**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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| IN RE: WAYNE COUNTY CRIMINAL DEFENSE BAR ASSOCIATION, and THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, | ) | Case No. 122709 |
| Plaintiffs. | ) | |
| v. | ) | |
| THE CHIEF JUDGES OF WAYNE COUNTY CIRCUIT COURT. | ) | |

# PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR REQUEST FOR WRIT OF SUPERINTENDING CONTROL


Brian D. Sieve, P.C. (*pro hac vice*)
Michael B. Slade (*pro hac vice*)
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Frank D. Eaman (P13070)
BELLANCA, BEATTIE, & DELISLE
20480 Vernier Road
Harper Woods, MI 48225
(313) 882-1100

Counsel for Plaintiffs

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## I. Introduction

On November 12, 2002, Plaintiffs filed a Complaint and Memorandum in Support of A Request for a Writ of Superintending Control against the Chief Judges of the Wayne County Circuit Court. Plaintiffs alleged, and provided substantial support in the form of affidavits and other exhibits, that: (1) the fees paid appointed counsel in Wayne County do not constitute "reasonable compensation for services performed" as required by MCL 775.16; and (2) a writ of superintending control is Plaintiffs' only adequate remedy. (*See, e.g.,* Compl. ¶¶ 8-9, 26-30, 35, Mem. in Support of Compl., Ex. 1 at ¶¶ 23, 33-34, Ex. 2 at ¶ 22)

The affidavits and exhibits filed by Plaintiffs is the only evidence proffered by any party. This evidence establishes, at a bare minimum, a prima facie case that the relief sought by Plaintiffs is warranted. (*Id.* at Ex. 1, ¶ 34) Indeed, Plaintiffs have established that ***no one*** -- not attorneys, not clients, not national experts, and ***not even the chief judges themselves*** -- believes that the fees now paid in Wayne County are reasonable compensation for the services performed by appointed counsel. (Compl. ¶¶ 29, 30, 32-33)

Now that the Chief Judges have answered and Wayne County has intervened, it is clear that there are few issues of fact remaining in this case. Neither the Chief Judges nor the County attempts to defend the low fees, nor does either party suggest that the fees are "reasonable" under any definition.[1] However, while it ignores the principal issue raised by Plaintiff's complaint, Wayne County's answer and brief raise several collateral issues. Pursuant to MCR 7.212(G), Plaintiffs file this Reply Memorandum to address these concerns.

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[1] The Chief Judges do not defend the low fees, but suggest that because Plaintiffs' complaint raises questions of fact, the Court should appoint a special master to receive evidence at trial. (Chief Judges' Memorandum of Law at 6-7) The Plaintiffs believe that the undisputed affidavits and exhibits filed with the complaint clearly establish that the fees paid in Wayne County are unreasonable, and no other evidence needs to be produced. However, if the Court believes a further record is necessary, the Plaintiffs also have asked that a special master be appointed to receive evidence and preside over a trial.

***First***, the answer of Wayne County challenges whether the unconscionably low fees in Wayne County are, in reality, simply the result of the County's refusal to budget money for those fees. This was an issue that, candidly, the Plaintiffs thought would be uncontested by the parties. Indeed, the Chief Judges concede in their answer that they have cited only budget limitations from Wayne County as the reason why they have not paid "reasonable compensation for services performed." (*See* Chief Judges' Answer, Sixth Sentence of ¶ 32) The Judges also admit that the fees were further reduced by 10% in 2001 solely because of budget constraints. (*See id.* at ¶ 25) All told, there is no evidence in the record to contradict Plaintiffs' allegations and evidentiary proffer, which establishes that budgetary concerns have unilaterally dictated the Chief Judges' decisions. This is illegal. *See In the Matter of the Recorder's Court Bar Ass'n*, 443 Mich 110, 129 & n.27, 503 N.W. 2d 885, 894 & n.27 (1993) ("Although we find that county budgetary concerns are appropriate considerations in the determination of 'reasonable compensation,' such considerations should seldom, if ever, be controlling. The counties have a duty to fund whatever the chief judge, in the exercise of sound discretion, deems appropriate.").

***Second***, Wayne County's brief suggests that even though the fee schedules fail to pay "reasonable compensation for services performed," this Court can dispense with this case based on legal issues. Wayne County alternatively asserts that: (a) the Judges have unreviewable discretion to set any fees they wish, however unreasonable (Wayne County Br. at 3-6); (b) this action is barred by res judicata (*id.* at 7-9); and (c) Plaintiffs do not have standing (*id.* at 10-12). As described below, these claims are all clearly contrary to Michigan law.

In sum, no party to this case believes that the current fee schedules pay appointed attorneys "reasonable compensation for services performed." The Court should grant Plaintiffs' request for a Writ of Superintending Control and demand compliance with MCL 775.16.

