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New York County Lawyers Association Tort Law Section Issues Statement in Support of New York State Senate Bill S9420

The New York County Lawyers Association Tort Law Committee supports the adoption of the proposed legislation.¹

Medical malpractice cases are highly complex and typically require a plaintiff's attorneys to expend a great deal of legal time and incur substantial disbursements. They also require a high level of skill to prosecute effectively. Nonetheless, the current statute sharply limits the legal fee that lawyers are allowed to charge in these cases, at a level significantly below what is permitted in general negligence cases. The malpractice fee scale now in effect involves sliding percentages based on the amount of the recovery. An attorney may be paid a 30% legal fee on the first \$250,000 recovered, then progressively lower percentages on additional amounts obtained through a lawsuit. For amounts over \$1.25 million, the legal fee is only 10%. Negligence cases, by contrast, routinely provide for a legal fee of 33.33% of the recovery.

The result of this restrictive fee schedule is that lawyers are often reluctant to accept meritorious medical malpractice cases, in view of the burdens and risks of handling them. It means that some of the most difficult, most expensive tort cases to litigate are also the least well compensated. This

¹ The views expressed here reflect those of the NYCLA Tort Committee and do not necessarily reflect the views of the NYCLA Board of Directors.

impedes injured parties' access to counsel and may result in otherwise viable cases not being brought. Many skilled attorneys elect not to handle medical malpractice cases at all.

The currently effective fee schedule also has been rendered increasingly inequitable by the effect of inflation. The law was last modified in 1986. The \$250,000 threshold that was deemed appropriate for a 30% legal fee in 1986 would be in excess of \$650,000 in today's dollars.

See Bureau of Labor Statistics CPI Inflation Calculator (accessible at https://www.bls.gov/data/inflation_calculator.htm). The dollar amounts, however, have not been adjusted in more than two decades.

The proposed legislation gives a potential plaintiff the choice of a modernized sliding fee schedule or authorizing a fee of up to 33.33% of a recovery, the same as would be applicable in a negligence case. This would bring about greater parity between the contingent fees charged in negligence cases and those charged in medical malpractice cases, thereby expanding access to representation. The Committee is of the view that the 33.33% ceiling for an agreed upon fee is sensible and appropriate, and that there is no sound reason a medical malpractice case should be required by law to be compensated at a lesser level than a general negligence one if the parties wish to agree otherwise.

The bill would further authorize attorneys who were retained on the sliding fee scale to seek an enhanced fee, though not to exceed one-third of the recovery. It identifies factors that "shall" be considered by the Court, including "whether the performance of the attorney was superior," and provides that the attorney "need not submit the number of hours expended." The Committee is of the view that the proposed language concerning fee enhancements could be refined to clarify that the expenditure of an extraordinary amount of time by an attorney on a case, or other factors significant to the Court, can be a basis for an enhanced fee, but does not oppose the concept that it is permissible for an attorney to seek a fee enhancement at the conclusion of a case if otherwise authorized in the retainer.

For all these reasons, the Committee supports the enactment of the legislation.

About the New York County Lawyers Association

The New York County Lawyers Association (www.nycla.org) was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender, and has a long history of supporting the rights of LGBTQ+ people. Since its inception, NYCLA has pioneered some of the most far-reaching and tangible reforms in American jurisprudence. For more information on NYCLA please visit nycla.org.

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