CONTACT
POLICY DEPARTMENT
MARIA CILENTI
212.382.6655 | mcilenti@nycbar.org
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org

REPORT ON LEGISLATION BY THE CRIMINAL JUSTICE OPERATIONS COMMITTEE

A.748 **M. of A. Cook**
S.3672 **Sen. Bailey**

AN ACT to amend the county law, in relation to assignment of counsel

THIS BILL IS APPROVED

Some legal issues cannot be effectively litigated on direct appeal because they involve off-the-record material. These include claims based on newly-discovered evidence, certain illegal sentence issues, actual innocence and claims of ineffective assistance of trial counsel, which may be suggested by appellate counsel's review of the record but which often demand presentation of additional facts.[1] However, assigned appellate lawyers in New York are not statutorily-entitled to compensation for investigating meritorious post-conviction motions and for drafting and filing papers in support of such motions. Compensation is only authorized for representation provided after a "hearing has been ordered in a proceeding upon a motion, pursuant to article four hundred forty of the criminal procedure law, to vacate a judgment or to set aside a sentence." County Law § 722 (4).

The practical result of this funding restriction is that many potentially meritorious motions under Article 440 of the Criminal Procedure Law are not pursued. A two-tiered system of appellate representation has emerged. As documented below, offices with salaried lawyers (legal aid societies, public defender offices and other organized providers in New York City) develop and file CPL Article 440 motions when meritorious issues are identified during the course of appellate representation. Assigned appellate lawyers who are dependent on hourly compensation (referred to as 18-B lawyers and who provide the bulk of appellate representation in upstate regions) do not.

No statewide analysis of CPL Article 440 practice has ever been done. But one limited study found a dearth of such motions filed on behalf of indigent clients in some parts of the state.[2] Conversely, it is the policy of the four institutional appellate providers in New York City (the Legal Aid Society, Office of the Appellate Defender, Appellate Advocates, and Center for

[1] See People v. Brown, 45 N.Y.2d 852 (1978).

[2] Amicus curiae brief filed by NYS Defenders Assoc. in Hurrell-Harring v. State of New York, 15 N.Y.3d 8 (2010), available at http://66.109.34.102/docs/PDFs/NYSDA_in_the_Courts/2010_hurrell-harringbrief.pdf.

Appellate Litigation) to investigate meritorious post-conviction claims and draft and file a 440 motion if appropriate.

Notably, based on input received from institutional providers, 440 motions represent a very low percentage of motions filed. From 2005-2009, a 440 motion was filed in only 2.4% of the cases assigned to these organizations. That number has held relatively steady in the years since, although there has been a slight uptick recently due to a few factors, including the impact of the Padilla v. Kentucky decision and the fact that trial evidence and sentencing schemes have become more complex. Moreover, some of these motions addressed unlawful sentencing issues only, under C.P.L. § 440.20, which are typically simpler to investigate and draft.

The quality of representation offered to indigent criminal appellants should not be affected by the employment status of their lawyers. Professional standards require assigned appellate lawyers to consider the possibility of filing a post-judgment motion (such as a CPL Article 440 motion) as part of an effective appellate strategy.[3] For economic reasons, some attorneys are unable to comply with this obligation.

Accordingly, we support the enactment of A.748/S.3672, which would amend paragraph 5 of section 722 of the County Law. Given the statistics cited above, this amendment should not have significant financial repercussions. On the contrary, the institutional providers noted above, which together represent thousands of indigent defendants per year -- and cover the vast majority of the indigent defendant appeals in New York City -- file 440 motions in only a tiny percentage of their cases. There is no reason to think that 18-B attorneys would file 440 motions at a higher rate than these organized providers. Like all lawyers, 18-B attorneys are ethically required to refrain from filing frivolous motions. Moreover, if a court determined that a CPL Article 440 motion was frivolous, it could properly refuse to order compensation. A court also has the authority to cut voucher payments if it believes the fees sought by an attorney are excessive. Finally, the proposed amendment is limited in scope: it covers only cases in which the defendant has a direct appeal pending and the CPL Article 440 motion relates to the judgment of conviction being appealed.

Criminal Justice Operations Committee
Sarah J. Berger, Chair

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[3] See, e.g., ABA Standards for Criminal Justice, Criminal Appeals 21-3.2.