MEMORANDUM

To: David C. Schopp, Chief Executive Officer

From: Alan Williams

Re: Conflict-of-interest matters

Introduction

You have asked me to look over the recent decision of the Court of Appeals in Matter of New York County Lawyers' Association v Bloomberg (decided October 30, 2012, affg 95 AD3d 92, in turn affg 30 Misc3d 921) and to assess its significance.

Background[1]

Bloomberg is about Article 18-B of the County Law (County Law §§ 722–722-f), which was enacted in 1965 to meet the state's obligation under Gideon v Wainwright (372 US 335) to provide counsel to indigent criminal defendants. County Law § 722 requires the governing body of each county, or of each city wherein an entire county is located, to "place in operation throughout the county a plan for providing counsel" to qualified indigent persons, which plan must "conform to one of the following" models:

- a public defender (County Law § 722[1]);
- a legal-aid organization designated by the county or city (County Law § 722[2]);
- a bar-association plan for the county or city, pursuant to which private counsel are selected on a rotating basis, and/or use of a conflict-defender office (County Law § 722[3][a]); or

[1] This discussion is taken from pages 2-10 of the slip opinion of the Court of Appeals in Bloomberg.

- "a plan containing a combination of any of the foregoing" (County Law § 722[4]).[2]

In the year that Article 18-B became law, the Association of the Bar of the City of New York and the New York County Lawyers' Association proposed a combination indigent-defense-representation plan. Under this plan, the Legal Aid Society—which was then "the only institutional provider of legal services in New York City" (majority op, at 5)—would be the main provider of indigent-defense representation;[3] and, in cases in which a court deemed the assignment of Legal Aid to be inappropriate due to conflicts of interest, the court would appoint counsel from attorney panels maintained by plan administrators[4] (who in turn would be appointed by the First and Second Judicial Departments of the Appellate Division). The 1965 bar-association plan also authorized the First and Second Departments to issue rules regulating the plan's administration.

New York's mayor at the time, Robert Wagner, issued Executive Order No. 178 (1965), which adopted a combination County Law § 722(4) system of representation, likewise consisting of § 722(2) and § 722(3) components. The executive order appointed Legal Aid to be the primary provider of indigent-defense representation, and it directed that in cases where Legal Aid declined to represent defendants because of conflicts of interest, counsel would be appointed pursuant to the 1965 bar-association plan.

The Court of Appeals mentioned certain developments that it found relevant—"practical alterations," it called them (majority op, at 5). In 1980 and 1991, the First and Second Departments promulgated rules—approved by local bar associations—that directed committees to screen prospective members of the attorney panels from which appointed counsel would be selected. Starting in 1996, moreover, New York City began to engage institutional defenders other than Legal Aid to represent indigent defendants, institutions that did not exist at the time of the 1965 bar-association plan.

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[2] The statute further provides that if the county or city has not adopted any § 722 plan, or if the county or city has adopted a plan that does not conform to § 722(3) or § 722(4) and there arises a situation in which a judge "is satisfied that a conflict of interest prevents the assignment of counsel pursuant to the plan in operation," the judge may appoint any attorney in the county or city (County Law § 722[4]).

[3] This aspect of the plan corresponded to the model contemplated by County Law § 722(2).

[4] This aspect of the plan corresponded to the model contemplated by County Law § 722(3).

Executive Order No. 118 (2008), issued by Mayor Michael Bloomberg, repealed Executive Order No. 178 (1965), but maintained for panel attorneys their exclusive role in conflict representation. The new executive order provided that an agency called the Office of the Criminal Justice Coordinator was to select providers for primary (that is, non-conflict) representation by means of a bidding process.

