

Sample Extraordinary Circumstances Fee Application
Pursuant to section 722-b of the N.Y. COUNTY LAW
Courtesy of the New York State Association of Criminal Defense Lawyers

STATE OF NEW YORK
COUNTY COURT

COUNTY OF NASSAU
SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK AFFIDAVIT IN SUPPORT OF
PAYMENT OF ENHANCED - against -
ATTORNEYS FEES

Indictment No. _____
Defendant. _____

STATE OF NEW YORK
COUNTY OF NASSAU }
 } ss.

, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York. I am assigned counsel for the accused, , in *People v.* , Indictment No. County Court.

I.

RELIEF REQUESTED

2. Pursuant to Article 18-B, section 722-b of the N.Y. COUNTY LAW, I submit this affidavit in support of my application for \$ in compensation at an enhanced rate due to extraordinary circumstances. This request for enhanced compensation also is made pursuant to Article 18-B, section 722-b of the N.Y. COUNTY LAW.

II.

CASE BACKGROUND

3. (Put in entire history of the case)

III.
APPLICATION FOR FINAL PAYMENT AT 18-B RATES

4. In accordance with the aforesaid appointment as assigned counsel I performed certain services from _____, 2003, through the present which are more fully described on the attached time sheet designated as Exhibit A.

5. The time sheet shows that I spent _____ hours, for a total of \$ _____ in legal fees, in-court performing services in connection with my representation of Mr. _____ in this case.

6. The time sheet also shows that I spent _____ hours, for a total of \$ _____ in legal fees, out-of-court performing services in connection with my representation of Mr. _____.

7. In addition to the time devoted to performing the services described in Exhibit A, I also incurred certain expenses consisting of postage in the amount of \$ _____ photocopying in the sum of \$ _____, \$ _____ in toll calls, and \$ _____ in delivery fees, for a total of \$ _____ for disbursements and expenses. Receipts for these expenses are attached hereto as Exhibit B.

8. As stated above, the total amount of interim compensation together with reimbursement claimed in connection with the matter underlying this appointment and pursuant to Article 18-B, section 722-b of the N.Y. COUNTY LAW is \$ _____

IV.
APPLICATION FOR ENHANCED PAYMENT

9. I seek enhanced payment of legal fees in this case at the \$90/hour rate provided to court-appointed counsel in the United States District Court. I seek such payment because I believe that this case presented the "extraordinary circumstances" that under section 722-b of the COUNTY LAW justify the award of a higher hourly fee.

10. The scope of this section of the *affidavit* includes the following:

- (a) The applicant's qualifications,
- (b) The extraordinary nature of the services rendered,
- (c) The need for the services rendered, (d) A summary of enhanced compensation sought, (e) The value of the services to the community, (t) The cost to applicant of providing the services,
- (g) The legal standard for awarding enhanced compensation.

A. QUALIFICATIONS OF APPLICANT

11. I am a 19 _____ graduate of _____ and received my law degree from in 1990. I am licensed to practice law in (list all jurisdictions).

12. Upon my admission to practice in _____, I worked for (pit in legal work history). Currently, more than half of my practice is devoted to the representation of indigent persons accused of crimes as an assigned attorney in fulfillment of my professional obligation to provide legal assistance to the poor.

13. I am a member of numerous bar organizations, among them (List all organizations).

14. Based upon my professional experience and study, I believe that I am qualified to offer an opinion as to the type of services which are reasonable and necessary in the defense of a man accused of _____. It is my opinion that the services rendered in this case, and the expenses involved in rendering these services, were not only reasonable, but necessary for the proper and effective representation which Nassau County had the duty to provide in this case.

B. EXTRAORDINARY NATURE OF THE CASE AND OF THE SERVICES RENDERED

15. This case presented little that was not extraordinary within the legal and lay meanings of that term.

1. **This Case Was Complex** (Explain)

2. **The Trial Was Lengthy and The Associated Materials Voluminous** (Explain)

3. **This Case Demanded An Attorney With Experience in Criminal Law and Complex Litigation** (Explain)

4. **The Nature of the Case Required Significant and Intense Trial Preparation** (Explain)

C. NEED FOR THE SERVICES RENDERED

16. The time, effort and expense involved in this case was the minimum amount that was absolutely necessary to provide fair representation of Mr. . There was nothing extravagant about this defense. What was done was what I deemed to be absolutely necessary in order to provide the fair and effective representation which our Constitution requires.

