

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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IN RE SHARWLINE NICHOLSON, ET AL., :  
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: CV-00-2229 (JBW)  
: CV-00-5155 (JBW)  
: CV-00-6885 (JBW)  
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MEMORANDUM OF LAW OF NEW YORK COUNTY LAWYERS' ASSOCIATION,  
AS *AMICUS CURIAE*, IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY INJUNCTION

Of Counsel

Craig A. Landy  
Norman L. Reimer  
NEW YORK COUNTY  
LAWYERS' ASSOCIATION  
14 Vesey Street  
New York, NY 10007  
(212) 267-6646

DAVIS POLK & WARDWELL  
450 Lexington Avenue  
New York, New York 10017  
(212) 450-4000

Attorneys for New York County  
Lawyers' Association, as *Amicus  
Curiae*

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The New York County Lawyers' Association ("NYCLA"), as *amicus curiae*, respectfully submits this memorandum of law, together with the declaration of Frank S. Moseley, dated November 20, 2001 ("Moseley Decl."), and its accompanying exhibits, the declaration of Dean Norman Lefstein, dated November 19, 2001 ("Lefstein Decl."), and the declaration of Dr. Lawrence H. Stiffman, dated November 13, 2001 ("Stiffman Decl."), and its accompanying exhibits, in support of a preliminary injunction providing: (1) an increase in the rates paid to counsel assigned to represent members of the classes certified by the Court as Subclasses A and B (the "Subclasses"); (2) the abolition of the arbitrary caps on total per-case compensation; and (3) the abolition of the arbitrary distinction in the rates paid for in- and out-of-court work. NYCLA submits this memorandum of law, together with the supporting declarations and exhibits, to assist the Court in fixing a rate that is sufficient to ensure that these assigned counsel will be able to provide meaningful, effective and ethical representation to members of the Subclasses. Specifically, NYCLA respectfully requests that the Court order that these assigned counsel be paid at the rate of \$100 per hour for both in- and out-of-court work.

### INTRODUCTION

NYCLA is a not-for-profit association of attorneys who practice primarily in New York County. Throughout its history, NYCLA has demonstrated its commitment to the provision of meaningful and effective legal representation to children and indigent adults in family and criminal court proceedings in New York City. In 1965, NYCLA co-sponsored and drafted the Assigned Counsel Plan of the City of New York ("Assigned Counsel Plan"), which was designed at that time to provide representation to indigents in

criminal trial and appellate proceedings in New York City. The Assigned Counsel Plan was adopted on November 27, 1965, pursuant to Mayor Robert Wagner’s Executive Order No. 178. As a bar association designated to participate in the Assigned Counsel Plan, NYCLA has continuing obligations to provide members to serve on the committees that screen attorneys for membership on the assigned counsel panels, to assist in evaluating the operation of the Assigned Counsel Plan and to provide continuing training and education for panel attorneys.<sup>1</sup> See 22 N.Y.C.R.R. Part 612. NYCLA has similar responsibilities with respect to the Family Court Law Guardian Plan for the First Judicial Department (“Family Court Plan”), which provides representation for children and indigent adults in family court proceedings in Bronx and New York Counties. See 22 N.Y.C.R.R. Part 611.

Most recently, NYCLA has acted to protect indigents’ rights by filing a lawsuit against the State of New York in New York State Supreme Court, challenging the constitutionality of the rates of compensation paid to assigned counsel who represent children and indigent adults in family and criminal court proceedings in New York City. NYCLA v. State, Index No. 102987/00 (compl. filed Feb. 18, 2000) (the “state court action”). In January 2001, Justice Lucindo Suarez found that NYCLA has standing to represent the children and indigent adults whose constitutional rights are at issue, and rejected the State’s argument that the claims NYCLA alleges in its complaint are non-

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<sup>1</sup> As used herein, the terms “assigned counsel” or “panel attorneys” refer to private attorneys assigned to represent members of Subclasses A and B pursuant to Article 18-B (§§ 722 et seq.) of the County Law (“Article 18-B”), §§ 241 et seq. of the Family Court Act, § 262 of the Family Court Act and § 35 of the Judiciary Law.

justiciable political questions. See NYCLA v. Pataki (State), 188 Misc. 2d 776, 779-81, 727 N.Y.S.2d 851, 854-55 (Sup. Ct. N.Y. County 2001).

In May 2001, NYCLA filed a motion for a preliminary injunction in the state court action seeking, among other things: (i) a declaration that NYCLA had demonstrated a likelihood of ultimate success on the merits of its claim that the rate-setting provisions of § 722-b of the County Law, § 245 of the Family Court Act and § 35 of the Judiciary Law are unconstitutional as applied to the representation of children and indigent adults in New York City; and (ii) preliminary injunctive relief ordering that the rate of compensation for assigned counsel in all family and criminal trial and appellate proceedings in New York City shall be \$100 per hour for both in- and out-of-court work to ensure that a sufficient number of private attorneys are available and able to provide children and indigent adults with meaningful and effective legal representation in these proceedings. That motion became fully submitted in early August 2001, and is currently pending before Justice Suarez.

NYCLA seeks to appear as *amicus curiae* in this litigation because, through its prosecution of the state court action, it has accumulated certain evidence and expertise which may be of assistance to the Court in fixing the amount of compensation necessary to ensure that the assigned counsel at issue in this action will be able to provide meaningful, effective and ethical representation to members of the Subclasses. By this memorandum, together with the supporting declarations and exhibits submitted herewith, NYCLA seeks to provide, among other things, materials responsive to the Court's request in its Rough Draft Preliminary Memorandum and Preliminary Injunction dated October

24, 2001 (“Oct. 24, 2001 Mem. & Order”), for “evidence on the cost-of-living increases since the fee amounts were fixed by the legislature and expert testimony.”

## BACKGROUND

### I. NYCLA’s Request for Leave To Appear as *Amicus Curiae*

The Court should grant NYCLA leave to appear as *amicus curiae* in this action. Unlike in the appellate context, see Fed. R. App. P. 29, no rules or statutes prescribe the procedure or furnish a standard for deciding whether to permit the filing of an *amicus* brief in a district court. See United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991); Onondaga Indian Nation v. State of New York, No. 97-CV-445, 1997 WL 369389, at \*2 (N.D.N.Y. June 25, 1997). Instead, “[d]istrict courts have broad discretion to permit or deny the appearance of amici curiae in a given case.” United States v. Ahmed, 788 F. Supp. 196, 198 n.1 (S.D.N.Y.), aff’d, 980 F.2d 161 (2d Cir. 1992); see Zell/Merrill Lynch Real Estate Opportunity Partners Ltd. P’ship III v. Rockefeller Ctr. Props., Inc., No. 96 Civ. 1445, 1996 WL 120672, at \*4 (S.D.N.Y. Mar. 19, 1996). The extent to which an *amicus* may participate in an action also lies in the discretion of the district court. See Gotti, 755 F. Supp. at 1158.<sup>2</sup>