In January of 2010, New York City adopted a significantly different indigent-defense-representation plan, which ended the exclusive role of—while preserving some role for—panel attorneys in conflict representation. Under this new plan, in cases where primary-representation providers declined to represent indigent defendants due to conflicts of interest (or for other valid reasons), defendants were to be represented either by panel attorneys or by institutional providers, and institutional providers would be selected in a bidding process by the Office of the Criminal Justice Coordinator. The plan also created an agency, called the Office of the Assigned Counsel Plan, to supervise the attorney panels; under the plan, this agency would be "overseen by two Administrators in consultation with the Presiding Justices of the First and Second Judicial Departments."[5]

In February 2010, New York City released a request for proposals, inviting conflict-representation bids from prospective institutional providers. An addendum to the RFP stated that the city's preexisting County Law § 722(3) model, which provided for conflict representation by attorneys chosen pursuant to the 1965 bar-association plan, was "no longer in effect." The addendum also stated that the city's new plan was a County Law § 722(2) plan, a plan reliant on representation by a private legal-aid organization. On the same day that this addendum was released, Mayor Bloomberg issued Executive Order 132 (2010), which again repealed Executive Order 178 (1965) but also stated that the attorney panels created by the repealed order would remain in existence and would be managed according to the rules of the First and Second Departments.

Various local bar associations brought an action in June 2010 seeking to invalidate Executive Order 132 (2010), the city's January 2010 indigent-

[5] The Appellate Division found that this agency did not take away any power from the county bar associations (95 AD3d at 102). The Court of Appeals seemed to endorse this finding, or at least to deem it significant (see majority op, at 16).

defense-representation plan, the RFP and its addenda,[6] and any contracts made thereunder. The basis of the challenge was that the order, the plan, and the RFP and its addenda were invalid under County Law Article 18-B and Municipal Home Rule Law § 11(1)(e)[7] because the city's plan deviated from the 1965 bar-association plan without the approval of the bar associations. In the challengers' view, because the city's plan was inconsistent with the 1965 plan and did not have the assent of the bar associations, the city's plan did not incorporate a "plan of a bar association" as contemplated by County Law § 722(3), and therefore was not a valid combination plan recognized by County Law § 722(4).

The next month, Mayor Bloomberg issued Executive Order 136 (2010), which rescinded Executive Orders 178 (1965), 118 (2008), and 132 (2010), but continued in existence the attorney panels created pursuant to Executive Order 178 and the 1965 bar-association plan. Those panels, as well as institutional providers, would be eligible to provide conflict representation.[8] The bar associations contended that this executive order was also invalid, in that it deviated from the 1965 bar-association plan without the consent of the bar associations. In the litigation, the city characterized its indigent-defense-representation plan as a County Law § 722(4) combination plan, not a § 722(2) plan as stated in the addendum.

Supreme Court, New York County (Singh, J.), rejected this challenge,[9] holding that County Law § 722(2) authorized the city to appoint institutional providers in conflict cases, and that the city's indigent-defense-representation plan was a lawful combination plan pursuant to County Law § 722(4), in that it provided for representation of indigent defendants in conflict cases both by institutional providers and by panel attorneys pursuant to a bar-association plan. The bar associations appealed, and the Appellate Division, First Department, affirmed by a vote of three to two, agreeing with Supreme Court that the city had adopted a valid combination plan pursuant

[6] Before the issuance of the addendum previously mentioned, there was an earlier addendum disclaiming any preexisting decision or representation about the number of providers each county would have.
[7] Under the latter provision, a municipal legislative body may not adopt a local law that both affects the courts and supersedes a state statute.
[8] 95 AD3d at 100.
[9] Supreme Court did invalidate part of the city's plan, pertaining to vouchers for panel attorneys' services. The plan required submission of the vouchers to the Office of the Assigned Counsel Plan before payment. This requirement was held to infringe on judicial authority to determine counsel's compensation and thus to violate County Law §§ 722-b and 722-c as well as the Municipal Home Rule Law (30 Misc2d at 932).

to County Law § 722(4), consisting of a § 722(2) component and a § 722(3) component.[10] The Court of Appeals affirmed by a vote of four to three.[11]

