STATE OF MICHIGAN

IN THE SUPREME COURT

In Re:
THE RECORDERS'S COURT BAR ASSOCIATION, THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, WOMEN LAWYERS ASSOCIATION OF MICHIGAN AND THE SUBURBAN BAR ASSOCIATION,

Plaintiffs,

v.

CHIEF JUDGES OF WAYNE COUNTY CIRCUIT COURT AND RECORDER'S COURT,

Defendants,
_____/

BRIEF IN SUPPORT OF COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL

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Plaintiffs say "YES"

STATEMENT OF FACTS

In 1981, some of the plaintiffs in this cause of action, along with other plaintiffs, filed an original complaint for superintending control in this Court (S.C. No. 70647) asking that this Court exercise superintending control in accordance with its supervisory powers over the Chief Judge of the Wayne County Circuit Court and the Chief Judge of the Recorder's Court for the City of Detroit. The basis for the lawsuit was that the attorney fees being paid to lawyers who were appointed to represent indigent defendants were totally inadequate because of the low rates of pay. The complaint alleged that the legal fees paid to attorneys appointed to represent indigent defendants had not been raised since 1967, and that the rate of inflation since that year had raised the cost of living almost three times above what the cost of living was in 1967.

After that lawsuit was filed, the Judges proposed a revised fee schedule in 1982 which raised the rates to approximately three times higher than they had been, in accordance with the increase of the cost of living. That fee schedule is attached to the complaint for superintending control in this cause as Exhibit B.

After the Judges' proposal raising the fees to an amount consistent with the increase in the cost of living, this Court dismissed the original complaint for superintending control, without prejudice to reinstitution of the action, should the fee schedule not go into effect. The Order of the Supreme Court in that superintending control case is attached to the complaint as Exhibit C.

Subsequent to the dismissal of the original superintending control action in this cause, the Judges, in October of 1982 first reduced the fees to a

level which was only twice the 1967 rate, despite the fact that the rate of inflation had been three times the 1967 average, not two times. This fee schedule is attached to the complaint as Exhibit D. After that reduction in fees, the Judges again reduced the fees in 1983, with a revised fee schedule which resulted in a gradual increase of fees over a period of several years; this fee schedule is attached to the complaint as Exhibit H.

When the gradual increase of fees finally resulted in an increase of fees to an amount which was double the 1967 rates, the Chief Judge of the Recorder's Court for the City of Detroit, acting as Executive Chief Judge for Recorders Court and for Wayne County Circuit Court, reduced the fees again in an Executive Order in 1985, setting the trial fees back to the same rate they had been in 1967 - $150.00 a day. This fee schedule is attached to the complaint as Exhibit H.

As a result of this schedule, some of the plaintiffs in this action, along with other plaintiffs, brought an action against the fee schedule, reminding Chief Judge Richard C. Dunn that the Supreme Court had dismissed the superintending control complaint based on an original fee schedule which was now no longer in effect (Wayne County Circuit No. 85-519626-CZ). Judge Dunn issued an opinion dismissing the complaint, finding that the fee schedule should be attacked by complaint for superintending control in the Supreme Court; Judge Dunn's opinion is attached to the complaint as Exhibit J.

Then, in July of 1988, the Chief Judge of Recorder's Court, the Honorable Dalton A. Roberson, and the Honorable Richard C. Kaufman, as Chief Judge for the Wayne County Circuit Court and Executive Chief Judge of both courts, again changed the fees in a new "schedule" issued by the Court. The new schedule is attached to the complaint as Exhibit A.

That new schedule sets flat fees in cases based on the seriousness of the penalty that the defendant faces. The fees, for the first time, are no longer

linked to performance activities of the attorney, and the flat fees are to be paid regardless of the activities or work performed by an attorney.

Based on a computation of an average case, the fees perpetuate and increase the unreasonableness of the fees paid to assigned counsel in Recorders Court and the Wayne County Circuit Court. A computation of an average plea case and average trial case is attached in the appendix to this brief. The fee schedule of 1988 does not approach the fee schedule of 1982 (Exhibit B) which caused the dismissal of the original complaint for superintending control in this Court.

