STATE OF MICHIGAN

IN THE SUPREME COURT

In Re:
THE KENT COUNTY CRIMINAL DEFENSE BAR,
Plaintiff,
v
THE HONORABLE ROBERT A. BENSON, CHIEF JUDGE OF THE KENT COUNTY CIRCUIT COURT,
Defendant.
/

Supreme Court No. 91553

In Re:
MARIAN F. KROMKOWSKI, JAMES R. RINCK. EDWARD A. MEANY, AND JAMES A. FREDERICK,
Plaintiffs,
v
THE HONORABLE JOSEPH P. SWALLOW, CHIEF JUDGE OF THE 26TH CIRCUIT COURT,
Defendant.
/

Supreme Court No. 94763

IN THE MATTER OF THE RECORDER'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,
Petitioners,
v
WAYNE COUNTY CIRCUIT COURT AND RECORDER'S COURT.
Respondents.
/

Supreme Court No. 86099

BRIEF OF AMICUS CURIAE, STATE BAR OF MICHIGAN

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STATEMENT OF QUESTION PRESENTED

I. DOES THE PAYMENT OF FEES TO APPOINTED COUNSEL WITHOUT REFERENCE TO ESTABLISHED STANDARDS OF REASONABLENESS AND WELL BELOW THE RANGE OF FEES NORMALLY PAID TO RETAINED COUNSEL VIOLATE STATUTORY REQUIREMENTS FOR REASONABLE COMPENSATION, CONFISCATE THE PROPERTY OF THE APPOINTED COUNSEL, AND INTERFERE WITH EQUAL ACCESS TO THE JUSTICE SYSTEM?

AMICUS CURIAE SAYS "YES"

STATEMENT OF FACTS

In each of the three cases at issue a fee was paid by a county pursuant to statutory requirements to counsel appointed to represent an indigent criminal defendant at trial or on appeal. Each case involves a separate county funding system in which the amount of the fee was calculated by reference to criteria established by the individual county, rather than by reference to those criteria established by this Court for determining reasonable fees for legal services. The specific facts of each case and the details of each of the counties' fee payment structures will not be addressed within this brief as they are documented in full in the briefs of the parties.

LAW AND ARGUMENT

I. THE PAYMENT OF FEES TO APPOINTED COUNSEL WITHOUT REFERENCE TO ESTABLISHED STANDARDS OF REASONABLENESS AND WELL BELOW THE RANGE OF FEES NORMALLY PAID TO RETAINED COUNSEL VIOLATES STATUTORY REQUIREMENTS OF REASONABLE COMPENSATION, CONFISCATES THE PROPERTY OF THE APPOINTED COUNSEL, AND INTERFERES WITH EQUAL ACCESS TO THE JUSTICE SYSTEM.

Since 1857, the Legislature has required courts to pay the reasonable fees of attorneys appointed to defend the indigent. 1857 PA No 109. Under that statute, without regard to county appropriations, the county is charged with the duty to pay those fees. *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 present intent of the legislature to continue that requirement

has been exhibited in amendments to that Act, most recently amended by 1980 PA No 506. MCL 775.16; MSA 28.1253. The statute on its face requires that compensation be "reasonable".

> "The attorney appointed by the Court shall be entitled to receive from the county treasurer. . . the amount which the chief judge considers to be reasonable compensation for the services performed."

The Act is notably devoid of limitations on fees on the basis of the type of offense alleged or the location of the court in which the action is tried, does not authorize counties to interfere, directly or indirectly, with the professional judgement of an independent practitioner as to which tasks must be completed, nor does it authorize counties or the chief judge of each circuit court to establish standards for "reasonableness" of counsel's fees independent of those established by this Court.

Criteria for the determination of a "reasonable" fee for legal services have long been established in Michigan. Similar criteria have been applied by the United States Supreme Court in its interpretations of Federal statutory requirements of a "reasonable" attorney fee.