Discussion

1. Rationale

The bar associations argued that County Law § 722 does not allow assignment of conflict representation to institutions other than institutional providers as contemplated in § 722(3)(a) (majority op, at 11). The Court of Appeals rejected this argument, reasoning that County Law § 722(2) authorizes reliance on institutional providers for conflict representation as well as for primary representation (id., at 11-14).[12] Because County Law § 722 requires "a plan for providing counsel" to indigent defendants, and because the right to counsel has been held to require not merely representation but conflict-free representation, the statutory directive for a representation plan must, in the Court's view, extend both to primary representation and to conflict representation (id., at 12). The Court also noted that the statutory language did not expressly prohibit institutional representation in conflict cases (id., at 12-13). The provision authorizing the city to rely on a conflict-defender office for conflict representation did not by negative implication prohibit reliance on other kinds of institutions for conflict representation pursuant to § 722(2); instead, the conflict-defender provision of § 722(3) merely created an additional method by which a municipality could provide conflict representation (id., at 13). Thus, the Court rejected the proposition that conflict counsel could be selected only by bar associations or by a court; the city may, under § 722(2), engage institutional providers to represent defendants in conflict cases (id., at 14).

The Court held that the city's indigent-defense-representation plan was a valid combination plan under County Law § 722(4), relying on a § 722(2) component and a § 722(3) component (majority op, at 14-18). The bar associations argued that because they did not assent to the provisions of the § 722(3) component that deviated from the 1965 bar-association plan,

[10] Justice Andrias delivered the opinion of the Appellate Division, in which Justices Moskowitz and Richter joined. Justice Abdus-Salaam filed a dissenting opinion, in which Justice Mazzarelli joined.
[11] Judge Ciparick delivered the opinion of the Court of Appeals, and was joined in this opinion by Judges Graffeo, Read, and Jones. Chief Judge Lippman filed a dissent, in which Judges Smith and Pigott joined.
[12] The dissent agreed with the majority opinion on this subject (dissenting op, at 1).

that component was not—as contemplated by the statute—a "plan of a bar association," and therefore that component had no statutory authorization (id., at 14). Taking a purposive rather than textualist approach to this issue of statutory interpretation (see id. ["If we are to effectuate the legislative intent underlying County Law § 722, however, we cannot invalidate the City's proposed plan on that basis."]), the Court upheld the § 722(3) component.[13] To accept the bar associations' argument would be to rule that a § 722(4) combination plan containing a § 722(3) component would be valid only if the city either maintained the 1965 bar-association plan or received the bar associations' consent to any deviations from that plan; and this would mean that the bar associations could, by withholding their consent, obstruct the city from assigning any role to institutional providers in conflict cases, and could frustrate the city's obligation under County Law § 722 to formulate an indigent-defense-representation plan, a situation that the Court believed was inconsistent with legislative intent (id., at 14-15). In the Court's view, the statute, "[c]onstrued as a whole, . . . affords the City the flexibility to appoint institutional providers to represent indigent defendants where a conflict of interest precludes representation by the primary provider" (id., at 17). However, the Court also emphasized that the new plan did not mark a complete departure from the 1965 plan (id., at 17-18 ["Importantly, the 18-B panels created by the 1965 Bar Plan remain in place and are expressly reserved by the Executive Order governing the City's 2010 plan."]).

In support of its ruling that the city's plan was valid, the Court downplayed the significance of certain aspects of the plan to which the bar associations took exception (majority op, at 15-17). The bar associations argued that the city's plan "impermissibly transfers authority to determine whether a conflict of interest exists from the judiciary to institutional providers," but the Court found no meaningful departure from the status quo ante: the 1965 bar-association plan did not commit to the courts the authority to decide whether conflicts of interest existed; Executive Order 178 (1965) evidently assumed that such decisions would be made by Legal Aid rather than by the courts; and in any event such decisions tend in practice to be made by counsel (id., at 15-16). The bar associations also argued that the city's creation of the Office of the Assigned Counsel Plan "usurped management authority over the 18-B panels from judicially appointed administrators and placed it under executive control," but the Court pointed

[13] This was the aspect of the majority opinion with which the dissenters took issue.

to the Appellate Division's finding that this agency did not take power away from county bar associations, and further noted that the agency would be "overseen by two Administrators in consultation with the Presiding Justices of the First and Second Judicial Departments" (id., at 16). Finally, the bar associations argued that the city was impermissibly changing the process for selecting panel attorneys, by replacing county bar associations' role in that process with committees of the First and Second Departments—committees that had no such role under the 1965 bar-association plan. This, the Court stated, "merely codifie[d] a change that the bar associations ratified and that has been in practice for decades," because in 1980 and 1991 the bar associations had approved initiatives put forth by the Appellate Division to create those screening committees in the first place (id., at 16-17).