“The usual rationale for *amicus curiae* submissions is that they are of aid to the court and offer insights not available from the parties.” Onondaga Indian Nation, 1997 WL 369389, at \*2 (quoting United States v. El-Gabrownny, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994)). Functions to be served by *amici* include assisting the court in cases of

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<sup>2</sup> Copies of the unreported court decisions cited herein are attached as Exhibits A-R to the Moseley Decl. submitted herewith.

general public interest and ensuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision. See Gotti, 755 F. Supp. at 1158; see also Long Island Soundkeeper Fund, Inc. v. New York Athletic Club, No. 94 Civ. 0436, 1995 WL 358777, \*1 (S.D.N.Y. June 14, 1995) (“The amicus privilege rests in the discretion of the court which may grant or refuse leave according [sic] as it deems the proffered information timely, useful, or otherwise.”) (internal quotations and citation omitted); cf. Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997) (stating in the appellate context that “[a]n amicus brief should normally be allowed . . . when the amicus has an interest in some other case that may be affected by the decision in the present case . . . [or] unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide”).

In light of its commitment to the provision of meaningful and effective legal representation to indigents in New York City, combined with the evidence and expertise it has accumulated through prosecution of the state court action, NYCLA believes it may be of assistance to the Court in its efforts to fix a rate sufficient to ensure that these assigned counsel will be able to provide ethical, meaningful and effective representation to members of the Subclasses. NYCLA respectfully requests leave to present this memorandum, together with the supporting declarations and exhibits submitted herewith, as *amicus curiae* to assist the Court in this important endeavor.

## II. The Statutory Compensation Scheme for Children and Indigent Litigants in New York City Family Court

### A. Compensation of Assigned Counsel

As the Court recognized in its October 24, 2001 Memorandum & Order, the members of the classes certified by this Court as “Subclass A”<sup>3</sup> and “Subclass B”<sup>4</sup> have the right to assigned counsel pursuant to the New York Family Court Act (“FCA”). See

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<sup>3</sup> Subclass A consists of:

All persons subject to domestic violence or its threat who are custodians of children, legally or de facto, if:

1. the children reside or resided in a home where battering was said to have occurred, but where the children themselves have not been physically harmed or threatened with harm, or neglected by the non-battering custodian, and where protection of the children and their best interests can be accomplished by separation of the alleged battered from the custodian and children or by other appropriate measures without removal of the children from the non-battering custodian; and if,
2. the children are sought to be removed or were removed by the New York City Administration for Children’s Services (ACS) or other governmental agency without court order (even if removal is ultimately approved by a court), in whole or in part because the children reside in a home where battering of the custodian was said to have occurred; or
3. the custodian is named as a respondent by ACS in child protective proceedings by ACS under Article 10 of the New York Family Court Act in which removal may be sought (even if removal is ultimately approved by a court), in whole or in part because the children reside in a home where battering of the custodian is said to have occurred; or
4. the custodian is denied adequate counsel:
  - a) in proceedings required by law before ACS may confirm or lead to removal of a child or failure to promptly return a removed child; or
  - b) in court proceedings which may confirm or lead to removal of a child or failure to promptly return a removed child.

Oct. 24, 2001 Mem. & Order, at 1-2.

<sup>4</sup> Subclass B consists of:

All children who are or were in the custody of a custodian in subclass A:

1. who have been or are likely to be removed by ACS or other governmental agency since December 16, 2000; or
2. who were removed prior to December 16, 2000 and continue to be in removed status after December 16, 2000; or
3. who have not been returned to the custodian as soon as possible after December 16, 2000 pursuant to a court order, where:
  - a) ACS has no discretion to delay the child’s return; or
  - b) ACS has discretion to delay or condition the child’s return, but delay or conditions are not necessary for the protection of the child.

Oct. 24, 2001 Mem. & Order, at 3.

FCA §§ 249, 262(a). Their right to the assistance of counsel is not only statutory; it is also constitutionally mandated. See In re Ella B., 30 N.Y.2d 352, 357, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972); In re Jamie TT, 191 A.D.2d 132, 136, 599 N.Y.S.2d 892, 894-95 (3d Dep’t 1993). It is equally well established that the right to counsel includes the right to meaningful and effective assistance of counsel. See, e.g., In re Erin G., 139 A.D.2d 737, 739, 527 N.Y.S.2d 488, 490 (2d Dep’t 1988) (“[B]ecause of the potentially drastic consequences of a child protective proceeding . . . the statutory right to counsel under Family Court Act § 262 affords [parents] protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings.”); In re Jamie TT, 191 A.D.2d at 137, 599 N.Y.S.2d at 895.

Counsel for members of Subclass A, to whom the Court’s draft order is addressed, are paid pursuant to the rates and procedures established by Article 18-B, which governs the implementation of court orders assigning counsel to indigent litigants. See FCA § 262(c) (providing that “any order for the assignment of counsel issued under this part shall be implemented as provided in article eighteen-B of the county law”). NYCLA respectfully notes that children who are members of Subclass B may also be represented by assigned counsel, and thus believes that the Court’s order should extend any higher rate to that representation.<sup>5</sup>

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<sup>5</sup> Children are entitled to assigned counsel, or a “law guardian,” in Family Court matters when they are the subject of the proceedings, regardless of indigency, “if independent legal representation is not available to such minor[s].” FCA § 249(a). Typically, children are represented by the Juvenile Rights Division of the Legal Aid Society (“JRD”). However, where the interests of children involved in a Family Court matter diverge, or where there is another conflict of interest preventing JRD from representing a child, one or more children may be represented by private counsel from the assigned counsel panels.

The FCA and Article 18-B establish the general legislative scheme through which New York State has required local governments to implement their own systems for providing legal representation for children and indigent adults in Family Court proceedings and indigent adults in criminal proceedings.<sup>6</sup> See FCA §§ 241 et seq.; N.Y. County Law §§ 722 et seq.; see also Report of the Appellate Division First Department Committee on Representation of the Poor: Crisis in the Legal Representation of the Poor (Mar. 23, 2001) (“Appellate Division Report”), at 9-17.<sup>7</sup> Pursuant to the Family Court and Assigned Counsel Plans, New York City provides such legal representation through a combined system of representation by institutions such as the Legal Aid Society and representation by private attorneys designated to serve on one or more assigned counsel panels for family and criminal court proceedings. With regard to Family Court, assigned counsel who serve on the Family Court Panels for trial-level cases may, and typically do, handle all types of proceedings, including representing almost all indigent adult litigants who are entitled to counsel in Family Court proceedings.

