operate such a program.

The Law Guardian Program pre-existed both sections. Enacted in 1962, in its original form it authorized the Appellate Division in each department to establish a panel of qualified attorneys or contract with an established legal aid society [Family Court Act § 243]. The Appellate Division was responsible for compensating a legal aid society on a cost basis

with approved salaries or by prescribing a schedule of fees, if any, for services rendered by private counsel [Family Court Act § 245]. This section, like § 35, has been affirmatively amended to provide for the Office of Court Administration to contract for services, and compensate attorneys in accordance with § 35 of the Judiciary Law.

The state programs established in each judicial department to provide § 35 legal services run side by side with the programs administered by the counties to provide legal services under § 722. They do not overlap operationally or administratively. In the original enactment of § 35, these plans had no connection to the operation of the article 18-B programs whatsoever. In time, the Office of Court Administration [OCA] instituted the practice of contracting with some local 722(a) and (b) providers to render the necessary legal services, and in 1985, § 35 was amended to statutorily authorize such contracts. Up to that time, the Chief Administrator had entered into the contracts by virtue of the power of that office to contract for services to the court. NYS Const. art 6, § 28 and Judiciary Law § 212(2)(o); *see* Memorandum, Bellacosa, Chief Administrative Judge, June 26, 1985, Bill Jacket L. 1985 ch. 315[amendment to § 35].

There have been few changes made to § 35 through the years, most involving rate increases, some adding proceedings where counsel must be provided by the state (*See generally* Legislative History Jud. Law § 35). The most significant change was the above mentioned 1985 amendment which provided for the administration of the section through the Chief Administrator and the Office of Court Administration (L. 1985 ch. 315,*supra*). No such adjustment has ever been made in the County Law. Nor can it be asserted that the independent contracts with § 722-a and -b providers to accept § 35 assignments vest the Chief Administrator with the authority to regulate practices under the County Law.

The distinction is beyond dispute: there are assigned counsel programs that are funded and administered by the State and there are assigned counsel programs that are funded and administered by the counties. *See e.g. Memorandum*, Bellacosa, Chief Administrative Judge, *supra*; Memorandum of the Office of Court Administration, Rosenblatt, Chief Administrative Judge, Bill Jacket L. 1987 ch. 317. In this vein, each statute sets forth the manner in which compensation orders will issue. Under § 35, the court administrator is charged with establishing the form in which applications for compensation are made. The fees granted are payable out of funds budgeted by the court and paid through the Office of Court Administration. In the same respect, the submission and consideration of applications for compensation for assignments to the trial court under the County Law are specifically governed by § 722-b and payable out of county funds. County Law § 722-e.

Neither at the time of, nor subsequent to, the creation of the unified court system, has the legislature changed the statutory language of 722-b to authorize any administrative or appellate review of a trial court order of extraordinary compensation or to endow the Office of Court Administration any authority over the administration of local 722(3) programs. On the other hand, since 1977, § 35 has been amended specifically to recognize the authority of the Chief Administrator to promulgate rules with regard to compensation awards for attorneys assigned pursuant to that section.

Thus, whatever powers the Chief Administrator may have under § 35 with regard to regulating the compensation of assigned counsel in those matters, they do not extend to the County Law provisions which apply to separate and distinct proceedings and reflect the unequivocal intent to vest the power of compensation of assigned counsel in the trial courts.

e. The Newly Amended Rule 127.2 Amounts to an Ultra Vires Statutory Amendment to § 722-B.

Article 18-b of the County Law sets forth the provisions related to the establishment of programs to provide legal representation for individuals charged with a crime who cannot afford to hire lawyers, or are adult parties before the family court or surrogates court. Section 722 provides for the creation of an assigned counsel program in each county. Section 722-b deals with the compensation and reimbursement of counsel pursuant to a county operated assigned counsel program. This section sets forth minimum hourly rates and maximum overall allowances in certain cases and provides that claims for compensation shall be by sworn statement specifying the enumerated basis for the claim. The statute specifically authorizes the trial court to grant compensation in excess of the stated limits in extraordinary circumstances. County Law § 722-b.