2. Implications

One issue you have asked me to consider is whether the decision in Bloomberg has statewide significance or is instead essentially limited in scope to New York City. Though I am mindful that "[t]he language of any opinion must be confined to the facts before the court" and that "[n]o opinion is an authority beyond the point actually decided" (Dougherty v Equitable Life Assur. Socy. of U.S., 266 NY 71, 88), my conclusion is that the decision's rationale is not specific to New York City. This was a case of statutory interpretation (see Bloomberg, majority op, at 11-12), and the relevant statute pertains to indigent-defense-representation plans of "[t]he governing body of each county [or] the governing body of the city in which a county is wholly contained" (County Law § 722). So the statute applies as much to a plan of the governing body of any county as it does to a plan of the governing body of New York City, and, as such, it is not evident why Bloomberg's rationale should not have equally broad application.[14]

You have also asked me to consider whether the decision is limited in scope to conflict representation (the subject of the case) or instead applies as well to primary representation. I believe that it has relevance to both kinds of representation, since the Court viewed the provision of both primary and conflict representation as integral to a County Law § 722 plan (see majority op, at 12). And just as nothing in County Law § 722 prohibits the use of a

[14] For reasons I do not understand, when counsel for New York City was asked at oral argument whether Erie County could adopt New York City's plan without the consent of the Erie County Bar Association, counsel answered in the negative. The relevant pages of the transcript of the oral argument (transcript, at 34-36), which I have attached to this memorandum, do not dispel my confusion about counsel's answer.

legal-aid organization for conflict representation (majority op, at 12), I find nothing in the statute that would prohibit the use of a § 722(3)(a)(i) bar-association plan for primary as well as conflict representation.

An additional inquiry put to me is whether a municipality could use an agency to provide conflict representation rather than leaving conflict representation to panel attorneys. Because the Court held that a County Law § 722(2) plan could provide for conflict representation, I would answer this question in the affirmative. If, however, a municipality wishes to rely on a conflict-defender office pursuant to § 722(3), then I am less certain of the answer. The relevant portion of § 722(3) recognizes the option of

> "Representation by counsel furnished pursuant to either or both of the following: a plan of a bar association in each county or the city in which a county is wholly contained whereby: (i) the services of private counsel are rotated and coordinated by an administrator. . .; or (ii) such representation is provided by an office of conflict defender" (County Law § 722[3][a]).

This language—particularly the words "either or both"—suggests that a municipality is not required to use panel attorneys, and can rely solely on a conflict-defender office. But the real question is whether a municipality could do this without the consent of the bar association.[15] Given the placement of the colons and the numerals, the statute appears to provide that the use of a conflict-defender office must be pursuant to a plan of a bar association. That seems a little strange.[16] Strange or not, that interpretation seems to be the one adopted by the Court of Appeals: the Court stated that the relevant statutory text contemplates "representation by an office of conflict defender <u>pursuant to a bar plan</u>" (majority op, at 13 [emphasis

[15] If the answer is no, then, as a practical matter, the moment that any municipality agreed to use panel attorneys in conflict representation without making any provision in the agreement for use of a conflict-defender office, the right to steer any work at all to a conflict-defender office would be forever lost. It might be argued that this would defeat the legislative intent to give the municipality freedom of choice.

[16] The Appellate Division in this case opined, in a footnote, "that the second colon should not have been included and that the '(i)' that appears. . . after it should have been placed after the phrase 'pursuant to either or both of the following:' and before the phrase 'a plan of a bar association'" (95 AD3d at 97 n 2). But this was dictum. The Appellate Division went on to assume for the sake of discussion that the conflict-defender provision "was intended to require County Bar approval of a plan employing the . . . option of an office of conflict defender," and concluded that this would be irrelevant, in part because New York City's plan "does not call for the creation of an office of conflict defender" (<u>id</u>.).

added]).[17] On the other hand, this language is arguably dictum, since the validity of a conflict-defender plan was not at issue in Bloomberg.