From 1935, the Michigan Supreme Court has embraced a clear and virtually unchanging set of criteria in enunciating the ethical standards to which all members of the bar are required to adhere for establishing the amount of a fee. The criteria apply for legal services performed in civil and criminal matters. No distinction has been made for plaintiffs' or defendants' attorneys. The Michigan Canons of Professional Ethics, Canon 12, effective 1935-1971, provided criteria virtually identical to that of its successor, The Michigan Code of Professional Responsibility. Currently, the Michigan Rules of Professional Conduct, the Supreme Court's

"authoritative statement of a lawyer's ethical obligations," require the application of criteria substantially identical to those enumerated in DR 2-106. MRPC, Rule 1.5 provides, in pertinent part, as follows:

> (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) the likelihood, if apparent to the client , that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) the fee customarily charged in the locality for similar services;
> >
> > (4) the amount involved and the results obtained;
> >
> > (5) the time limitations imposed by the client or by the circumstances;
> >
> > (6) the nature and length of the professional relationship with the client;
> >
> > (7) the experience, reputation, and the ability of the lawyer or lawyers performing the services; and
> >
> > (8) Whether the fee is fixed or contingent."

In addition to the ethical guidelines promulgated for all members of the Bar, this Court has established criteria for the determination of "reasonable" attorney fees in *Wood v DAIIE*, 413 Mich 573; 321 NW2d

653 (1982). The *Wood* factors are essentially identical to, and make reference to the ethical standards.

The United States Supreme Court, in interpreting statutory requirements for the payment of "reasonable" attorney fees, has required the payment of fees at market rates. The Federal Civil Rights Attorney Fees Act, 42 USC §1988 provides for attorneys fees as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 USC §1988

The "lodestar" approach to fee assessment under §1988 considers the number of hours expended on litigation multiplied by a reasonable rate and adjusts the award from that point. *Hensley v Eckerhart*, 103 S.Ct. 1933; 76 L Ed 40; 461 U.S. 424 (1983). In *Venegas v Mitchell*, 110 S.Ct. 1679; 109 L Ed; 495 U.S. 82 (1990), the Supreme Court held that "reasonable fees" under §1988 are to be calculated according to "prevailing market" rates in the relevant community. The prevailing rates have been applied as an upward adjustment for attorneys who normally provide services at reduced rates when retained. *Blum v Stenson*, 104 S. Ct. 1541; 465 U.S. 886; 79 L Ed 891 (1984); See, also, *Save Our Cumberland Mountains, Inc. v Hodel,* 857 F2d 1516 (D.C. Cir. 1988).

This set of criteria have been applied consistently in determining fees and fee awards in civil cases but are almost entirely neglected in evaluations of fees for indigent criminal defense. The criteria for the payment of fees within several of the counties' structures diverge dramatically from criteria previously established by this Court through

civil cases and as provided by the Rules of Professional Conduct. In many cases, the fee schedules are patently arbitrary -- the fees paid bear no relationship to the type, volume, quality, or results of the work done, nor do the rates paid to assigned counsel relate to the time and labor required, the requisite skill, or the fees customarily charged for similar services. Under other structures, the level of compensation is not arbitrary, but plainly contrary to zealous criminal defense -- the more work that is done by the appointed attorney, the less his or her effective hourly rate of pay.

At best, within such a structure, ethical appointed counsel will be required to subsidize a public function by completing tasks to the benefit of a client knowing that the work will not be compensated. It has been fairly argued by counsel as well as by courts of other jurisdictions that the imposition of the costs of indigent criminal defense upon a limited portion of the Bar constitutes a taking of private property for public purposes without just compensation. US Const, Am V; Mich Const 1963, art 10, sec 2. See, e.g., the reasoning in *DeLisio v Alaska Superior Court*, 740 P2d 437 (Alaska, 1987); *State ex rel Stephan v Smith*, 242 Kansas 336; 747 P2d 816 (1987), and *White v Board of County Commissioners of Pinellas County*, 537 So2d 1376 (Fla. 1989).