The plaintiffs to this action, some of whom were the original plaintiffs in the original superintending control, now come back to this Court and ask that the original fee schedule of 1982 be firmly established by this Court. As the actions of the Chief Judges demonstrate, the Court is perfectly willing to continue to reduce fees or set them at differing rates unless this Court takes firm action to implement the 1982 fee schedule. Although that schedule is almost seven years old, as the computations in the appendix show, that schedule would provide a fair, more reasonable rate of pay for attorneys now working in Recorders Court and Wayne County Circuit Court on indigent cases.

I. LAWYERS APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN MICHIGAN ARE ENTITLED TO A REASONABLE FEE.

In Michigan, a statute, MCLA 775.16; MSA 28.1253 provides:

> Sec. 16. When a person charged with having committed a felony appears before a magistrate without counsel, and who has not waived examination on the charge upon which the person appears, the person shall be advised of his or her right to have counsel appointed for the examination. If the person states that he or she is unable to procure counsel, the magistrate shall notify the chief judge of the circuit court in the judicial district in which the offense is alleged to have occurred, or the chief judge of the recorder's court of the city of Detroit if the offense is alleged to have occurred in the city of Detroit. Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.

A statute requiring the courts to pay reasonable fees to attorneys appointed to defend the indigent accused has been in effect in Michigan since 1857; see, 1857 PA No 109. The plain language of the statute states that an attorney is entitled to receive "reasonable compensation." This statute has been amended recently by 1980 PA No 506, Section 1, effective January 22, 1981; therefore, the Legislature having reviewed and amended the statute, it can be presumed that the statute embodies present legislative intent.

Interpretation of that statute, or its predecessors, has reaffirmed the duty of the judges to determine reasonable fees and the duty of the county to pay those fees when certified. See, e.g., Withey v Osceola Circuit Judge, 108 Mich 168; 65 NW 668 (1895); People ex rel Schmittdiel v Wayne County, 13 Mich 233 (1865); People v Macomb County, 3 Mich 475 (1855). The last cited cases

also stand for the principle that the courts will compel the county to pay those fees when certified by the judges. Pursuant to Article 6 of the Michigan Constitution of 1963, the courts have retained for themselves a single system of justice and the inherent power to administer and fund that system. See, Wayne Circuit Judges v Wayne County, 386 Mich 1; 190 NW2d 228; 59 ALR3d 548 (1971).

Neither the statute nor the previously cited cases limits the payment of "reasonable compensation" to "funds appropriated." This court has not allowed appropriations to control other court expenditures. Wayne Circuit Judges v Wayne County, supra.

The Appellate Courts of other states have also refused to limit reasonable compensation of appointed lawyers to appropriated funds. See, Lindh v O'Hara, 325 A2d 84 (Del, 1974); Polakovic v Superior Court, 28 Cal App 3d 69; 104 Cal Rptr 383 (1972); People Ex Rel Conn v Randolph, 35 Ill 2d 24; 219 NE2d (1966); Knox County Council v State, 217 Ind 493, 29 NE 2d 405 (1940); Hall v Washington, 2 G Greene 473 (Iowa, 1850); Carpenter v County of Dane, 9 Wis 274 (1859); County of Dane v Smith, 13 Wis 585 (1861) and Phillips v Seely, 43 Cal App 3d 104, 116; 117 Cal Rptr 863 (1974).

As stated by the Michigan Supreme Court in Wayne County Judges v Wayne County, supra, 386 Mich at 9:

> [T]the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth, but also throughout our nation. (emphasis in original)

A "reasonable fee" to an attorney has to be a fee which compensates the attorney for his or her services in the same manner that an attorney would be compensated in providing services for members of the general public. The President's Commission on Law Enforcement and Administration of Justice concluded that assigned counsel should be paid no less than members of the private bar who perform the same work. The Commission stated:

> Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient, because it is part of a lawyer's obligation as a member of the Bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused. If the status of the Defense Bar is to be upgraded and if able lawyers are to be attracted into criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount. President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS, p 69 (1967).

The Supreme Courts of other states, in reviewing the reasonableness of compensation in the criminal justice sytem, have upheld the right of attorneys to collect in indigent cases a fee similar to what lawyers would be paid for their work on behalf of paying clients.