Although the constitutional obligation to provide indigent litigants with the meaningful and effective assistance of counsel rests ultimately upon the State of New

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<sup>6</sup> The rights of children, including the members of Subclass B, to assigned counsel in Family Court proceedings are implemented by a separate statutory scheme, codified in FCA §§ 241 et seq. and Judiciary Law § 35. FCA § 243 authorizes the Office of Court Administration (“OCA”) and the Appellate Divisions, respectively, to contract with a private legal aid society and to designate panels of private attorneys to serve as law guardians for children in Family Court proceedings. FCA § 245 and Judiciary Law § 35 provide that those panel attorneys shall be compensated at hourly rates of compensation, and shall be subject to limits on total compensation, which are identical to the rates and limits set forth in Article 18-B. Thus, any discussion of the rates established by Article 18-B applies with equal force to the rates established by FCA §§ 241 et seq. and Judiciary Law § 35.

<sup>7</sup> NYCLA would be pleased to provide the Court with copies of any materials cited herein.

York, see Douglas v. California, 372 U.S. 353, 356 (1963); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); People v. Witek, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965), the State has delegated to its cities and counties the responsibilities for both the operation of their assigned counsel systems and the compensation of counsel assigned under Article 18-B. See N.Y. County Law § 722-e (imposing responsibility for “all expenses for providing counsel and services other than counsel” on cities and counties). Accordingly, New York City currently bears the costs of providing assigned counsel to the members of Subclass A, as well as all other indigent adults in family and criminal court proceedings.<sup>8</sup>

Within Article 18-B, Section 722-b of the County Law establishes the maximum hourly rates of compensation, and the maximum amount of compensation per case, which may be paid to panel attorneys. The statute provides that panel attorneys must be paid “at a rate not exceeding” \$40 per hour for time spent in court, and \$25 per hour for time “reasonably” spent out of court in trial-level proceedings. Panel attorneys assigned to appellate cases must be paid no more than \$40 per hour for both in-court and out-of-court work. Panel attorneys must also receive “reimbursement for expenses reasonably incurred.” N.Y. County Law § 722-b. Article 18-B also establishes limits, or caps, on the total per-case compensation a panel attorney may receive of \$800 for misdemeanor cases and Family Court matters, and \$1,200 for felony cases and all appellate matters. See id.; see also N.Y. Jud. Law § 35 (establishing rates of, and limits on, compensation

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<sup>8</sup> The Judiciary Law does not delegate the responsibility for compensation of law guardians to the counties and cities. Thus, in contrast to the legislative scheme established by Article 18-B, the State of New York bears the costs of providing assigned counsel to children in Family Court proceedings.

for law guardians identical to those in Article 18-B). As described below, these caps may be – and often are – set aside by the court in particular cases upon a finding of “extraordinary circumstances.” These hourly rates and caps on total per-case compensation have not been changed since 1986.

Under the statutory scheme, any compensation award must be fixed and approved by the trial court that entered the judgment of conviction or acquittal or order of dismissal or, for representation on appeal, by the appellate court. Each claim for compensation and reimbursement under § 722-b must be supported by a sworn statement specifying the time spent, services rendered and expenses incurred. The trial or appellate court may grant compensation in excess of the statutory limits in “extraordinary circumstances.” N.Y. County Law § 722-b. New York State court judges have interpreted this provision as authorizing them, in cases presenting the requisite “extraordinary circumstances,” to award compensation to panel attorneys that exceeds both the statutory caps and the statutory hourly rates. See People v. Brisman, 173 Misc. 2d 573, 577, 661 N.Y.S.2d 422, 426 (Sup. Ct. N.Y. County 1996); see also People v. Tommy Johnson, 4/18/2001 N.Y.L.J. 19, col. 2 (Sup. Ct. N.Y. County) (Kahn, J.) (citing Brisman), modified, 5/31/2001 N.Y.L.J. 20, col. 2 (Scherer, J.); People v. Brown, 1/19/2001 N.Y.L.J. 28, col. 4 (Sup. Ct. Bronx County) (same).

B. History of the Statutory Scheme for Assigned Counsel

In considering the adequacy of the current rates of compensation under Article 18-B for attorneys assigned to represent the members of Subclasses, it is useful to examine the legislative history of Article 18-B. The New York State Legislature adopted Article

18-B in 1965 in response to the decisions of the United States Supreme Court in Gideon v. Wainwright, supra, and the New York Court of Appeals in People v. Witenki, supra. See Brisman, 173 Misc. 2d at 581, 661 N.Y.S.2d at 428. Then-Attorney General Louis Lefkowitz and the New York State Department of Law drafted the statute based upon the Federal Criminal Justice Act of 1964, 18 U.S.C. §§ 3006 et seq. (the “CJA”), and the Legislature enacted the statute without any hearings or reports. See Tommy Johnson, supra, at 19. The Attorney General made clear in his legislative memorandum that “[t]he Federal Act serves as a guide to reasonable standards of compensation for assigned counsel. The rates of compensation under the proposed bill are the same as the Federal . . . .” Brisman, 173 Misc. 2d at 582, 661 N.Y.S.2d at 428 (quoting Mem. of Attorney General, New York State Legislative Annual–1965, at 33–34). When first enacted in 1965, Article 18-B established hourly rates of \$15 for in-court work and \$10 for out-of-court work, the same rates then paid under the CJA. See Tommy Johnson, supra, at 19.

New York State courts have recognized that Article 18-B is modeled on the CJA. In considering some of the first applications for enhanced compensation under Article 18-B, the then-Presiding Justices of the Appellate Divisions, First and Second Departments, sitting jointly in their administrative capacities, declared that § 722-b and the CJA “are so substantially similar that, for all practical purposes, the language of the CJA regarding compensation of assigned counsel can be considered identical in purpose, meaning and effect with that of section 722-b as amplified by the plan of the Bar Associations.” People v. Perry, 27 A.D.2d 154, 157, 278 N.Y.S.2d 323, 325 (1967).

The legislative history of both the CJA and Article 18-B also make clear that the compensation rates were intended to provide attorneys with “reasonable” compensation. The original House Report for the CJA states that the initial CJA rates were intended to provide “a reasonable basis upon which lawyers could carry out their profession’s responsibility to accept court appointments, without either personal profiteering or undue financial sacrifice.” *Id.* at 157–58, 326 (quoting H.R. 7457, U.S.C.C.A.N. 2997–98 (1964)); see also *Brisman*, 173 Misc. 2d at 582 n.4, 661 N.Y.S.2d at 429 n.4 (noting that a review of the Governor’s Bill Jacket for the 1978 amendment to Article 18-B reveals that “many of those who commented on that bill viewed payment of reasonable compensation to assigned counsel as necessary to attract competent attorneys to join the 18-B panels and to facilitate the critical social goal of providing quality legal representation to indigent defendants”).<sup>9</sup>

### III. Recent History of the City’s Assigned Counsel System

#### A. The Current Crisis in Assigned Counsel Representation

The system designed to provide legal representation to children and indigent adults in Family Court proceedings in New York City is now, and for many years has been, in a state of crisis. After a recent visit to Family Court, Chief Judge of the State of

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<sup>9</sup> “Reasonable compensation” was not intended to be the functional equivalent of *pro bono* work. Before the enactment of Article 18-B, New York State relied almost exclusively on private attorneys to represent children and indigent adults on a *pro bono* basis. While the Legislature debated passage of Article 18-B, the New York State Bar Association (“NYSBA”) issued a report concluding that the immense burden of representing all children and indigent adults required to be represented by assigned counsel in criminal trial and appellate proceedings could not be met by private attorneys working on a *pro bono* basis. Instead, the NYSBA report recommended that “[l]awyers who are assigned to represent indigents should be compensated sufficiently to permit them to devote the time, care and patience to the preparation and disposition of the case which are necessary to meaningful exercise of the right to counsel.” See Comm. on State Legis., NYSBA Report No. 48 (1965), at 2.