## II. Argument

### A. Plaintiffs Can Challenge The Chief Judges' Fee Schedules, Which Are Reviewable in This Court.

Wayne County first asserts that simply because Chief Judges have set the fee schedules, that action constitutes compliance with MCL 775.16 regardless of the structure of the schedule or the amount of the fees paid. (Wayne County Br. at 3-6.) This argument defies Michigan law, under which courts have consistently held that the appellate courts can review whether fees paid under schedules devised pursuant to MCL 775.16 are actually "reasonable compensation for services performed." Indeed, this Court has specifically held that regardless of what the fee schedules say, "assigned counsel in Michigan presently have a statutory right to reasonable compensation" under MCL 775.16. *In re Recorder's Court Bar Assn.*, 443 Mich at 122, 503 NW 2d at 891. Wayne County appears to ignore *Recorder's Court Bar Assn.*, where this Court identified the issue reviewable here – whether the fee schedule currently in force "operates to provide assigned counsel 'reasonable compensation for the services performed' within the meaning of the statute." *Id.* at 123, 503 NW 2d at 891.

Under this same reasoning, Michigan appellate courts have consistently recognized that the reasonableness of fees paid to appointed counsel under MCL 775.16 is reviewable. *See People v. Edgley*, 187 Mich App 211, 212, 466 NW 2d 296, 297 (1990) (reversing fee award to counsel as unreasonable); *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 85, 438 NW 2d 878, 880 (1989) ("[W]e hold that the lower court order, in part, violates the statutory right to reasonable compensation for assigned appellate counsel."); *see also In re Attorney Fees of Burgess,* 69 Mich App 689, 691-92, 245 NW 2d 348, 349-350 (1972) (holding that under MCL 775.16, attorneys are entitled to reasonable fees for services performed, even if the services are not specifically delineated in the fee schedule). In each of these cases, and in

many others, appellate review of fee awards has taken place irrespective of the fact that the judges ordered the fees pursuant to MCL 775.16, making clear that such decisions are not -- as Wayne County asserts -- unreviewable.

Moreover, even if Wayne County's interpretation of MCL 775.16 (that any Chief Judges' fee schedules are presumptively and indisputably compliant with the statute merely because the Judges set them) were the correct one -- and it is not -- a writ should be granted. The reason is that the Chief Judges who are the defendants in this case did not set the fees at issue in this lawsuit; the current fees were set, as demonstrated by Plaintiff's submission, by these Judges' predecessors. (*See* Compl., Ex. 1-2) Plaintiffs have alleged, in fact, that the current chief judges do not believe that the current fee schedules constitute "reasonable compensation for services performed." (Compl. ¶¶ 32-33) Therefore, even were Wayne County's interpretation of MCL 775.16 correct, a writ should be granted to permit the Chief Judges who are the defendants in this case to set fees which they believe to be reasonable, unshackled by Wayne County's severe budget restrictions.

At bottom, the fact that prior Chief Judges set the schedules, presumably believing them to be reasonable, does not relieve this Court of its duty to review the Judges' decision in the context of this case.

**B. Plaintiffs' Complaint Is Not Barred By Res Judicata**

In 1992, the Plaintiffs, and others, brought an action against the then-Chief Judges of the Wayne County Circuit Court and the now-abolished Recorder's Court, challenging a "flat fee" schedule promulgated in 1988 as a violation of MCL 775.16. *See Recorders' Court Bar Assn.,* 443 Mich at 116, 503 NW 2d at 888. The Plaintiffs were victorious, and the flat fee schedule was found to be a violation of MCL 775.16. *Id.* The Chief Judges then established a new fee schedule, which was never challenged in court and which has been changed several

times, most recently when it was reduced by 10% in 2001. (See Compl. ¶ 25, Chief Judges Ans. ¶ 25) (admitting the 10% reduction) The 1992 action, as a matter of law, cannot have preclusive effect upon this case.

Res judicata does not apply to challenges, like this one, to specific ordinances or schedules not previously adjudicated in court. *See, e.g., Ditmore v. Michalik*, 244 Mich App 569, 574-75, 625 NW 2d 462, 466 (2001) ("The present case involves facts and events separate from those involved in the 1963 dispute, and the doctrine of res judicata was therefore inapplicable."); *Black v. General Motors Corp., Oldsmobile Division*, 125 Mich App 469, 473-74; 336 NW 2d 28, 30 (1983) ("[T]his claim raised a factual question different from the one involved in the first claim, that is, whether plaintiff's back condition had changed in the interim."). Res judicata might have precluded a challenge, on different grounds, to the same statute challenged in 1992, but it does not preclude a wholly separate challenge to a fee schedule -- different in structure and execution -- which has never before been addressed in court.