At worst, in has been argued, such a structure encourages less conscientious counsel to do less research, less investigation, or to pursue guilty pleas at the expense of those with viable defenses, while other attorneys avoid the dilemma altogether by not taking assignments from those circuits where insufficient pay for complex cases is likely. Ideally, dedication and diligence of defense counsel should not be dependant upon a higher fee. As a practical matter, however, under several of the present

structures, equal access to justice and to effective representation is neither guaranteed nor fostered.

The Michigan Rules of Professional Conduct, largely drawn from the American Bar Association's Model Rules of Professional Conduct, include a comment section for each of the rules as an aid to understanding the context within which the rules were adopted and to provide practical support for their application. The comment section for Rule 1.5 states that:

> "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of service in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures."

The American Bar Association has emphasized that the imposition of the cost of criminal defense of the indigent upon a small segment of the Bar in intolerable.

> "Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs." *ABA Standards Relating to the Administration of Criminal Justice, Chapter Five, Providing Defense Services*, Approved Draft (1978), Standard 5-2.4, p 12.

The President's Commission on Law Enforcement and Administration of Justice has expressed similar conclusions:

> "Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. . . 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 criteria addressed above is an abstract ideal. The test of that ideal is the reality which has evolved under those guidelines. That reality is defined by actual fees normally paid for legal services and actual costs normally and foreseeably incurred in providing such services. These factors have been most recently measured and described by the State Bar's 1990 Economics of Law Practice Survey.

According to the State Bar Survey, the current median office overhead expense for law practice in Michigan has been found to be over Thirty-Five ($35.00) Dollars per hour. The median hourly billing rate for all retained attorneys is One Hundred and Five ($105.00) Dollars and for criminal lawyers is Ninety ($90.00) Dollars. Hourly rates for appellate assigned counsel range from Twenty-Five ($25.00) in Macomb County to Sixty-Five ($65.00) Dollars in Ionia County. An appeal requiring fifty hours of work will pay the attorney Sixty ($60.00) Dollars per hour in Ionia but only Eight 20/100 ($8.20) Dollars per hour in Barry County. Hourly rates for assigned counsel at the trial level is similarly variable. Several Counties have not raised their rates for over ten years. "Beyond Tort Reform" Mich SBJ Vol 71 No. 8, August, 1992, p. 756.

The court in Michigan has recently stated what it considers to be "reasonable" fees in civil cases. See, e.g., *Ecclestone, Moffett & Humphrey, P.C. v Ogne, Jinks, Alberts & Stuart, P.C.*, 177 Mich App 74; 441 N.W.2d

7 (1989), upholding the trial court's determination that fees at the rate of $100.00 per hour were reasonable, as compared with *Department of Transportation v Dyl*, 177 Mich App 33; 441 N.W.2d 18 (1989), where the trial court awarded and the appellate court upheld a fee of over $200.00 per hour.

Rates of compensation for prosecutors, judges, police officers, court clerks, court stenographers, and other personnel within the criminal justice system consider factors such as cost of living, and normally include benefits, access to facilities and staff. None of these professionals are called upon to expect that their paychecks may be substantially diminished without warning or reason after their work has been completed, depending upon someone else's evaluation of what should have been paid, or how much work should have been done. None of these personnel need expect that their paychecks will be reduced if the defendant is poor. None of these personnel are expected to accept pay reductions based upon differences in the attitudes of the judges with whom they work. In addition, many court personnel receive additional training and education at no cost. The legislature has made appropriations for the training and education of prosecutors. MCL 49.101; MSA 5.820(1).