The Illinois Court of Appeals, in In re Petition for Fees In: People v Johnson, 93 Ill App 3d 848 (1981), defined reasonableness as follows:

> A reasonable fee infers at least some compensation. As such, fees awarded appointed counsel must reimburse the attorney for office overhead and expenses and yield something toward his own support. (See State v Rush (1966), 46 NJ 399, 217 A2d 441). A fee awarded by the court should neither unjustly enrich nor unduly impoverish appointed counsel and

> should allow the financial survival of his private practice. (See Smith v State (NH 1978), 394 A2d 834). However, we do not interpret the statute to require compensation equal to the prevailing market rate in the community, as petitioners suggest, although such a fee is not prohibited and may well constitute an appropriate amount in a given case. But what constitutes a reasonable fee must ultimately be determined by the trial judge with reference to that particular case in the exercise of sound discretion. (emphasis in original)

In Iowa Supreme Court, in Parrish v Denato, 262 NW2d 281 (1978), had defined the standard of reasonableness in determining an attorney fee in a criminal proceeding as follows:

> In determining a reasonable fee, generally the time necessarily spent, the nature and extent of the services, the amount involved (or, as here, the possible punishment involved), the difficulty of handling and importance of issues, responsibility assumed and the results obtained, as well as the standing and experience of the attorney in the profession should be considered. Gabel v Gabel, 254 Iowa 248, 251, 117 NW2d 501, 503. Similar guidelines were set forth in In re Marriage of Jayne, 200 NW 2d 532, 534 (Iowa 1972), where the customary charge for similar service was added as a factor which must be included.

Subsequent to the decision of Parrish v Denato, the Iowa Legislature amended the appropriate reasonable attorney fee statute to make it clear that a reasonable attorney fee in Iowa was the going rate in the community. The relevant statute in Iowa (Code Section 815.7) provides as follows, in relevant part:

> An attorney appointed by the court to represent any person charged with a crime in this state shall be entitled to a reasonable compensation which shall be the ordinary and customary charges for like services in the community to be decided in each case by a

> judge of the district court, including such sum or sums as the court may determine are necessary for investigation in the interests of justice . . . .

In Hulse v Van Wifvat, 306 NW2d 707 (Iowa, 1981), the Iowa Supreme Court, in interpreting the last quoted statute to mean that "reasonable compensation" was "full compensation," held that "no discount is now required based on an attorney's duty to represent the poor."

The New Jersey Supreme Court, after waxing poetic about the duty of the Bar to provide representation to indigents in criminal cases, settled on a practical recommendation that lawyers appointed to represent indigent defendants receive a fee equal to 60% of the rate charged to paying clients. State v Rush, 46 NJ 399; 217 A2d 441; 21 ALR 3d 804 (1966).

The Florida Supreme Court faced the inadequacy of a legislatively established fee schedule in Makemson v Martin County, 491 So 2d 1109 (Fla, 1986). The defense attorney in a death penalty case sought compensation for 248.3 hours. Although expert testimony established the value of his services at $25,000.00, the attorney asked for only $9,500.00. The trial court placed $6,000.00 in escrow pending appeal, because the statute allowed only $3,500.00.

The Supreme Court found the fee schedule statute facially valid, since the appropriation of funds is within the legislature's province. However, it also found the inflexible application of statutory maximum fees interfered with the defendant's right to effective assistance of counsel. Because the courts are ultimately responsible for protecting that right, they have the inherent power to depart from the fee schedule in extraordinary cases "to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents." Id. at 1115.

The Florida Supreme Court repeatedly emphasized the link between compensation and the quality of representation. It said the increasing complexity of criminal cases and the rising cost of doing business could not be ignored. While the attorney in question was seeking only "reasonable" compensation, not the market value of his services, the statute provided a token amount ($14.10/hour in this case) which in many instances would not even cover a lawyer's overhead.

In Michigan, little guidance has been given by the Supreme Court as to what fees lawyers are required to accept in extending their services in indigent criminal cases. In the case of In Re Meizlish, 387 Mich 228; 196 NW2d 129 (1972), the Michigan Supreme Court held that an attorney providing services to an indigent defendant was not entitled to full compensation for his services at the prevailing rates, but only to such amounts as schedules then in effect would allow him. The Court in Meizlish seemed to be saying that the attorney fee schedule did provide for the statutorily mandated reasonable fee:

> Obviously, lawyers may spend more time on some cases than on others and still receive the same compensation, and certainly in some cases a lawyer will receive far below the minimum Bar fees. But, in general, the court rule does provide reasonable compensation for court-appointed attorneys for indigents. In Re Meizlish, supra, 235-236.