That a municipality can replace panel attorneys with a conflict-defender office without the consent of the bar association entails either of the following: the requirement of a bar-association plan does not apply where the municipality elects to use a conflict-defender office, or the requirement does apply but the bar association's consent is not necessary. The latter option brings us to somewhat familiar territory: in Bloomberg, the bar associations did not consent to the city's plan, at least in significant part because that plan sought to reduce the role of panel attorneys in conflict representation (and to assign some of that role to institutional providers), yet the courts held that the city's plan was lawful. Similarly, then, a conflict-defender plan that reduces the role of panel attorneys in conflict representation (and assigns some of that role to a conflict-defender office) should not be invalid simply because the bar associations do not assent to it.

On the other hand, if there is to be any such thing as a plan of a bar association in the matter, as § 722(3) contemplates, how much freedom does a municipality have to enact a program whose provisions the local bar association finds objectionable? That question—how much freedom a municipality has—is relevant not only to the conflict-defender issue but also to any situation in which a municipality attempts to assign institutional providers to work that has been performed by panel attorneys.

It is possible to read the opinion of the Court of Appeals to recognize broad power on the part of municipal governments to change their indigent-defense-representation plans without the assent of local bar associations. The change at issue in Bloomberg was a fairly significant change: it eliminated the panel attorneys' monopoly on conflict representation, creating a role for institutional providers that previously did not exist. Additionally, at the risk of speculating, the Court's opinion could be read to suggest a deferential attitude toward municipal policy judgments and a reluctance to confer on bar associations a veto power over municipal initiatives (see majority op, at 15 [recoiling from decision that "would. . . allow the bar associations to unilaterally block the City from adopting a plan for conflict representation that includes institutional providers" and that would enable

[17] Chief Judge Lippman also read the statute in this way (dissenting op, at 5 n 3 [statute allows "conflict defense services to be provided by an office of conflict defender pursuant to a plan of a bar association"] [emphasis added]).

bar associations to "control the City's ability to fulfill its statutory mandate to formulate a comprehensive plan for indigent defense], 17 [due to "flexibility" given to city by County Law § 722, "the City, in the exercise of its discretion, was not required to adopt that portion of the 1965 Bar Plan reserving conflict cases exclusively to 18-B panel attorneys in order to implement a combination plan incorporating 'a plan of a bar association' pursuant to County Law § 722 (3)"], 18 ["The City's plan thus allows for the defense of indigent criminal defendants by the Legal Aid Society, other institutional providers and the private bar, as a combination plan that serves the needs of the clients but also recognizes fiscal realities to be borne by the City."]).

That said, there are indications that the opinion of the Court should not be read very broadly. For one thing, the Court might very well have reasoned simply that the bar associations' position in Bloomberg was too extreme to be accepted. The Court stated that it would not "condition the City's authority to implement a combination plan incorporating a subsection (3) component either on the adoption of the 1965 Bar Plan in its entirety or on the bar associations' consent to abandon that portion of the plan reserving conflict representation exclusively to 18-B attorneys" (majority op, at 14-15), and it further commented that the statute "appears to contemplate precisely what occurred here -- that the City, in response to needs actual or perceived, could implement a combination plan apportioning conflict representation among both institutional providers and private counsel retained pursuant to the selection method created by the 1965 Bar Plan, the 18-B panels" (id., at 15). Perhaps any plan that in the Court's view appears to have been contemplated by the statute will be safe.[18] But recall that the Court downplayed the significance of the city's changes to the 1965 bar-association plan. The Court stated, "Importantly, the 18-B panels created by the 1965 Bar Plan remain in place and are expressly preserved by the Executive Order governing the City's 2010 plan" (id., at 17-18 [emphasis added])—and surely that would not be important if counties had the freedom to make any changes they wished to make without the consent of the bar associations. And when the Court addressed the bar associations' challenges to other alterations made by the city's new plan, the Court rejected those challenges because the pertinent changes were inconsequential (id., at 16 ["what petitioners contend is a major change is, in effect, no change at all"],

[18] It must, however, be noted that one of the members of the majority has died, and that another will very soon reach the mandatory retirement age. If either or both of them are replaced with judges who sympathize with the dissent, then Bloomberg might be overruled or narrowed in a future case.