Under the statutory structure of the assigned counsel system pursuant to County Law article 18-b, there are two provisions that require the participation of the Chief Administrator in the administration of local assigned counsel programs; neither of these relate to the question of compensation; both are out of date. The first requires the *state administrator* to approve of a county bar association program under County Law § 722(3) and the second obligates the *judicial conference* to retrieve reports under the provisions of County Law § 722-f [the references to the state administrator and the judicial conference are obsolete]. Pursuant to the balance of the provisions of this article, the assignment and compensation of counsel is purely a county function with the final approval of vouchers vested in the trial court in which the assignment was carried out. Thus nothing in article 18-b confers upon the Chief Administrative Judge any power or authority over assignments or compensation. In fact, the only references to the power of any court with regard to the satisfaction of claims for

compensation relate to the power of the trial court to approve claims and the power of the appellate courts to set the rates of compensation on appeal.

Unlike Judiciary Law § 35, the Chief Administrative Judge is not authorized under County Law § 722-b to promulgate rules, direct the use of forms or in any way usurp the power of the trial courts to function under the mandate of this law. Thus, the newly amended rule, 127.2, amounts to an illegitimate amendment to County Law § 722-b and cannot stand.

f. The Newly Amended Rule Violates the Principles of Jurisprudence that Prohibit a Judge from Reviewing or Modifying an Order of Another Judge of Coordinate Jurisdiction.

The mere creation of a statutory framework in article 18-B to provide public defense services and private attorney compensation at the county level did not insulate the branches of state government-- executive, legislative, and/or judicial-- from the state and federal constitutional imperatives to provide effective assistance of counsel to indigent defendants. The trial court has an obligation under § 722-b to order fair compensation to assigned counsel based on the circumstances of the particular case before it.

This determination is based on an evaluation of the demands of the case as well as counsel's performance in meeting those demands. In order to ensure that effective representation is achieved in any given case as required by the 6th Amendment to the United State Constitution and article 1, § 6 of the New York State Constitution, the trial court must consider all aspects of the case, including whether compensation in strict accordance with the statutory fees and caps will be grossly disproportionate to the work done. *People v Perry*, *supra*, at 158-159. If the statutory scheme would result in unjust compensation for zealous representation, then the statutory provisions are clear: the court may order extraordinary compensation, particularly when the trial court is protecting and/or implementing the

defendants' constitutional right to counsel, and the Chief Administrative Judge's actions have the effect of infringing upon that right. Recently, in *New York County Lawyers v. Pataki, et al*, 727 N.Y.S.2d 851 (Sup. Ct. New York Co. 2001), Justice Suarez, in denying respondents' motion to dismiss, recognized that attorney compensation rates, including those currently in effect, could be inadequate to the point of constituting a denial of an indigent accused's constitutional right to counsel. Justice Suarez's opinion sets forth ample evidence why the current rates are, in fact, so inadequate that they presumptively deny indigent defendants their constitutional right to effective assistance of counsel. Thus, orders of extraordinary compensation are sometimes necessary to preserve an attorney's right to *fair value for services rendered* [*Cf.* 22 NYCRR 100.3(c)(3)] as well as the defendants' rights to the effective assistance of counsel.

The standing Rule 127.2 dramatically impacts the authority of the trial court to exercise this power by providing not only for coincidental review by an administrative judge, but the power to *sua sponte* modify an order. By respondent's own admission, the current amendments to the old rule were made in response to complaints by the localities regarding the fiscal burden of paying extraordinary compensation awards. The decision was then made that court administrators should be "playing a role" in the determination of compensation awards of assigned counsel fees, "since there was no mechanism *at all* to review these awards". *See Affidavit in Opposition*, submitted by Michael Colodner, at para. 15, p.8. There is no valid authority for the Chief Administrative Judge to usurp the trial courts' power as statutorily vested by the legislature or delegate it to another unauthorized individual regardless of the fiscal burden to the counties.

Empowering an administrative judge with the authority to review and modify a trial court's statutory obligation in this fashion infringes upon the trial court's responsibility to act independently with regard to the matters before it. To uphold this rule would open the door to permitting an administrative judge to overrule a court in virtually any evidentiary matter before it should the supervising judge disagree with a court's ruling.

The law is clear that it is improper for any judge to make or change a ruling based on evidence not heard by that judge. *See e.g.* Judiciary Law § 21 ["A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge"]; CPLR 2221 Practice Commentaries, 1991, David D. Siegel [The specific purpose of this provision is to prevent one nisi prius judge from in effect sitting as a court of appeals over a colleague] *and* Supplementary Practice Commentaries, 2000, David D. Siegel [CPLR 2221 bars one judge of a court from undoing what another judge of the same court has done]; *Matter of Wright v. County of Monroe*, 45 A.D.2d 932 (4th Dept. 1984)[It is fundamental that one Judge may not review or overrule an order of another Judge of co-ordinate jurisdiction in the same proceeding].