But Meizlish is no authority for interpretation of the statute which requires reasonable compensation. MCLA 775.16; MSA 28.1253. Incredible as it may be, none of the parties cited this statute to the court, nor did the court cite this statute in ruling on the "reasonableness" of the petitioner's fee. Perhaps that is why the court correctly predicted in Meizlish that the question of attorney fees in indigent criminal cases would "doubtless" be

reviewed again.

Other than the decision in Meizlish, the Court of Appeals and Supreme Court have conducted a case-by-case review of attorney fees on a basis of reasonableness and on a basis of schedules then in effect for attorney fees. See, e.g., In the Matter of Ritter, 63 Mich App 24; 233 NW2d 876 (1975), rev'd 399 Mich 563; 249 NW2d 301 (1975); In the Matter of Hayes, 55 Mich App 30; 222 NW2d 20 (1974); In the Matter of Burgess, 69 Mich App 689; 245 NW2d 301 (1976). Unlike Meizlish, these cases did consider the statute requiring reasonable compensation.

A number of other Michigan statutes provide for awards of "reasonable" attorneys' fees in certain limited circumstances, and none require a "discounted rate." The Michigan Freedom of Information Act, MCLA 15.231, et seq.; MSA 4.1801 et seq., for example, entitles the prevailing party in an action to compel disclosure of information to such "reasonable" attorneys' fees. While recognizing this entitlement, the reported decisions have offered no real guidance for the determination of such fees. See, e.g., Penokie v Michigan Technological University, 93 Mich App 650; 281 NW 2d 304 (1979). Appellate review of "reasonable attorney's fees" awarded pursuant to MCLA 570.12; MSA 26.292 (in an action involving a mechanic's lien claim), has proved only slightly more instructive. In Sturgis Savings & Loan v Italian Village, Inc., 81 Mich App 577; 265 NW2d 755 (1978), the court affirmed the trial court's fee award. It noted, with apparent approval, that the lower court considerd the number of hours properly expended on the case, the amount in controversy, and the complexity and difficulty of the issues involved.

Courts' determination of "reasonable" compensation usually provide for an examination of the prevailing rate for attorney services. Whether or not the

courts or the legislature authorize payment of the prevailing rate as "reasonable" compensation, the consideration of the prevailing rate is always a factor. While opinions construing reasonable attorney fees have varied widely in emphasis, clarity of analysis and results (see Berger, Court Awarded Attorney Fees: What is Reasonable? 126 U Pa L 281 [1977]), a basic framework for determining reasonableness has been recognized in a number of cases. Awarding fees pursuant to 42 USC §1988 in Card v Dempsey, 445 F Supp 942, 946 (ED Mich 1978), the court observed:

> The starting point for determining a reasonable fee is the simple mathematical exercise of multiplying attorneys' hours by the typical rate of the type of work. City of Detroit v Grinnell Corp, 495 F2d 448 (2d Cir 1974); Oliver v Kalamazoo Board of Education, 73 FRD 30, 41-44 (1976).

Similarly, in Singer v Mahoning County Board of Mental Retardation, 519 F2d 748 (CA 6, 1975), the Sixth Circuit interpreted Title VII reasonable attorney's fees provisions to require the district court to award "a fee that would approximate the customary fee in the community for similar work."

It has been recognized in Michigan that the customary hourly rate for lawyers who practice criminal law is $75.00 to $125.00 an hour. "Economics of the Practice of Law" 67 Mich SBJ, Vol 67, No 11B (November 1988), p 23

Any fee schedule which does not compensate lawyers for criminal defendants at the rate of $75.00 - $125.00 an hour does not pay a "reasonable fee."

II. REQUIRING ATTORNEYS TO WORK AT UNREASONABLE RATES FOR INDIGENT DEFENDANTS IS A TAKING OF THE ATTORNEYS' PROPERTY WITHOUT JUST COMPENSATION.