17 ["the City's proposed plan merely codifies a change that the bar associations ratified and that has been in practice for decades"]),[19] which suggests that the validity vel non of deviations from a preexisting bar-association plan will depend in part on how meaningful those deviations are.

In my view, therefore, Bloomberg does not imply that counties can make whatever changes they wish to their indigent-defense plans without the consent of the bar associations,[20] though it does suggest that counties need not have the bar associations' approval of any and all desired changes.

One last issue I have been asked to consider is whether a county would be able to assign indigent-defense work to an institutional provider that does not comply with the standards promulgated by the Office of Indigent Legal Services. I think that this would not be permissible. County Law § 722(3)(b) provides that a bar-association plan will go into effect only if approved by the state administrator, and it further provides that "[w]hen considering approval of an office of conflict defender pursuant to this section, the state administrator shall employ the guidelines established by the office of indigent legal services pursuant to paragraph (d) of subdivision three of section eight hundred thirty-two of the executive law." Perhaps this could be read to require only that the administrator take compliance or noncompliance with the guidelines into account, but even if the statute does not absolutely require the administrator to reject a proposed conflict-defender plan if the institution at issue is not in compliance with the guidelines, the administrator could still choose to withhold approval on the ground of noncompliance with the standards. Moreover, County Law § 722(3)(c) suggests that the guidelines are viewed by law as highly important: it provides that when the Office of Indigent Legal Services promulgates its standards, a county that relies on a conflict-defender office may continue to use that conflict-defender office so long as the county submits a plan to the administrator within 180 days after the promulgation of the standards. That

[19] An alternative interpretation is that the Court found the changes to be nonexistent rather than insubstantial. But this does not explain why the Court deemed it important that the city's plan did not so sharply break with the 1965 bar-association plan as to eliminate altogether the role of panel attorneys in conflict representation; if that fact was important to the Court's analysis, then it seems that the significance of deviations from preexisting bar-association plans will bear on whether or not those deviations can be effected without bar-association consent.

[20] There is a caveat. Because a plan of a bar association is required only where there is either a County Law § 722(3) plan or a § 722(4) combination plan with a § 722(3) component, my analysis assumes that the municipality is relying on either a § 722(3) plan or a § 722(4) combination plan with a § 722(3) component. Only § 722(3) requires a plan of a bar association, so the adoption of an indigent-defense plan not reliant either in whole or in part on § 722(3)—for example, a pure § 722(2) plan—should be within a county's ability to adopt even without the consent of the local bar association.

the county would need to submit a plan within six months after the standards are set forth suggests that the county's plan must show how the conflict-defender office measures up against those standards. Finally, and most importantly in my view, Executive Law § 832(3)(d) requires the Office of Indigent Legal Services "to establish standards and criteria for the provision of. . . services in cases involving a conflict of interest and to assist counties to develop plans consistent with such standards and criteria." To my mind, the language "standards and criteria" indicates that the agency is setting forth requirements for representation eligibility, though I realize that this proposition is controvertible.[21]

Please let me know if you would like me to look further into these issues or to look into other pertinent issues.

[21] The terms "standards" and "criteria," I acknowledge, do not always signify something mandatory (see Pinzon v City of New York, 197 AD2d 680, 681 ["The standards promulgated by these agencies are not mandatory but merely suggested guidelines"]; People v Bonilla, 95 AD2d 396, 405 [op of Rubin, J.] ["It should be noted that the criterion of a flat EEG is not mandatory but is considered confirmatory."]; Matter of Boyer v Dept. of Health of County of Albany, 52 AD2d 652, 652 ["There is no showing that the standards set forth in section 75.5 of the code (10 NYCRR 75.5) are mandatory."]; Matter of Frey v McCoy, 35 AD2d 1030 [Correction Law did not mandate compliance with workload standards issued by state Director of Probation]).