Simply put, the holding in the 1992 action, that "the fixed-fee system currently utilized . . . .systematically fails to provide 'reasonable compensation' within the meaning of MCL 775.16," is not res judicata as to any issue presented by this litigation. *Recorder's Court Bar Assn.*, 443 Mich at 116, 503 NW 2d at 888. Here, Plaintiffs challenge the legality of a completely different fee schedule, which was implemented precisely because this Court found the old one to be illegal. The second prerequisite to application of res judicata, that the issues in this case were or could have been raised in the 1992 action, is not satisfied here.

### C. Plaintiffs Have Standing To Prosecute This Action.

Wayne County's final claim is that Plaintiffs lack standing to prosecute this action because they purportedly "have no legally protected interest in receiving higher compensation for their services." (Wayne County Mem. at 12) This argument is frivolous.

Though it is unclear which prong of the standing inquiry Wayne County believes that Plaintiffs do not fulfill, the County's general argument appears to be that Plaintiffs cannot show a legal entitlement to higher compensation for their services.[2] (Wayne County Mem. at 11) That argument flies in the face of Michigan law. Plaintiffs have a statutory right to reasonable compensation for their services. MCL 776.15; *Recorder's Court Bar Ass'n.*, 443 Mich at 122-23, 130, 503 NW 2d at 891; *In re Attorney Fees of Mullkoff*, 176 Mich App at 85, 438 NW 2d at 880. Where -- as here -- plaintiffs bring suit to require compliance with a statute guaranteeing them reasonable fees, standing surely exists. *See, e.g., Warth v. Seldin,* 422 U.S. 490, 514, 95 S. Ct. 2197, 2213, 45 L. Ed. 2d 343 (1975) (holding that the legislature "may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); *Trustees for Mich. Laborers' Health Care Fund v. Seaboard Sur. Co.*, 137 F.3d 427, 430 (6th Cir. 1998) ("[P]laintiffs do have standing to sue under the state statute, to recover as compensation 'justly due'."); *see generally* CHEMERINSKY, FEDERAL JURISDICTION § 2.3, p. 69 (2nd ed. 1994) ("Violations of rights created by statute . . . are sufficient for standing purposes.").

In short, Plaintiffs are injured "in fact" every time that one of their members is paid less than "reasonable compensation" under the current fee schedules. (Pl. Mem. in Support, Ex. 1 [Spangenberg Aff.], at ¶¶ 23, 33-34, Ex. 2 [Stiffman Aff.] at ¶ 22)

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2 Wayne County also appears to assert that Plaintiffs do not have standing because they have not established that their members have requested, and been denied, "extraordinary fees." But this Court has already rejected that argument. *In re Recorder's Court Bar*, 443 Mich at 135, 503 NW 2d at 897 ("[A]lthough undercompensated attorneys have the ability to petition the court for extraordinary fees and, if they desire, to appeal any adverse determination all the way to this Court, we find such a remedy inadequate. While the record shows that most of the relatively few applications currently submitted are granted, at least in part, we strongly suspect that such a trend would rapidly change if the number of applications required to assure tha each and every attorney is provided reasonable compensation for time and effort were actually filed. Application denials would likely skyrocket, forcing attorneys to appeal. And even if attorneys were routinely granted relief on appeal, all they would have to look forward to is another appeal after another assignment because the underlying problem would remain unchanged. Under such circumstances, the legal remedy is inadequate.").

## III. Conclusion

The answers and briefs filed by the Chief Judges and Wayne County assert no real defenses and not even an argument that the fees paid to lawyers appointed to represent indigent felony defendants in Wayne County are, in fact, "reasonable." Neither the Chief Judges, nor Wayne County, has offered any evidence to refute the undisputed facts in the affidavits and exhibits relied upon by the Plaintiffs.

This court should grant Plaintiff's request for a Writ of Superintending Control and Order the Chief Judges to implement a reasonable fee schedule, among the alternatives proposed by the Plaintiffs in their complaint. If this court believes a further record is necessary before relief can be granted to the Plaintiffs, then this court should appoint a special master and provide him or her with the discretion necessary to hold hearings and establish a record supporting the Plaintiffs' allegations.

Respectfully submitted,

Brian D. Sieve, P.C.
Michael B. Slade
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601

Frank D. Eaman
BELLANCA, BEATTIE and DE LISLE P.C.
20480 Vernier Road
Harper Woods, MI 48225
(313) 882-1100

Attorneys for Plaintiffs

Dated: May 6, 2003

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**CERTIFICATE OF SERVICE**

I hereby certify that the PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL was served by first-class mail, this 6th day of May, 2003, upon:

Azzam E. Elder
Robert S. Gazall
Ellen E. Mason
Wayne County Corporation Counsel
600 Randolph, Second Floor
Detroit, MI 48226

Peter Ellsworth
Jeffrey Stuckey
Dickinson Wright PLLC
215 S. Washington Square, Suite 200
Lansing, MI 48933-1816

Michael Slade