Representation of indigents accused of a crime is not pro bono publico work. Lawyers defending an indigent accused of a crime, while performing a public function, are not truly working "for the good of the public," but are primarily devoted to the representation of a client, and must undertake to do so with the zeal of any other lawyer who accepts representation on behalf of a client. The American Bar Association, for instance, has never suggested that pro bono publico work should extend to the defense of the criminally accused. Rather, in its Standard Relating to Providing Defense Services, the Institute of Judicial Administration of the American Bar Association stated:

> Assigned counsel should be compensated for time and service necessarily performed in the discretion of the court within limits specified by the applicable statute. In establishing the limits and in the exercise of discretion the objective should be to provide reasonable compensation in accordance with prevailing standards.

Historically, a very small segment of the Bar has undertaken the defense of indigents in criminal courts. This was noted 20 years ago by the American Bar Association and, as recently as 1978, a member of the Michigan Bar, in surveying the assigned counsel system, noted ". . . It remains true that only a small part of the Bar is active in handling indigent cases. . . ." Mann, Representation of Indigent Defendants in Michigan, 57 Mich SBJ 848, 851 (1978)

Although it has been suggested that every lawyer who has a license to practice acquires with that license an obligation to defend indigents in criminal cases, the fact remains that the vast majority of the Bar practices an entire career without ever representing an indigent accused. Ironically,

the most intelligent, wealthy, and powerful members of the Bar, who could best afford to offer services to the poor, are seldom found in the ranks of those who defend indigents.

The fact that a majority of the Bar does not represent indigents accused of crimes is no accident. The defense of criminal cases has become a complex and difficult task, with the required skill level of an average criminal defense lawyer reaching new heights with every new issue of the Supreme Court advance sheets. There are few members of the Bar who possess "ordinary skill and training in the criminal law."

There is, however, another underlying reason why most members of the Bar have not undertaken the defense of indigents accused of crimes -- the pay to be derived therefrom. With the maintenance of extensive law libraries, word processing machines, computers, copying machines, paralegals, and other support staff necessary to secure the effective assistance of counsel, major law firms must recover a sufficient hourly fee to support their practice. Because of the intransigence of governments, who adequately fund prosecutors, police, and the courts, but who refuse to adequately fund the public function of criminal defense, it is unlikely that any members of the Bar could now achieve necessary and reasonable compensation for their efforts on behalf of the criminally accused in any County of this State.

What has occurred, then, is that a small segment of the Bar has undertaken the public function of defending the criminally accused, and that segment performs its services at rates of pay far below the rates charged by the vast majority of the Bar.

The fact that lawyers are available to work at substandard rates in the defense of the indigent accused is not proof that the fees are reasonable, but

it is commentary on the acute devotion of some attorneys to representation of the poor, as well as the dire financial status of some members of the Bar. A past economic survey of the profession revealed that a sole practitioner, during the first few years of his practice, is averaging an income of $12,800 a year. Wright, 1981 Economics of Law Practice Survey of Michigan Lawyers, Part II, Mich SBJ 112 (1982)

As the American Bar Association Institute of Judicial Administration observed:

> The legal profession has carried for many years the major part of the burden of representation in criminal cases. In so doing many individual lawyers have suffered personal hardship because of their loyalty to the tradition that no one should lack counsel because of indigency. Many private practitioners have devoted vast amounts of time which required them to neglect their paying clients and other responsibilities in order to perform needed services for indigent defendants. Society cannot justly impose this heavy demand on one segment of the population. Standards Relating to Providing Defense Services, op. cit., p. 34

The heavy financial burden placed on the small segment of the bar that accepts appointments to represent indigent defendants has resulted in the Courts of other states finding that low assigned counsel rates amount to the taking of private property for public purposes without just compensation. Both the federal and Michigan Constitutions forbid such takings. US Const, Am V; Mich Const 1963, art 10, sec 2.

In DeLisio v Alaska Superior Court, 740 P2d 437 (Alaska, 1987), the Alaska Supreme Court reversed earlier decisions on the subject, and concluded that:

> . . . requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the

> public upon the attorney rather than upon the citizenry as a whole. As such, the appropriation of the attorney's labor is a 'taking' under the provisions of Alaska Constitution article I, section 18. Id. at 443.