17. I have recorded spending a total of hours on his case. Exactly hours were spent in-court, and hours were spent out-of-court.

D. SUMMARY OF ENHANCED COMPENSATION SOUGHT

18. I seek reimbursement at the rates paid to court-appointed counsel in the Eastern District of New York because I believe those rates more fairly reflect the value of my time and experience as applied to this case. I also believe that these rates more fairly represent the lower end of compensation that private counsel would have expected had she been retained when I was in this case.

19. In the U.S. District Court, court-appointed counsel are reimbursed at the rate of \$90/hour for out-of-court and in-court work. (By contrast, section 722-b provides that lawyers be paid \$25/hour for out-of-court work and \$40/hour for in-court work.) The rates paid in the Eastern District of New York are set by the Judicial Conference for the Second Circuit and reflect the minimum range of prevailing hourly rates for qualified criminal defense lawyers within the district. *See* 18 U.S.C. § 3006A(d)(1). As a lawyer admitted to practice in the Eastern District of New York, I qualify for these rates when I take federal court-appointed cases.

20. Were this Court to retroactively grant enhanced compensation in this case at the proposed rates, total compensation for legal fees and expenses in this case would equal

E. VALUE OF THE SERVICES TO THE COMMUNITY

21. The circumstances which make this case extraordinary also make it a good example of the value of providing competent representation to the indigent person accused of crime. Such representation is compelled by the New York and U.S. constitutions, but is sometimes questioned because citizens wonder why money should be spent on those accused of crime. Though costly, the right to counsel represents a tremendous breakthrough in the struggle of our society toward justice for all.

22. Our common law system of justice rests upon certain fundamental assumptions: that an accused person is presumed innocent; that guilt must be established in an adversarial proceeding in which the charging authority has the burden of proof; that the two adversaries be aided by advocates capable of rendering effective assistance to the cause. A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-1.2 (3d ed. 1993). The right to be provided counsel is so fundamental to the American idea of fairness in

criminal procedure that in 1932, the Supreme Court recognized it as part of the due process of law which every state owes to its citizens. *Powell v. Alabama*, 287 U.S. 45 (1932). Dimensions of this obligation on the part of the state were defined 25 years ago in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

F. COSTS OF SERVICES TO COUNSEL

23. I operate a person law firm. Preparing Mr. case for trial caused me to forego taking new cases, a practice that the press of work required me to continue throughout the proceedings. I cannot say for certain how much work I turned down during that period because my attention was on Mr. defense. I only know that referring out business did nothing to encourage new clients after the trial was over. Only now do I feel that my business is returning to normal and that clients with new matters are not hesitating to contact me.

24. In addition, the additional compensation sought in this case is reasonable in view of the fees that a privately retained lawyer would have charged. (Put in rate for retained cases).

G. LEGAL STANDARD FOR ENHANCED COMPENSATION

25. As noted above, court-appointed lawyers in criminal cases in New York earn \$40 per hour for in-court work and \$25 per hour for out-of-court work. N.Y. COUNTY LAW, ad. 18B, § 722-b. In felony cases not punishable by death, total fees are capped at \$1,200. *Id* This limit -- which the Legislature established in 1985 -- may be exceeded when the trial judge finds that "extraordinary circumstances" exist. *Id.*; *also L.* 1985, ch. 315, § 3.

26. Extraordinary circumstances generally are held to exist when a case involves protracted litigation and the facts are such that denial of additional compensation would be grossly unjust. *People v. Perry*, 27 A.D.2d 154, 160-61 (1st and 2d Depts. 1967). In addition, courts have ordered additional compensation after evaluating the traditional factors that justify the imposition of a legal fee, including: the nature and extent of the services rendered, the actual time spent, the necessity for the expenditure of time, the issues involved, the professional standing of counsel, and the results achieved. E.g., *Matter of Burk*, 5 A.D.2d 429, 430 (1st Dept. 1958); *Matter of Armani*, 83 Misc.2d 252, 259 (County Ct. Hamilton County 1975); *Matter of Crimi*, 60 Misc.2d 144, 146 (County Ct. Monroe County 1969).