Court reporters, like assigned defense attorneys, are guaranteed a reasonable rate of compensation by statute. The rate of compensation for court reporters, however, has been firmly established at a fixed and precise rate of one and 75/100 ($1.75) dollars per page, in addition to salary and benefits. Counties paid approximately $2.5 million dollars for circuit court transcripts in 1989 but only $1.9 million for appellate assigned counsel. "Beyond Tort Reform" Mich SBJ Vol 71 No. 8, August, 1992, p. 754, 756. Plaintiff Kromkowski was paid only 38% of the amount to

which the court reporter was entitled by statute for transcripts, apart from salary and benefits. There is no statutorily defined dollar rate of compensation for assigned counsel, the "reasonable" rate is left to the discretion of the chief judge. MCL 775. 16; MSA 28.1253. Although the broader range of tasks and responsibility of the assigned counsel requires flexibility in formulating the final fee, it does not eliminate the necessity of establishing a reasonable minimum rate.

In *In re Meizlish*, 387 Mich 228; 196 NW2d 129 (1972), this Court expressed its commitment to improving the fee payment structures for indigent defense, noting, however, the lack of excess funds generally available to local government:

> "...Our Court will continue to work for improvement of our present system, agreeing with appellant that it must be improved.
>
> "...Because of these increasingly insistent demands for such a uniform schedule of fees, and in view of the present dialogue regarding improved methods of financing the entire judicial system, we shall doubtless review the question again in the future, but for the present we are reluctant to take such action as would plunge the counties into a position of responsibility for the payment of attorneys' fees more than double those presently paid. Such a burden we are not yet prepared to thrust upon them." *In re Meizlish*, 387 Mich 228, 241; 196 NW2d 129 (1972).

Concern for the county fisc cannot override the necessity for reasonable funding of the criminal defense of the indigent. Constitutionally guaranteed protections of effective assistance of counsel and equal access to justice are essential to the integrity of the criminal justice system and are not the appropriate corners to cut in order to preserve local budgets. Statutory requirements for "reasonable fees" for indigent defense aside, counties and local governments are frequently required to pay attorneys'

fees under a broad array of Michigan statutes and court rules under various circumstances and rationales, none of which require payment at a discounted rate. See, e.g., MCR 2.114; the Elliot-Larsen Civil Rights Act, MCLA 37.2102, *et seq.*; MSA 3.548 (101) *et seq.*; the Uniform Condemnation Procedures Act, MCL 213.66(3); MSA 8.265(16)(3); the Michigan Mental Health Code, MCL 330.1615; MSA 14.800(615); and the Freedom of Information Act, MCL 15.231, *et seq.*; MSA 4.1801 *et seq.*

Market rate attorney fees are available in Michigan as a sanction when a party or counsel has failed to follow procedural guidelines or court orders, see, e.g., *Plumbers and Pipefitters Local Union No 190 v Wolff*, 141 Mich App 815; 369 NW2d 237 (1985), under the general equitable powers of the court, *Gunderson v Village of Bingham Farms*, 1 Mich App 647; 137 NW2d 763 (1966), and as an element in measuring exemplary damages. *Oppenhuizen v Wennersten*, 2 Mich App 288, 299; 139 NW2d 765 (1866). None of these provisions require or recommend payment at a discounted rate. None of these provisions exempt counties from payment under the same standards as other parties.

In addition to awards of attorneys fees under state law, counties and local governments are regularly required to pay attorney fees at market rates under numerous Federal provisions, including the Federal Civil Rights Attorney Fees Act, 42 USC §1988, supra..

County and local governments are regularly required to pay attorney fees at the market rate and even beyond market rate under numerous rationales, some with and some without constitutional overtones, some with and some without firm historic and moral foundations. Why is the refusal of payment of adequate attorney fees to indigent defense counsel tolerated when such payment is a known necessity and the requirement for such

payment is so firmly embedded in the State and Federal constitutions and in legislation which has been in place for over a century?