New York Judith S. Kaye reported that in the past year this “crisis” has become a “catastrophe.” John Caher, “Dearth of 18-B Attorneys Creates Near ‘Catastrophe’ Situation,” N.Y.L.J., Nov. 8, 2001, available at <http://www6.law.com/ny>. The reason for the catastrophe is clear: There are not enough qualified private attorneys available and able to represent all those who are constitutionally and statutorily entitled to receive meaningful and effective assistance of counsel. These shortages, in turn, can be traced to the absurdly low rates of compensation paid to assigned counsel. Because the current statutory scheme provides woefully inadequate compensation, the number of attorneys actively participating in the Family Court Panels has plummeted in the last ten years, and the few who remain are hopelessly overburdened.

Participants in New York City’s courts have recognized for years that New York’s very low assigned counsel rates undermine both the operation of the courts and the quality of the representation provided to children and indigent adults. In 1999, Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman reported that because of the low rates, few attorneys remained willing to take on assigned counsel work. See Emi Endo, “Attorney Shortage? Call to Raise Court-Appointment Fees?”, N.Y. Newsday, June 3, 1999, at A43. Judge Lippman said that as a result, “the quality of representation has clearly suffered and the system is at a point of breakdown.” Id. Later that year, New York City Family Court officials admitted that up to fifty indigent parents were sent home each week because assigned counsel could not be found to represent them. David Rohde, “Critical Shortage of Lawyers for Poor Seen,” N.Y. Times, Dec. 12, 1999, at B55.

In January 2000, Chief Judge Kaye made a proposal to raise assigned counsel rates a centerpiece of her State of the Judiciary Address. Noting that the rates were “barely adequate” to attract and sustain participation by a sufficient number of qualified private attorneys when they were fixed in 1986, she said that by January 2000, the rates were so “completely out of line with today’s economic realities” that there had been “a mass exodus of attorneys from the assigned counsel panels.” Hon Judith S. Kaye, New York State of the Judiciary Address, Jan. 10. 2000. Chief Judge Kaye warned that “a bedrock component of our State’s commitment to equal access to justice is the availability of qualified assigned counsel to represent indigent litigants in criminal and Family Court matters. Unfortunately, our ability to honor that commitment is at risk.” Id. Chief Judge Kaye urged that the rates be raised to \$75 per hour, in and out of court, for felonies and Family Court matters, and \$60 per hour, in and out of court, for misdemeanors.

At the same time, the Office of Court Administration (“OCA”) released a report authored by Chief Administrative Judge Lippman and Deputy Chief Administrative Judge Juanita Bing Newton entitled “Assigned Counsel Compensation in New York: A Growing Crisis.” The report found that assigned counsel rates were “woefully inadequate” to ensure that children and indigent adults receive adequate legal representation. Assigned Counsel Compensation in New York: A Growing Crisis (Jan. 2000) (“OCA Report”), at 1.

Others came to the same conclusions about the effects of the rates on adequate representation of children and families. In connection with the settlement of a federal

lawsuit challenging the provision of child welfare services in New York City, Marisol A. v. Giuliani, 185 F.R.D. 152, 172 (S.D.N.Y. 1999), a panel of nationally recognized child welfare experts (the “Marisol Panel”) studied the New York City Family Court. In their March 2000 Report, the Marisol Panel also identified the rates paid to panel attorneys as a major cause of the Family Court’s failings and argued that those rates should be raised.

The Panel wrote that

[t]he current crisis in 18-B panel representation for parents is the obvious place to start [advocating for adequate legal representation of parents and children]. Compensation issues must be tackled, as it is the consensus of all that sufficient numbers of attorneys cannot be recruited without a fairer payment system.

Advisory Report on Front Line and Supervisory Practice: Special Report on Family Court (Mar. 9, 2000) (“Marisol Panel Report”), at 51.

In its report “Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Welfare Proceedings,” the Office of the New York City Public Advocate came to a similar conclusion:

[The assigned counsel] system is now in severe crisis. The reimbursement rates are grossly disproportionate to the cost of maintaining a law practice; the caseloads are impossibly high; and the investigative, counseling and support services necessary to meet client needs are largely non-existent. Despite their best efforts, attorneys working under such conditions can provide only the most minimal time and attention to each of their cases. The result is a system that fails to meet the requirements of the law, undermines the proper functioning of the Family Court, and adds immeasurably to the short and long-term costs of removing children from their homes.

Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Welfare Proceedings (May 2000) (“Justice Denied Report”), at i. Likewise, the Appellate Division First Department Committee on the Representation of the Poor concluded that partly “[a]s a result of shamefully low rates of compensation of assigned counsel . . . [and] ever-increasing caseloads, New York's poor are too often not being afforded the ‘meaningful and effective’ representation to which they are entitled under New York law and the New York State Constitution.” Appellate Division Report, supra, at 1-2.

B. Judicial Recognition of the Crisis

Despite the consensus that the assigned counsel system is in crisis, the State Legislature has failed to act in 1999, 2000 or 2001 to protect the rights of children and families by adequately funding the assigned counsel system. Increasingly, litigants dependent upon assigned counsel and their advocates have turned to the judiciary to protect these rights.

1. Extraordinary Circumstances

As set forth in Part II.A., supra, Article 18-B provides that a trial or appellate court may grant compensation in excess of the current statutory limits in “extraordinary circumstances.” Since its enactment, courts have relied upon this provision to provide greater compensation in individual cases. Recently, however, some courts have applied the provision more frequently, and, in some cases, on a uniform basis, in an effort to ameliorate the crisis created by the abysmal statutory rates.