27. In most cases, the finding of extraordinary circumstances is used to justify paying a lawyer not at the statutory rate, but in excess of the statutory cap. *See, e.g., Perry*, 27 A.D.2d at 160-61. Thus, it could be said that extraordinary circumstances already have been found in this case since counsel has been compensated at a level beyond the statutory cap. However, extraordinary circumstances may also be found to justify payment of appointed counsel at a rate that exceeds the statutory rate and for a total that far exceeds the statutory limit.

28. A leading case regarding enhanced hourly compensation for court-appointed counsel is *People v. Brisman*, 173 Misc.2d 573 (Sup. Ct., New York Co. 1996). In that case, defense counsel based in New York City sought compensation at the rate of \$75 per hour for

both in- and out-of-court work. A higher hourly fee was justified, the lawyer asserted, because the case involved lengthy pre-trial hearings and multiple indictments alleging serious crimes, including a charge of Murder in the Second Degree. *Id.* at 584.

29. *Brisman* held that both public policy concerns and the plain wording of section 722-b of the *County Law* permit court-appointed counsel to be compensated at a higher hourly rate than specified by statute. Enhanced hourly compensation is permissible, the court said, when a case meets the traditional criteria for extraordinary circumstances *and*:

- Involves lengthy hearings and/or trial; or
Concerns multiple, extraordinary and complex issues; or
- Presents a multiplicity of serious charges.

Id. at 590-91.

30. Interestingly, the *Brisman* court set no standard for determining the amount by which the standard hourly section 722-b rates should be enhanced. Rather, the court agreed that counsel's in-court fee should be raised to \$75 per hour, but denied counsel's application for a higher out-of-court rate. *Id.* A higher out-of-court hourly wage would be appropriate, the court held, in cases involving "extraordinarily lengthy proceedings," such as a trial that lasted more -than one month. *Id.*

31. Applying the *Brisman* standards to this case, it is clear that the circumstances described in this affidavit are extraordinary within the meaning of the law.

32. The public policy analysis outlined in *Brisman* empowers this Court to consider a range of factors in determining the level of compensation to which defense counsel will be entitled in this case. Certainly, the Court must consider the overhead that defense counsel faces.

33. Additionally, the Court should be aware that the Third Department in *People v. Herring* recently refused to overturn a trial court's decision to award \$75/hour for in-court legal work, \$50/hour for out-of-court legal work, and \$12.50/hour for paralegal work in an assigned counsel case. *See People v. Herring, 2001 N.Y. App. Div. LEXIS 247* (3d Dept. -- Jan. 11, 2001) (dismissing county appeal of "extraordinary circumstances" fee award). The *Herring* case demonstrates that a court may award higher hourly attorneys fees - and, indeed, reimbursement for paralegal costs - to appointed counsel where "extraordinary circumstances" are present. *Id.*

34. Even more recently, two Family Court judges in Dutchess County have ruled that all law guardians and assigned counsel in those courts are entitled to fees of \$75/hour. *See Matter of Sweat (Family Ct., Dutchess Co. -- Jan. 23, 2001)*(Brands, J.); *see- also Matter of*

Laniqua C., Docket No. NN-00373-2000 (Family Ct., Dutchess Co. - Jan. 30, 2001) (Amodeo, J.). The courts increased hourly fees in this manner for appointed counsel because the Legislature's failure to raise these fees for 15 years has caused lawyers to leave the assigned counsel panels in Family Court in droves. Additionally, the courts in both *Sweat* and *Laniqua C.* found that the statutory assigned counsel rate of \$40/hour for in-court time and \$25/hour for out-of-court time bears no relation to the economic realities (e.g., overhead costs) currently facing assigned counsel.

35. In her State of the Judiciary Address in 1999, Chief Judge Kaye stated that "Another area that cries out for change is the current schedule of assigned counsel fees under section 18-B of the County Law. The current law provides for \$40 an hour for in-court work and \$25 an hour for out-of-court time. These rates have not changed since 1986. In the past 13 years, plumbers, teachers--even judges--have gotten much deserved raises. If we are committed to quality justice, we simply cannot let another year pass without action on this issue."