The Court reasoned that an attorney's service is property, and the appropriation of that property is a taking. The taking is for a public use, since the appointment of counsel is designed to insure that all defendants receive equally fair trials. Just compensation, the Court then determined, is the fair market value of the property taken. In the case of attorney services, fair market value is "the compensation received by the average competent attorney operating on the open market." Id.

The Kansas Supreme Court relied heavily on DeLisio when it decided State ex rel Stephan v Smith, 242 Kans 336; 747 P2d 816 (1987). The Kansas Court was reviewing multiple challenges to the state system for providing indigent defense which, although regulated and funded at the state level, permitted wide variation from county to county. In some populous areas, public defender offices handled all but conflict cases, and the private bar was little involved. In other counties, members of the local bar were put on assigned counsel panels involuntarily and were required to accept assignments. The compensation rate of $30.00 per hour was set by regulation, and was subject not only to mandatory maxima, but to reduction when adequate funds for the entire system were not available.

The Kansas Supreme Court reviewed the changes that had occurred since the days when indigent criminal defense needs could be adequately served by having lawyers handle an occasional criminal case pro bono. The Court addressed the volume and complexity of criminal cases, and the increasing cost of overhead, which typically reaches or exceeds $30.00 per hour. It agreed that attorney

services are property subject to Fifth Amendment protection, as is expense money advanced by attorneys out-of-pocket.

The Kansas Supreme Court concluded:

> The State of Kansas has the obligation to furnish counsel for indigents charged with felonies, for indigents charged with misdemeanors when imprisonment upon conviction is a real possibility, and for other persons upon certain circumstances. The State also has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses. The basis of the amount to be paid for services must not vary with each judge, but there must be a statewide basis or scale. No one attorney must be saddled with appointments which unreasonably interfere with the attorney's right to make a living. Out-of-pocket expenses must be fully reimbursed.
>
> Kansas attorneys have an ethical obligation to provide pro bono services for indigents, but the legal obligation rests on the state, not upon the bar as a whole or upon a select few members of the profession. Id. at 849-50.

The fact that the performance of the public function of providing equal justice under the law has been delegated to a small, underpaid segment of the Bar is, itself, cause for concern. Of more concern, however, is the likelihood that the indigent accused, instead of being provided with the protection of equal justice, will be victimized by a substandard, second-class justice provided by substandard, underpaid counsel. The payment of reasonable fees is for benefit of the system, not for benefit of the lawyer. The American Bar Association, in its articulation of standards relating to providing defense services, observed that:

> Inadequate compensation, leading to an inability to recruit and retain personnel of high quality, is one

> of the greatest dangers in the creation of institutionalized defender services.

It is for the good of the client, as well as the lawyer, that rates of compensation remain reasonable.

III. THE SETTING OF ATTORNEY FEES IN THE CIRCUIT COURT AND RECORDER'S COURT IS A MATTER OVER WHICH THE MICHIGAN SUPREME COURT CAN EXERCISE SUPERINTENDING CONTROL.

The Plaintiffs challenge the setting of fees by the Chief Judges of the Wayne County Circuit Court and the Recorder's Court. These fees have been set by a "Joint Administrative Order," specifically numbered "Joint Administrative Order 1988-2." See Exhibit A attached to Complaint.

MCR 8.112 provides that administrative orders are limited only to those matters governing internal court management. Clearly, a schedule for paying attorneys who are appointed to represent indigent defendants in the court is not an internal court management matter, but a matter that affects attorneys who accept appointments and attorneys who work in the courts on behalf of indigent defendants.

MCR 8.112 requires the court to adopt as a local court rule any practice of the trial court not specifically authorized by the Michigan Court Rules. The Michigan Court Rules are entirely silent on attorney fees, and the fees to be set must be established by local court rule.

The fees set in the Court are matters which insure the proper and just administration of justice in the Courts, particularly because the fees affect which attorneys will accept assignments, whether attorneys are adequately paid for assignments, and, in reality, whether indigents who accept appointed counsel receive effective assistance of counsel.

If the Chief Judges set a "fee schedule" which by its operation provides for an unreasonable fee, the judges, by general practice and policy have violated the "reasonable fee" dictates of statute (MCL 775.16; MSA 28.1253) and a complaint for superintending control is appropriate to review the general practice which violates that statute.