One Dutchess County Family Court judge, for example, ruled that he would compensate all assigned counsel appearing in his courtroom at \$75 per hour. The judge

wrote that “a crisis has occurred in the court system where lawyers are unwilling to accept assignments at the present pay scale as it results in those individuals giving professional services at a less than break even scenario.” Matter of Sweat, 1/24/2001 N.Y.L.J. 31, col. 1 (Dutchess County Fam. Ct.). As a result, “the burden has been thrust on the courts to find ways to deal with the crisis.” Id.; see also Matter of Joshua AA, 187 Misc. 2d. 216, 225, 722 N.Y.S. 2d 361, 367 (Clinton County Fam. Ct. 2001) (finding it “fair and just” to announce a pay rate of \$75 per hour for in-court and out-of-court work as an incentive for attorneys to accept appointments); Department of Soc. Servs. v. Patricia S., 2/1/2001 N.Y.L.J. 32, col. 4 (Dutchess County Fam. Ct.) (finding “grossly inadequate” rates, shortages of assigned counsel, and overburdened attorneys to be extraordinary circumstances for current voucher and all future vouchers submitted in that court and awarding \$75 per hour for all legal services); Matter of Wager, 2/8/2001 N.Y.L.J. 32, col. 6 (Dutchess County Fam. Ct.) (finding that current situation in Family Court constitutes extraordinary circumstances and awarding \$75 in all future cases); Matter of D.H., 8/15/2000 N.Y.L.J. 24, col. 4 (N.Y. County Fam. Ct.) (finding extraordinary circumstances in a juvenile delinquency proceeding and awarding hourly rate of \$75); Moriarty v. Moriarty, 2/6/01 N.Y.L.J. 32, col. 2 (Monroe County Fam. Ct.) (finding extraordinary circumstances in a custody case and awarding hourly rate of \$75); cf. Matter of Vouchers for Compensation, 12/8/2000 N.Y.L.J. 28, col. 5 (Kings County Fam. Ct.) (noting that “the failure of the legislature since 1985 to increase the rate of compensation for assigned counsel . . . [makes it increasingly difficult for the Family Court] to find sufficient numbers of counsel to represent all of the indigent litigants who

appear,” but finding no extraordinary circumstances and declining to award rates in excess of the statutory maximum).<sup>10</sup>

Similarly, many judges have granted compensation in excess of the statutory rates to assigned counsel in criminal proceedings. See, e.g., People v. Francine Johnson, 6/29/2001 N.Y.L.J. 20, col. 3 (Sup. Ct. N.Y. County) (granting \$75 per hour for representation of defendant charged with felony); People v. Roth, 5/31/2001 N.Y.L.J. 20, col. 2 (Sup. Ct. N.Y. County) (upon administrative review, approving trial judge’s grant of \$100 per hour for both in- and out-of-court work in felony case); cf. Tommy Johnson, supra, at 19 (granting enhanced rates of \$75 per hour on the ground that the inadequate rates themselves constitute “extraordinary circumstances”), modified, supra, at 20 (upon administrative review, reducing compensation to statutory rates).

Awards of assigned counsel compensation by a trial court are not subject to appellate review. See Director of Assigned Counsel Plan of City of N.Y. (Bodek), 87 N.Y.2d 191, 194, 638 N.Y.S.2d 415, 416 (1995) (“Such orders are essentially administrative in nature and, accordingly, are not amenable to judicial review on the merits by an appellate panel.”). In response to the growing number of awards of enhanced compensation, however, Chief Administrative Judge Lippman created a new system of administrative review of such awards in March 2001. That system, which is contained in Parts 127.2 and 127.4 of the Rules of the Chief Administrator of the Courts,

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<sup>10</sup> As described above, Family Court cases are also subject to a \$800 cap on total per-case compensation. This cap is routinely waived. See, e.g., Matter of Sheppard, 11/17/2000 N.Y.L.J. 28, col. 6 (N.Y. County Fam. Ct.) (waiving cap and recognizing that it is “customary practice in Family Court, for years” to approve applications in excess of \$800 limit); Matter of D.H., supra, at 24 (awarding \$3,367.50 in compensation).

provides for review of enhanced fee awards by an administrative judge (in the case of attorneys for adults) or by the presiding justice of the appropriate appellate division (in the case of attorneys for children). See generally John Caher, “Judge Sets Standards for 18-B Excess Compensation,” N.Y.L.J., Mar. 20, 2001; see also 22 N.Y.C.R.R. Part 127.2 (providing that a trial judge’s order 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”); 22 N.Y.C.R.R. Part 127.4.

Soon after this administrative review began, awards of enhanced compensation began to be reduced. As result, not all attorneys awarded enhanced fees actually receive them. See Michael Riccardi, “Lawyer Seeks to Block Review of 18-B Fee Increases,” N.Y.L.J., July 12, 2001. The legitimacy of the administrative review process is currently the subject of litigation in the Appellate Division, First Department, where several panel attorneys whose fees were reduced have filed an Article 78 proceeding challenging Judge Lippman’s authority to enact such a procedure. See Levenson v. Lippman, (1<sup>st</sup> Dep’t Art. 78 Pet. filed July 6, 2001).

## 2. Challenges to the Constitutionality of the Rates

Because the absurdly low statutory rates have caused attorney shortages and other systemic deficiencies, NYCLA has filed the state court action challenging the constitutionality of the current assigned counsel compensation system. In the state court action, NYCLA has asked the court to declare the current system unconstitutional, and to grant injunctive relief to ensure that the rights of children and indigent adults to counsel and to due process are protected.

On May 31, 2001, NYCLA moved for a preliminary injunction and asked the court to declare, among other things, that the State's failure to raise the hourly rates of compensation paid to assigned counsel, to set aside the distinction between the rates paid for in- and out-of-court work, and to eliminate the caps on total per-case compensation has created a severe and unacceptably high risk that children and indigent adults will not receive meaningful and effective legal representation in violation of the New York and United States Constitutions. Accordingly, NYCLA has asked the court to declare that it has established a likelihood of ultimate success on the merits of its claim that the rate-setting provisions of § 722-b of the County Law, § 245 of the FCA and § 35 of the Judiciary Law are unconstitutional as applied to the representation of children and indigent adults in New York City.

NYCLA has also sought preliminary injunctive relief ordering, among other things, that: (1) the rate of compensation for assigned counsel in all family and criminal trial and appellate proceedings in New York City be fixed at \$100 per hour to ensure that a sufficient number of qualified private attorneys are available and able to provide children and indigent adults with meaningful and effective legal representation in these proceedings; (2) the distinction between the hourly rates paid for in- and out-of-court work be set aside; and (3) the ceilings on total per-case compensation be eliminated.

C. Continued Legislative Inaction

The State Legislature has yet to act to adequately fund the assigned counsel system. The preliminary budget passed by the Legislature on August 3, 2001 failed to include any funding for an increase in assigned counsel rates. On October 25, 2001, the

Legislature passed its final budget bill (S5828), which likewise failed to fund any such increase. Governor Pataki signed that bill into law on October 31, 2001.