36. In a June 3, 1999 statement regarding Chief Judge Kaye's proposals concerning 18b rates, Attorney General Eliot Spitzer stated that: Chief Judge Kaye has presented a sound proposal for meeting a critical challenge to the court system. Her proposal would reduce the widespread disruption caused by the unavailability of attorneys for assigned counsel work. This is a problem not only for those seeking representation, but for all those involved in the court system --judges, prosecutors, court officers and jurors. Judge Kaye's proposal will help address the growing perception that adequate legal representation depends on wealth. This perception --if left unaddressed -- could undermine respect for the law, which is the great civilizing force in our society. At present, assigned counsel include some talented and dedicated attorneys. They deserve an increase in the 18-b rates. An increase would also encourage other qualified attorneys to make themselves available to handle cases. I believe this proposal -- which the Chief Judge has designed to avoid imposing additional financial burdens on local governments -- will help build respect for the law and strengthen the court system. I urge the Legislature and the Executive to work together to enact appropriate legislation as soon as possible.

37. In her State of the Judiciary Address in 2000, she called the current 18-B rates "absolutely ridiculous." She said the rates were "barely adequate" when set in 1986 and now are "completely out of line with modern economic reality." Caher, "Kaye Calls for Raise in 18-B Fees," N.Y.L.J. 1/10/2000, at 1.

38. Also in 2000, The Office of Court Administration rightly termed this situation a "growing crisis" in court-appointed representation. *See* Lippman, J., *Assigned Counsel Compensation in New York: A Growing Crisis* (NYS Office of Court Admin. - Jan. 2000).

39. Judge Kaye repeated her sentiments in her State of the Judiciary Address in January 2001

40. In her State of the Judiciary remarks delivered January 15, 2002. She -stated: 7

"[W]e simply must stanch the bleeding and raise assigned counsel fees. It has now been 16 years since these fees—\$40 for in-court work and \$25 for out-of-court work — were last increased. They are just about the lowest fees paid by any State in the nation. Governor Pataki, legislators, prosecutors and editorial boards, among others, have all recognized that this is an intolerable situation — but no one feels the daily impact more than the judges searching in vain for counsel to assign and the litigants desperately needing lawyers. The continuing failure to resolve this crisis has now generated significant litigation, with a federal court only weeks ago ordering that a substantially higher hourly fee be paid to attorneys assigned in certain Family Court matters. Piecemeal resolution in the courts is plainly not the ideal way to proceed. Appropriate rate levels, procedures for implementing the increases and the means of paying for them are issues that should be comprehensively resolved by the policymakers. So let's deal with this now. Even in today's climate of austerity, raising these rates must be a priority. The assigned counsel crisis is undermining our capacity to function as a court system and, even worse, is threatening the very foundation of our justice system — our commitment to equal justice under the law."

41. In her State of the Judiciary address delivered January 13, 2003, Judge Kaye again addressed this continuing crisis.

42. Even a cursory review of recent litigation and motions on this subject points out that jurists recognize the need for increased payment to 18b attorneys. *See, e.g., New York County Lawyers v. New York State.*

43. Indeed, in Nassau County, enhanced fees in a criminal case have already been Ordered by the Hon. Donald DeRiggi on September 6, 2002 in *People v. Pruitt*, Indictment Number 2310N/99 and by the Hon. Joseph Calabrese on December 10, 2002 in *People v. Sutton*, Indictment Number 0866N/02.

44. This Court also must bear in mind that the current section 722-b rates are much, much smaller than the fees paid to attorneys who are hired to provide legal services to government officials or agencies. Attorneys who work under state agency contracts, in civil rights cases, and under N.Y. PUBLIC OFFICERS LAW sections 17 and 19 (which provide legal services for state employees and agencies in civil and criminal cases) commonly receive fees between \$150 and \$300 per hour, depending on the case and the attorney's experience.

45. These public policy considerations militate in favor of a forgoing of extraordinary circumstances in this case and the awarding of attorneys fees above the cap imposed by section 722-b of the COUNTY LAW.

WHEREFORE, it is respectfully requested that this Court:

- (1) Approve payment of \$ _____ for legal services rendered and for reimbursement of disbursements in the defense of _____ ,
- (2) Find that enhanced compensation should be paid at the rate provided for Criminal

Justice Act counsel in the U.S. District Court for the Eastern District of New York; and,

(3) For such other and further relief to which Mr. Nelson and his counsel may be entitled in law or in equity.

Dated: _ New York, 2003
 New York

Sworn to before me this
day of _____, 2003

Notary Public-State of New York