

June 18, 2001

Dear 18B Panelists,

As most of you know, 18B attorneys throughout the State have for many years submitted vouchers in excess of the ceilings of \$800 and \$1200, based upon the fact that the individual cases involved extraordinary circumstances.

More recently, however, 18B attorneys in various counties have been submitting vouchers that seek payment **in excess of the statutory \$40 and \$25 per hour rates**, based upon extraordinary circumstances that in some cases amount to nothing more than the fact that the current fee structure is antiquated.

In Dutchess County, for example, three Family Court Judges earlier this year ordered that all 18B lawyers who appeared in their courtrooms be paid \$75 per hour. In Clinton County, a Family Court Judge ordered that an 18B attorney be paid \$75 per hour for both in-court and out-of-court work based upon the fact that the unjust compensation rates led to a shortage of attorneys willing to represent adult indigent defendants and that the shortage caused a crisis in the court.

On April 16, 2001, in response to such orders, Chief Administrative Judge Jonathan Lippman amended Part 127 of the Rules of the Chief Administrator of the Courts to provide that

The order of a trial judge with respect to a claim for compensation in excess of the statutory limits may be reviewed by the appropriate administrative judge, with or without application, who may modify the award if it is found that the award reflects an abuse of discretion by the trial judge.

Armed with this amendment, Judge Micki A. Scherer, the Administrative Judge of the Criminal Term of State Supreme Court in Manhattan, recently overturned a ruling by Manhattan Judge Marcy Kahn that the State Legislature's failure to raise 18B rates since 1986 in and of itself constituted an "extraordinary circumstance". Left intact, that rationale could have set a precedent for judges in Manhattan to increase pay rates for all 18B practitioners.

The good news, however, is that in 11 other cases, Judge Scherer approved compensation rates in excess of the statutory rate and in one case approved an 18B payment of \$100 per hour for both in court and out of court work.

The reasons she approved and disapproved the higher rates are set forth in her various orders. Among other points, she notes:

- The rules governing 18B payment do not permit routine enhancement of vouchers.
- The phrase “extraordinary circumstances” applies to the particular facts of a particular case. Accordingly, scrutiny on a case by case basis is required.
- The County Law does not empower judges to authorize enhanced fees because of factors unrelated to the specifics of the case in question. The failure of the legislature to act with regard to increased fees does not convert the statutory “extraordinary circumstances” test to the “unacceptable circumstances” test.
- The trial judge must review each voucher individually and make a determination on a case-by-case basis. A judicial declaration that enhancements will be awarded in all cases is not the exercise of discretion contemplated by the statute.
- Extraordinary circumstances will not be found if the attorneys’ request is based upon a form or generic affirmation that fails to distinguish the instant case from any other case.
- **Factors to be considered in determining whether extraordinary circumstances are present are:**
  - the complexity of the issues**
  - the extent of service required**
  - the actual time spent**
  - the time saved by the attorney’s prior experience, and by his/her ability to grasp the issues quickly or resolve a complicated matter expeditiously.**
- **Extraordinary circumstances will not normally be found unless the voucher is accompanied by a detailed affirmation stating facts which establish the complexity and multiplicity of significant legal issues, the precise manner in which the time was expended, the necessity thereof, the protracted nature of the proceedings, and/or any other factors that would demonstrate the requisite extraordinary circumstances.**
- **Extraordinary circumstances apply where more than one of the foregoing factors are manifest to a significant extent.**

I am not suggesting that you begin to seek enhanced rates on all of your cases. The statute does not contemplate that, and our current budget could not handle the overage. Nor would I presume to predict how our Nassau County Trial Judges and Administrative Judge might rule on such applications.

I am merely providing the foregoing information so that if you feel you have a case that qualifies as one of “extraordinary circumstances”, you may be guided accordingly.

#### PRIVATE FEES

In the last two months, certain attorneys, who had already been assigned pursuant to 18B, approached members of the defendant’s family in an effort to arrange a private fee in place of the 18B appointment. In one case, this was apparently done innocently, in the belief that the defendant’s finances were such that he was not eligible for an 18B attorney. Nevertheless, you are reminded that County Law § 722b specifically provides for payment to an 18B attorney once he/she is assigned. The statute goes on to state:

No counsel assigned hereunder **shall seek or accept any fee** for representing the party for whom he is assigned without approval of the court as herein provided. (emphasis supplied)

Thus, even if you have reason to believe that the defendant or his family has sufficient funds to hire an attorney or to contribute something toward a fee, **you may not pursue this on your own** once you are assigned under 18B, but should bring it to the attention of the court. To do otherwise is to violate the statute and jeopardize your status on the panel.

#### CO-COUNSEL LIST

Please add the following name to the Co-Counsel Panel. Attorneys on the Co-Counsel Panel are in need of litigation experience and have indicated that they will serve as co-counsel, for no fee, during criminal trials and/or hearings.

Jason G. Parpas – Valley Stream – 516-285-0761

#### 18B RATE INCREASE – UPDATE

There appears to be a consensus that the State will pay the cost of increased fees but there is still no State budget and there are still no uniform rules governing 18B programs across the State. Such uniform rules appear to be a prerequisite to State funding. The Task Force on this issue is supposed to release a report of some kind in late June or July. I will keep you advised. Until then, I thank you for your continued work on the panel.

Very truly yours,

Patrick L. McCloskey