### ARGUMENT

I. The Court Should Order That Assigned Counsel Rates Be Fixed at \$100 per Hour To Ensure Meaningful, Effective and Ethical Representation of the Subclasses

The system designed to provide legal representation to children and indigent adults in Family Court proceedings in New York City is in a state of catastrophe. As a direct result of the absurdly low rates of compensation paid to assigned counsel, there are not enough qualified private attorneys who are available and able to represent all those who are constitutionally and statutorily entitled to receive meaningful and effective assistance of counsel.

The question before the Court is what level of compensation is necessary to ensure that sufficient numbers of qualified private attorneys *will* be available and able to provide meaningful, effective and ethical representation to members of the Subclasses. In its motion for a preliminary injunction in the state court action, NYCLA has argued that a rate of compensation of \$100 per hour for both in- and out-of court work is necessary to ensure that sufficient numbers of qualified attorneys will be available and able to represent children and indigent adults in Family Court proceedings in New York City. As set forth below, there is substantial support for an order fixing the rate of compensation for assigned counsel at \$100 per hour.

A. A Rate of \$100 per Hour Is Necessary To Attract Sufficient Numbers of Attorneys to the Family Court Panels

A primary reason for the current crisis in the City's assigned counsel system is that there simply are not enough panel attorneys available to represent the litigants who need them and who are entitled to them. Few attorneys remain willing to represent litigants in Family Court at the abysmally low rates now paid to assigned counsel. The Court must fix a rate of compensation that reasonably compensates panel attorneys for their work and, thus, is sufficient to attract and retain qualified attorneys to the Family Court Panels. The rates of compensation currently paid under other statutes and rules to attorneys and other professionals for work in state and federal court proceedings in New York City provide the best evidence of the minimum rate necessary to attract and retain qualified attorneys. As set forth below, these rates are at least \$75 per hour, with very few exceptions, and often are significantly more than \$75 per hour.

1. CJA Rates

Attorneys who serve on the federal Criminal Justice Act (CJA) panels in the United States District Courts for the Eastern and Southern Districts of New York currently receive \$75 per hour for both in- and out-of-court work. This rate has been in effect for over ten years, since January 1, 1990. See Moseley Decl. Ex. S (Admin. Office of the U.S. Courts, Defender Services Comm'n, Implementation of Criminal Justice Act Alternative Hourly Attorney Rates (Mar. 2001)), at 1. This year, the Judicial Conference of the United States requested funding for FY 2002 to increase CJA rates to \$113 per hour for both in- and out-of-court work because "the current hourly rates are too low to

recruit and retain a sufficient number of qualified and experienced counsel to accept CJA appointments and to provide a fair rate of pay.” Moseley Decl. Ex. T (Justification for the \$113 CJA Panel Hourly Rate in FY 2002), at 1. In particular, the Judicial Conference found that: (i) the current \$75 rate does not cover many attorneys’ non-reimbursable overhead costs, which it found to be approximately \$65 per hour on a nationwide-basis according to the Altman Weil 2000 Survey of Law Firm Economics; and (ii) the current rate is “resulting in qualified and experienced attorneys declining to accept CJA appointments and leaving the panel.” Id. at 1.

In July 2001, the House of Representatives approved a bill (H.R. 2500, S. 1215) appropriating funding for an increase in CJA rates to \$90 per hour. See Moseley Decl. Ex. U (Bill Status for H.R. 2500, S. 1215; Excerpts from H.R. 2500, H.R. Rep. 107-139, H.R. Rep. 107-278 and S. Rep. 107-42), at 1. The House relied upon a House Committee Report which found that the current rates “often do not cover private attorneys’ overhead costs” and, because more than 90% of CJA attorneys are sole practitioners or members of firms with only 2 to 5 attorneys, “place a significant financial burden on the individual attorneys accepting appointments.” Id. (H.R. Rep. 107-139), at 1. The Committee Report further found that the current rates have “not kept pace with inflation over the past 15 years and that this has negatively impacted the Judiciary’s ability to attract and retain attorneys to the panel.” Id. On November 9, 2001, the Conference Committee Report adopted, by reference, the language of the House Committee Report and approved the funding for a \$90 rate, to be implemented by May 1, 2002. See Moseley Decl. Ex. U (H.R. Rep. 107-278), at 1.

The comparison to CJA rates is particularly relevant because, as discussed in Part II.B., supra, the legislative history of Article 18-B clearly indicates that the federal statute is meant to “serve[] as a guide to reasonable standards of compensation for assigned counsel.” Brisman, 173 Misc. 2d at 582, 661 N.Y.S.2d at 428.

Moreover, a 1997 survey of the CJA Panel for the Southern District of New York conducted by NYCLA’s Task Force on the Representation of the Indigent suggests that additional attorneys would in fact accept assigned counsel work in state court if the rates in both jurisdictions were identical. Of the attorneys who responded to this survey, 75% stated that they had reduced or eliminated the number of assigned cases they handled in state court after qualifying for CJA work, and 97% said they would increase the number of assigned cases they handle in state court, or resume taking such cases, if the rates of compensation were identical. See Moseley Decl. Ex. V (NYCLA Task Force on the Representation of the Indigent, Report of the Committee on Assigned Counsel Compensation (1997)) (“NYCLA Task Force Report”), at 7.

## 2. Section 35-b, or Capital, Rates

Attorneys who are appointed to represent indigent criminal defendants charged with capital offenses pursuant to Section 35-b of the Judiciary Law receive \$100 per hour for lead counsel and \$75 per hour for associate counsel for any work performed prior to the State’s filing of a notice that it intends to seek the death penalty, and \$125 per hour for lead counsel and \$100 per hour for associate counsel for any work performed after the filing of such a notice. See N.Y. Jud. Law § 35-b(5); New York State Ass’n of Criminal

Defense Lawyers v. Kaye, 96 N.Y.2d 512, 516, 755 N.E.2d 837, 730 N.Y.S.2d 477, 478-79 (2001).

3. Recent Enhanced Rate Decisions

As set forth above, New York State Supreme Court Justices and New York Family Court Judges in New York City and surrounding counties have found enhanced hourly rates of \$75 or more per hour warranted for both in- and out-of-court work. See Part II.A, III.B1, supra.

4. EAJA and PLRA Rates

Attorneys who represent prevailing parties in an action against the United States are entitled to an award of attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §§ 2412 et seq.. Under the EAJA, attorneys are compensated at a rate not to exceed \$125 per hour, unless the court determines that an increase in the cost of living, or a special factor such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher rate. 28 U.S.C. § 2412(d)(A)(2)(ii). In a class action on behalf of Medicare beneficiaries, this Court approved rates of \$250 per hour for partners in a New York law firm, \$200 per hour for an associate professor, and \$150 per hour for an associate. See David v. Sullivan, 777 F. Supp. 212, 222 (E.D.N.Y. 1991).

