

New York County
Index No. 102987/00

To be argued by
Ellen Ravitch

NEW YORK SUPREME COURT
APPELLATE DIVISION - FIRST DEPARTMENT

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Plaintiff-Respondent,

- against -

THE STATE OF NEW YORK and CITY OF NEW YORK,
Defendants-Appellants

BRIEF FOR CITY DEFENDANT-APPELLANT

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August 5, 2002

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BRIEF FOR CITY DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

In this action seeking declaratory and injunctive relief, defendant the City of New York (the "City") appeals from a Decision and Order of the Supreme Court, New York County (Suarez, J.), dated May 3, 2002 and entered May 6, 2002, which granted plaintiff-respondent's motion for a preliminary injunction and denied the City's motion to dismiss. Specifically, the Court ordered, inter alia, (a) the City to pay assigned counsel the interim rate of \$90.00 an hour for in and out-of-court work until modification of County Law § 722(b) or further order of the Court and (b) the State to pay assigned counsel the interim rate of \$90.00 an hour for in and out-of-court work, as related to representation in New York City, until it modifies Judiciary Law § 35.

QUESTIONS PRESENTED

1. Did the lower Court err in granting preliminary injunctive relief, given that plaintiff did not demonstrate

actual irreparable harm and given that the preliminary injunctive relief compels appropriation of public funds without giving the legislature the opportunity to remedy any statutory deficiencies?

2. Assuming, arguendo, that plaintiff is entitled to some sort of preliminary injunctive relief, did the lower Court overstep its authority by setting a rate of \$90 per hour; by making its order, including the \$90 per hour rate, equally applicable to all cases to which the Court applied it; and by making the preliminary injunctive relief applicable to cases in which there is no constitutional right to the assistance of counsel?

STATEMENT OF FACTS, PROCEDURAL HISTORY, AND ORDER APPEALED FROM

For a statement of the facts relevant to this appeal, the procedural history that led to this appeal, and a summary of the order appealed from, the City respectfully refers the Court to the Statement of the Case section of the Brief for Defendant-Appellant the State of New York.

POINT I

**THE LOWER COURT ERRED IN GRANTING
PRELIMINARY INJUNCTIVE RELIEF,
GIVEN THAT PLAINTIFF FAILED TO
DEMONSTRATE ACTUAL IRREPARABLE
HARM AND GIVEN THAT THE
PRELIMINARY INJUNCTIVE RELIEF
COMPELS APPROPRIATION OF PUBLIC
FUNDS WITHOUT GIVING THE
LEGISLATURE THE OPPORTUNITY TO
REMEDY ANY STATUTORY DEFICIENCIES.**

As the City joins fully in the arguments urged by the State defendant, both (1) that plaintiff did not make the requisite factual showing to support preliminary injunctive

relief herein and (2) that the lower Court should not have assumed the legislature's role of amending a statute where an existing statute is declared unconstitutional, the City respectfully refers the Court to Point I of the Brief for Defendant-Appellant the State of New York.

POINT II

ASSUMING, ARGUENDO, THAT PLAINTIFF IS ENTITLED TO SOME SORT OF PRELIMINARY INJUNCTIVE RELIEF, THE LOWER COURT OVERSTEPPED ITS AUTHORITY BY SETTING A RATE OF \$90 PER HOUR, BY MAKING THE PRELIMINARY INJUNCTIVE RELIEF EQUALLY APPLICABLE TO ALL CASES TO WHICH THE COURT APPLIED IT, AND BY MAKING ITS ORDER APPLICABLE TO CASES IN WHICH THERE IS NO CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL.

As the City joins fully in the arguments urged by the State defendant, (1) that the lower Court did not have the authority to set a new rate of payment of statutorily-authorized counsel for the indigent, as such function is one of the legislature, (2) that even if the lower Court had authority to set a new rate of payment, the evidence herein does not support the Court's determination that the new rate will be \$90 per hour, and (3) that there is no basis for raising the rates in certain classes of cases, and (4) that the lower Court lacked the authority to make any order applicable to cases in which there is no constitutional right to the assistance of counsel, the City respectfully refers the Court to Point II of the Brief for Defendant-Appellant the State of New York.

CONCLUSION

THE ORDER SHOULD BE REVERSED OR
THE INJUNCTION SHOULD BE MODIFIED.

Dated: August 5, 2002

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for City Defendant-
Appellant.



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NEW YORK SUPREME COURT
APPELLATE DIVISION, FIRST DEPARTMENT

NEW YORK COUNTY LAWYERS' ASSOCIATION,

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OAG NO. 00-002238-A1

STATEMENT UNDER RULE 5531

1. The action is identified as Index No. 102987-00 in the Supreme Court, County of New York.
2. The names of the parties are stated in full in the title, and there have been no changes in the parties so named or their attorneys.
3. This action was commenced in the Supreme Court, New York County.
4. A Supplemental Summons and Complaint was served on or about January 30, 2002. A Supplemental Answer on behalf of Defendant State of New York was served on or about February 12, 2002. A Notice of Motion for Preliminary Injunction with Supporting Affirmations and Affidavits was served on or about May 31, 2001. Several Opposing Affidavits and Affirmations were served.

5. The action seeks:

- (a) a declaratory judgment that the State Defendant has a constitutional and statutory obligation to ensure that qualified assigned private counsel are available and able to provide meaningful and effective representation to children and indigent adults in New York City;
- (b) a declaratory judgment that the State Defendant's failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total compensation per case has created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation in New York City in violation of the New York and United States Constitutions;
- (c) a declaratory judgment that those portions of § 722-b of the County Law, § 245 of the Family Court Act, and § 35 of the Judiciary Law fixing these rates and limits are unconstitutional as applied to the representation of children and indigent adults in New York City;

(d) an injunction setting new rates, abolishing the distinction between the rates paid for in-court and out-of-court work, and removing the current limits on compensation for private counsel who participate in the assigned counsel program. The new rates shall be set both preliminarily and permanently at a level sufficient to ensure that qualified private counsel are available and able to provide children and indigent adults in New York City with constitutionally adequate representation in family and criminal court proceedings at the trial and appellate levels. NYCLA requests that the Court issue such an injunction setting new rates against the State Defendant, order the State Defendant to fund the expenses incurred as a result of the new rates and, to the extent necessary, declare the provisions of § 722-e of the County Law unconstitutional as applied to the expenses incurred as a result of the new rates. In the alternative, NYCLA requests that the Court issue such an injunction setting new rates against both the State and the City Defendants;

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- (e) an award of attorney's fees, costs and disbursements accrued in pursuit of this action under 42 U.S.C. § 1988 and CPLR Article 86; and
 - (f) such other and further relief as the Court may deem just and proper.

6. The notice of Appeal on behalf of Defendant State of New York is from the Orders dated May 3, 2002 and entered in New York County on May 6, 2002 and the Decision and Order dated May 3, 2002 and entered in the office of the Clerk of New York County on May 6, 2002 (Hon. Lucindo Suarez, J.S.C.).

The Notice of Appeal on behalf of Defendant City of New York is from the Decision and Order (one paper) entered in the office of the Clerk of New York County on May 6, 2002 (Hon. Lucindo Suarez, J.S.C.).

7. The appendix method of appeal is not being used. This appeal is on a full printed record.