The rates of compensation for appointed counsel do not meet the standards which have been established either by this Court, in abstract ideal, or the standards which have been obtained by the Bar in practical reality. Most striking is the situation presented by attorney Kromkowski, who, after successfully appealing a conviction was compensated at an effective rate of Six 81/100 ($6.81) Dollars per hour! The "real dollar" figures described by the Bar survey as income and overhead for retained counsel are a useful reality check. The survey illustrates the range of fees within which it is possible to measure whether the ideal criteria are being met by the fees actually paid to appointed counsel. Appointed counsel do not claim to be entitled to compensation beyond the crest of the range, nor even above the median of fees received by retained counsel. Certainly, however, appointed counsel are entitled to compensation which falls within the range and not well below its lowest reach. A fee cannot be "reasonable" if it cannot, at a minimum, reimburse the appointed attorney for the base cost of providing the services.

Commentators have argued that, in order to implement a viable funding structure for indigent trial and appellate defense, it must be done on a statewide basis and with funding provided by the State. Upon such a premise, it is then argued that the legislature, rather than the court, is the proper forum for resolution of this issue as it is not within the power of this Court to effectively legislate appropriations for the purpose of funding the defense of the indigent accused. Although cogent arguments for a statewide funding system have been made, it is not necessary for this Court to consider those arguments in order to resolve the present issues.

Additional legislation is unnecessary. The resolution of the immediate crisis in funding for the defense of the indigent accused should not be obscured by arguments to change what the legislature has long required. There is no need for this Court to override existing legislation in order to address the present issue -- the legislature has already acted, consistently and firmly for over a century, and has assigned the responsibility of funding indigent defense to the counties with a mandate that plainly requires that the rate of compensation be "reasonable". The counties may not simply refuse to meet their statutory obligation of adequately funding the public function of criminal defense. If the counties wish to challenge the propriety of the designated source for that funding, they are free to solicit legislative change. Absent such change, the responsibility to provide reasonable fees remains with the counties. It is within this Court's power to require that counties fulfill their statutory obligation. What remains is simply the enforcement of clear legislative intent.

CONCLUSION

The payment of reasonable fees to appointed counsel is fundamental to insure equal access to justice and to the integrity of the criminal justice system as a whole. The present series of cases represent a long-standing and well-documented concern over the inadequacy of funding for assigned defense counsel for the indigent at both the trial and appellate levels. The counties, long holding the duty to fund criminal defense for the indigent, have been unwilling to allocate the necessary funds to provide for the payment of this public service. Despite the best talents and efforts of the various counties, no payment structure has been developed which stretches

that inadequate funding so that it will become adequate. The results of each of the programs confirm that a clear statement of what constitutes a "reasonable" rate of compensation for the defense of indigent accused must be made, and enforced, by this Court.

What constitutes a "reasonable fee" for legal services provided to the indigent for their defense? At a minimum, a "reasonable fee" is a rate of compensation sufficient to reimburse the appointed counsel for overhead costs plus a reasonable wage and, ideally, to sustain a trained, experienced and willing pool of attorneys for the purposes of criminal defense.

The Court holds the inherent power to administer and fund this State's single system of justice, as well as the ultimate responsibility to ensure that such administration and funding are secure. *Wayne County Judges v Wayne County*, 386 Mich 1; 190 NW2d 228; 59 ALR3d 548 (1971).

Const 1963, art 6, sec 5 states:

> "The Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. . ."

In reviewing the present cases, this Court has an opportunity to review the effectiveness of the wide array of responses to the funding question as well as the broader context within which the present controversy has arisen. It is the hope of the State Bar that this Court will take advantage of the present opportunity to declare that the existing criteria for civil attorneys' fees apply as well to criminal cases, or to establish other explicit criteria for consistent and reasonable compensation which will correct the inadequate and widely disparate payment rates applied across the various counties. The State Bar urges this Court to

embrace the responsibility for guaranteeing that indigent defendants receive more than mere *pro forma* representation and that their counsel are adequately compensated.

RELIEF REQUESTED

Wherefore, The State Bar of Michigan requests this Court issue an order establishing the requirement that the fees paid attorneys appointed to represent indigent defendant at trial and on appeal be reasonable according to the standards of reasonableness established by this Court for all other areas of legal services.

Respectfully submitted,

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