Similarly, attorneys who represent prisoners in successful actions brought under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. §§ 1997 et seq., are entitled to apply for attorney's fees under the Civil Rights Attorney's Fees Awards Act, §§ 1988 et seq., which provides that a district court "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). In the Eastern and Southern

Districts of New York, the maximum hourly rate permitted under the PLRA is \$112.50 per hour. See Reynolds v. Goord, No. 98 Civ. 6722, 2001 WL 118564, at \*2 (S.D.N.Y. Feb. 13, 2001). In a recent case, Judge Keenan found \$112.50 per hour a “reasonable attorney’s fee,” and also awarded \$75 per hour for work done by a law student working as a summer associate and \$60 per hour for work done by paralegals. See Hutchinson v. McCabe, No. 95 Civ. 5449, 2001 WL 930842, at \*7 (S.D.N.Y. Aug. 15, 2001).

5. Rates Paid to Attorneys Hired by New York State and City Agencies

New York State and City agencies pay private counsel hourly rates that are far in excess of the rates paid to assigned counsel in Family Court proceedings. For example, bond counsel hired by the State Dormitory Authority receive from \$175 per hour to \$300 per hour depending on experience. See OCA Report, supra, at 6–7. Counsel hired by the Metropolitan Transit Authority receive over \$250 per hour. See id. Counsel hired by the New York City Education Construction Fund receive an average of \$325 per hour. See id. Law firm partners assigned under the New York Public Officers Law § 17 to represent state employees where the Attorney General has a conflict receive \$100 and \$75 per hour for in- and out-of-court work, respectively, while law firm associates with three or more years of experience receive \$75 and \$50 per hour, respectively. See Moseley Decl. Ex. V (NYCLA Task Force Report), at 4.

6. Rates Paid to Other Professionals in State Court Proceedings

In criminal and Family Court proceedings in New York City, court-appointed physicians are compensated at \$200 per hour, psychiatrists at \$125 per hour, certified

psychologists at \$90 per hour, certified social workers at \$45 per hour and licensed investigators at \$32 per hour pursuant to an administrative order of the Chief Administrator of the New York State Courts. See OCA Report, supra, at 7. These hourly rates are the minimum, and judges routinely order that such experts be paid at higher hourly rates. See, e.g., Bodek, 87 N.Y.2d at 193, 638 N.Y.S.2d at 415.

B. A Rate of \$100 Per Hour Is Necessary To Provide “Reasonable Compensation” to Panel Attorneys and To Cover Their High Overhead Costs

Many attorneys no longer take assigned cases because the current, low statutory rates do not cover the high overhead costs of maintaining a law practice in New York City. The Court must fix a rate of compensation at an amount that is sufficient to cover attorneys’ substantial overhead costs and still provide them with reasonable compensation. As set forth below, substantial evidence supports a finding that overhead expenses for panel attorneys in New York City are as high as \$75 per hour before taxes and that, accordingly, a rate of \$100 per hour is necessary.

1. Declaration of NYCLA’s Expert, Dean Norman Lefstein

In his declaration, Dean Lefstein of Indiana University School of Law concludes, based upon his substantial experience in the field of representation of the indigent, that the current rates of compensation paid to assigned counsel fail to “provide ‘reasonable’ or adequate compensation” in violation of prevailing professional standards. Lefstein Decl. ¶ 22. Because the compensation is inadequate even to cover the costs of necessary support services and resources, Dean Lefstein concludes that there is “a substantial risk

that indigent clients in New York City will not receive effective legal representation.”

Lefstein Decl. ¶ 27.

2. Declaration of NYCLA’s Expert, Dr. Lawrence H. Stiffman

Based upon an analysis and extrapolation of data he collected for the New York State Bar Association’s 1995–97 survey on the Economics of Law Practice in New York, Dr. Stiffman concludes that for attorneys practicing in New York City in 2001: (1) overhead expenses range from \$23.05 to \$75.81 per hour before taxes in firms of 1–9 attorneys; (2) when the current statutory hourly rates are considered against the hourly overhead cost based on total hours, “it is clear that assigned counsel would have great difficulty maintaining a law practice in New York City”; and (3) some attorneys actually lose money when their overhead costs are considered. See Stiffman Decl. ¶¶ 21–26 (originally filed in NYCLA v. State on May 31, 2001).

3. Altman Weil Survey of Law Firm Economics

As cited by the Judicial Conference in its request for increased funding, the Altman Weil 2000 Survey of Law Firm Economics finds that attorneys’ non-reimbursable overhead costs are approximately \$65 per hour. See Moseley Decl. Ex. T (Justification for the \$113 CJA Panel Hourly Rate in FY 2002), at 1.<sup>11</sup>

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<sup>11</sup> This Court has also recognized the high costs of providing legal services in New York. In assessing a fee application under the Equal Access to Justice Act, this Court wrote that “[i]n the Eastern District of New York, the cost of legal services has risen substantially faster than the cost of goods and other services so that there is a substantial gap between the general price index and that for legal services. In fixing legal fees, it is the cost of legal services that is relevant, not the cost of other necessities such as automobiles, bread and cable television.” Savone v. Sullivan, 780 F. Supp. 976, 978 (E.D.N.Y. 1992).

#### 4. Comparison to Rates Paid in Other States

Despite being one of the most expensive states in the country in which to practice law, and the most expensive city in that State, assigned counsel in New York City receive among the lowest hourly rates of compensation in the nation. With regard to the representation of indigent criminal defendants for which nation-wide data is regularly compiled, the statutory rates of compensation paid to assigned counsel in New York State are the second lowest in the United States. Alabama, Arkansas, Georgia, Louisiana, West Virginia and many other states with significantly lower costs-of-living all pay higher rates than New York. See Moseley Decl. Ex. W (Rates of Compensation Paid to Court Appointed Counsel in Non-Capital Felony Cases At Trial: A State-by-State Overview (Nov. 1999), at 1-12.

##### C. A Rate of \$100 Is Warranted in Light of Earlier Proposals, Including That of Chief Judge Kaye

As set forth in Part III.A., supra, there is a clear consensus that New York City's assigned counsel system is in crisis and many, including Chief Judge Kaye, have advanced proposals in recent years to remedy the crisis by increasing the statutory rates of compensation. Because many of these proposals are now outdated, a rate of \$100 per hour is warranted.

##### 1. Chief Judge Kaye's Proposal

Nearly two years ago in their January 2000 Report, Chief Judge Kaye and OCA proposed that assigned counsel representing clients in all Family Court matters and felony criminal cases receive \$75 per hour for both in- and out-of-court work, and \$60 per hour

for both in- and out-of-court work in misdemeanor criminal cases. Based on the data Dr. Stiffman collected for the New York State Bar Association during its 1995-1997 survey, the OCA Report also found that the average New York State attorney practicing in 2000 lost \$9.75 for every hour of out-of-court work performed and made a profit of only \$5.75 pre-tax for every in-court hour, based upon average hourly overhead costs of \$34.75. See OCA Report, supra, at 8.