In Morcom v Recorder's Judges, 15 Mich App 358; 166 NW2d 646 (1968), the Michigan Court of Appeals held that an action for superintending control filed in the Court of Appeals was inappropriate because it dealt with the "proper and just administration of justice" in the courtrooms. The Court of Appeals correctly held that the appeals court can exercise superintending control "in respect of a particular error in an actual case and controversy, and that we have not been delegated superintending control over the general practices of an inferior court or any judge thereof." 15 Mich App at 360. Therefore, the Court of Appeals dismissed the complaint for superintending control in that case.

In People v Blachura, 390 Mich 326, 344-345; 212 NW2d 182 (1973), the Supreme Court implicitly approved of the holding of Morcom.

The Supreme Court has previously granted a Complaint for Superintending Control filed by the County of Wayne in 1982 concerning the fees set in Wayne County Circuit Court and Recorders Court, Supreme Court Number 70647.

MCR 3.302 provides that superintending control is intended to enforce the superintending power of court over lower courts or tribunals. MCR 7.304 establishes the procedure for filing a superintending control complaint.

The rules require that superintending control be utilized only where there is no adequate remedy at law. The only remedy at law that attorneys have who are laboring under this oppressive and unreasonable fee schedule is to file individual actions protesting the fees awarded. Since there are approximately 14,000 criminal cases a year filed in Wayne County Circuit Court and Recorders Court, 14,000 legal actions is not an adequate legal remedy, and superintending control is, in fact, the appropriate remedy to address unreasonable fees.

Former Chief Judge Dunn, in his Opinion upholding the 1985 Wayne County and Recorder's Court fee schedule, has conceded that an original action for superintending control is the only vehicle to challenge fees in those courts when he stated:

> Inasmuch as the action presently before the Court contests the general practices of the Wayne County Circuit Court and Recorder's Court the action is in the nature of one for superintending control over a circuit court or the Recorder's Court. Yet, only the Supreme Court has original jurisdiction in such actions. Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 681 (1972); Morcom v Recorder's Court Judges, 15 Mich App 358, 360 (1968). That this Court has no subject matter jurisdiction in this action accordingly dictates that this instant action will be dismissed.

Recently, this Court has been presented with another Complaint for Superintending Control and the request to bypass the Court of Appeals in a matter concerning Circuit Court Judges' policy for the appointment of counsel in appeals cases. See In re: State Appellate Defender Office and State Appellate Defender Commission v 26th Circuit Court Judges, S. Ct. No. 85216. That cause, while only pending in this Court, is a similar cause of action involving the administration of justice in the Circuit Court. The Supreme Court has stayed the Court of Appeals proceedings pending consideration of that application.

RELIEF REQUESTED

WHEREFORE, for the reasons and grounds expressed herein, Plaintiffs request that this Court grant the relief requested in Plaintiffs' complaint.

Respectfully submitted,

BELLANCA, BEATTIE AND De LISLE, P. C.

By: /S/

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Dated: April 13, 1989

APPENDIX

Hypothetical No. 1

Defense Attorney is appointed to defend a felonious assault case; interviews client in jail; holds preliminary examination, investigates case, appears at arraignment on information, pleads client guilty to reduced charge, appears at sentencing. Total time: ten hours

Fee Computation

1967 Rates	1981 Schedule	1988 Schedule	Hourly (75/hr)
$425.00	$575.00	$525.00	$750.00

Effective Hourly Rates

1967 Rates	1981 Schedule	1988 Schedule	Hourly
$ 42.50	$57.50	$52.50	$75.00

APPENDIX

Hypothetical No. 2

Defense Attorneys appointed to defend an armed robbery case; interviews client in jail before preliminary examination; holds preliminary examination, investigates case, appears at arraignment on information, files two motions, appears at two calendar conferences, visits client in jail before trial and during trial, holds three-day jury trial, client found not guilty. Total time: 50 hours

Fee Computation

1967 Rates	1981 Schedule	1988 Schedule	Hourly (75/hr)
$825.00	$2,070.00	$750.00	$3,750.00

Effective Hourly Rates

1967 Rates	1981 Schedule	1988 Schedule	Hourly
$ 16.50	$41.40	$15.00	$75.00