In this regard, the Court of Appeals wrote in *Bodek, supra*

> we note that formal appellate review of these compensation orders is impractical, since the appeals courts are several steps removed from the circumstances in which the services were rendered and are therefore not well positioned to assess the wisdom of the Trial Judges' discretionary choices. *Matter of Director (Bodek)* at 194.

Also, *Brisman, supra*, citing this authority stated

> Traditionally, the responsibility for setting compensation for assigned counsel has been vested in Trial Judges. In this regard, it has long been recognized that Trial Judges, who are intimately familiar with the intricacies of the cases before them and of individual circumstances in which the services

> were rendered in those cases, are in the best position to make such determinations. From a practical standpoint, others, even other Judges, who are several steps removed from the circumstances of the individual cases, are not well positioned to review the wisdom of Trial Judges' determinations in this regard. (*See, Matter of Director of Assigned Counsel Plan of City of N. Y. [Bodek*], 87 NY2d 191, 194, *supra; Byrnes v County of Monroe*, 129 AD2d 229, 232 [4th Dept 1987]; *People v Perry, supra*, at 162, *People v Elliot*, 98 Misc 2d 424, 426 [Sup Ct, NY County 1979]; *see also, People ex rel. Peck v Board of Supervisors*, 61 App Div 545, 548 [4th Dept 1901], *affd on other grounds* 168 NY 640 [1901].) *People v Brisman*, at 586.

Under the new rule, the trial court has been divested of its unambiguous statutory authority to rule on applications for extraordinary compensation. The mere insertion of language into the rule that purports to bind the administrative judge to act only where it is determined to be "an abuse of discretion" does not serve to validate this rule. Indeed, this change brings the new rule, once again, headlong into conflict with *Werfel v Agresta*, because such a standard [abuse of discretion] suggests the existence of a justiciable issue subject to review which was rejected in that case. In reality, the new provisions authorize administrative judges to impose their own fiscal assessment over the meritorious opinion of the trial judges which violates the principles of jurisprudence in this state prohibiting the review of a judicial order by a judge of coordinate jurisdiction.

4. *Conclusion*

Based on the foregoing, nothing in article 6, § 28 of the Constitution or other controlling law authorizes the Chief Administrative Judge to regulate the county assigned counsel programs other than that which is directly provided for under article 18-B of the County Law. In particular, nothing in article 6, § 28 of the constitution or Judiciary Law §§ 211 or 212 or County Law 18-B authorizes the Chief Administrative Judge to regulate the trial court's power under County Law 722-b. Nor is there anything in article 6, § 28

authorizing the Chief Administrative Judge to regulate the expenditure of local county funds as mandated by County Law 722-e.

Therefore, 22 NYCRR 127.2 is invalid. It provides for an illegal delegation of authority by the Chief Administrator to local administrative judges to consider and modify trial court awards of extraordinary fees granted pursuant to County Law § 722-b. It improperly places the fiscal condition of localities above constitutional and statutory mandate, and implicates separation of powers issues and an indigent accused's constitutional right to effective assistance of counsel.

The authority of the trial court to order extraordinary compensation based on disproportionate statutory allowances in order to ensure the effective representation by counsel, as required by the 6th Amendment to the United State Constitution and article 1, § 6 of the New York State Constitution, is encompassed by County Law § 722-b. Rule 127.2 represents an unconstitutional delegation of authority and must be struck down. Any orders that purport to modify or nullify a trial court compensation order under County Law § 722-b pursuant to it must be vacated.

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Respectfully submitted,

Jonathan E. Gradess
New York State Defenders Association

To: Clerk of the Court

Michael Colodner
Counsel to the Office of Court Administration
Attorney for the Respondents

Office of Court Administration
25 Beaver Street
New York, New York 10004
(212) 428-2150

Honorable Eliot L. Spitzer
Attorney General of the State of New York
120 Broadway
New York, New York 10271-0332

Christopher D. Thomas
Attorney for the Petitioners
Nixon, Peabody, LLP
Clinton Square
Post Office Box 31051
Rochester, New York 14603-1051
(716) 263-1000