2. NYCLA's 1997 Proposal

In 1997, the NYCLA Task Force on the Representation of the Indigent recommended that assigned counsel be paid \$100 per hour for both in- and out-of-court work in felony criminal cases involving a potential term of life imprisonment, \$75 per hour for all work in all other felony cases and all criminal appeals, and \$50 per hour for all work in misdemeanor cases. The New York State Bar Association's House of Delegates subsequently adopted NYCLA's recommendation. See Moseley Decl. Ex. V (NYCLA Task Force Report), at 10.

\* \* \*

As NYCLA has argued in its motion for a preliminary injunction in the state court action, and as plaintiffs argue here, the provisions of § 722-b of the County Law and § 35 of the Judiciary Law fixing the hourly rates of compensation for assigned counsel and imposing caps on total per-case compensation are unconstitutional as applied to the representation of children and indigent adults in family court proceedings in New York City. If the Court concludes that plaintiffs have shown a clear and substantial likelihood of success on the merits of this claim, the Court has the power – indeed the duty – to fix

new hourly rates of compensation for representation of member of the Subclasses. For all these reasons set forth above, the Court should order that the rate of compensation for counsel assigned to represent members of the Subclasses be fixed at \$100 per hour to ensure that they receive meaningful, effective and ethical representation.

II. The Court Should Order That the Arbitrary Caps on Total Per-Case Compensation and the Arbitrary Distinction Between Rates Paid For In- and Out-of-Court Work Be Set Aside To Ensure Meaningful, Effective and Ethical Representation of the Subclasses

Of course, increasing the rate of compensation to \$100 per hour would be ineffectual if the arbitrary caps on total per-case compensation also were not set aside. The arbitrary distinction between the rates paid for in- and out-of-court work also must be set aside to ensure meaningful, effective and ethical representation of members of the Subclasses.

In its motion for a preliminary injunction in the state court action, NYCLA has argued that the arbitrary caps on total per-case compensation and the distinction between in- and out-of-court work be set aside in favor of a \$100 per-hour rate of compensation for all work. Once again, there is substantial support for an order setting aside the caps on total per-case compensation and the distinction between the rates paid for in- and out-of-court work as they apply to counsel assigned to represent members of the Subclasses.

A. Comparable Statutes Do Not Pay Different Rates for In- and Out-of-Court Work

As set forth above, comparable statutes do not pay different rates for in- and out-of-court work performed by attorneys and other professionals in state and federal court proceedings in New York City. Attorneys who serve on the CJA Panels and the § 35-b,

or Capital, Panels in New York City receive the same hourly rate for in- and out-of-court work, as do other professionals who are appointed in state court proceedings. Similarly, the rates that New York State and City agencies pay to private counsel are not subject to strict caps on total per-case compensation and do not depend on whether the work is done in or out of court. The sole exceptions are law firm partners assigned under the New York Public Officers Law § 17 to represent state employees where the Attorney General has a conflict. They receive \$100 and \$75 per hour for in- and out-of-court work, respectively, and their associates with three or more years of experience receive \$75 and \$50 per hour, respectively. See Moseley Decl. Ex. V (NYCLA Task Force Report), at 4.

B. The Payment of a Lower Rate for Out-of-Court Work Discourages Necessary Out-of-Court Preparation and Results in a Lower Quality of Legal Representation

As Dean Lefstein poignantly observes in his declaration:

the statutory distinction in Article 18-B and in § 35 of the Judiciary Law between the rates of compensation paid to assigned counsel for in-court and out-of-court work results in a constant incentive for assigned counsel to maximize the amount of time they spend in court and a corresponding disincentive to perform basic out-of-court tasks. Thus, assigned counsel are discouraged from performing necessary out-of-court tasks such as a full and proper investigation of the facts and law, which are essential to providing effective legal representation.

Lefstein Decl. ¶ 23.

In their January 2000 Report, Chief Judge Kaye and the OCA proposed removing the caps on total per-case compensation and the distinction between rates paid for in- and out-of-court work. The OCA Report concluded that the payment of a lower hourly rate

for out-of-court work discourages necessary preparation and “results in a lower quality of representation.” See OCA Report, supra, at 18–19.

Many others have come to the same conclusion. In its March 2000 Report, the Appellate Division First Department Committee on Representation of the Poor proposed that the distinction between rates paid for in- and out-of-court work in criminal matters be abolished, citing testimony before the Committee that a lower hourly rate for out-of-court work discourages thorough case preparation. See Appellate Division Report, supra, at 19–20 & n.21. In 1997, NYCLA and the NYSBA joined in recommending that the caps on total per-case compensation and the distinction between rates paid for in- and out-of-court work be abolished in criminal matters. See Moseley Decl. Ex. V (NYCLA Task Force Report), at 10.

In its report, “Justice Denied,” the Office of the Public Advocate found that “the two-tier system of remuneration, by its very nature, encourages underpaid and overworked panel members to perform the minimum amount of out-of-court work.” Justice Denied Report, supra, at 31. Likewise, the Marisol Panel also found that the distinction between in- and out-of-court compensation “in practice means that [assigned counsel] generally do not spend time out of court working on their clients’ cases.” Marisol Panel Report, supra, at 46.

In an order granting an enhanced rate of \$75 per hour based on a finding of “extraordinary circumstances,” a Dutchess County Family Court judge awarded the same rate for in- and out-of-court work, explaining the importance of out-of-court work to Family Court cases: “The preparation of a case through review of court pleadings,

documents in the possession of the Dutchess County Department of Social Services and the like is as important, if not more so, than the time spent in court.” Department of Soc. Servs. v. Mitchell, 2/9/2000 N.Y.L.J. 31, col. 6 (Dutchess County Fam. Ct.).

For all these reasons, the Court should set aside the arbitrary caps on total per-case compensation and the distinction between the rates paid for in- and out-of-court work.

CONCLUSION

NYCLA respectfully requests that the Court issue an order fixing the rates paid to counsel assigned to represent members of the Subclasses at \$100 per hour, and setting aside the arbitrary caps on total per-case compensation and the arbitrary distinction between the rates paid for in- and out-of-court work. NYCLA respectfully submits that this relief is necessary to ensure that members of the Subclasses receive the meaningful, effective and ethical representation by counsel to which they are entitled under the United States and New York State constitutions and state statutes.

Dated: New York, New York  
November 20, 2001

Respectfully submitted,

By: \_\_\_\_\_  
Frank S. Moseley (FSM 2956 )

Of Counsel

Craig A. Landy  
Norman L. Reimer  
NEW YORK COUNTY LAWYERS'  
ASSOCIATION  
14 Vesey Street  
New York, NY 10007  
(212) 267-6646

DAVIS POLK & WARDWELL  
450 Lexington Avenue  
New York, NY 10017  
(212) 450-4000

Attorneys for New York County Lawyers'  
Association, as *Amicus Curiae*