

TO: New York State Unified Court System
Commission on Parental Legal Representation

FROM: Justin Block, President, Suffolk County Bar Association
Elena Karabatos, President, Nassau County Bar Association
Catherine Miller, President, Suffolk County Matrimonial Bar Association

DATE: August 15, 2018

RE: Oral Testimony

On behalf of the Suffolk County Bar Association, the Nassau County Bar Association and the Suffolk County Matrimonial Bar Association, we hereby request the opportunity to testify orally before the Commission on Parental Legal Representation at the public hearing scheduled for October 23, 2018 at the Supreme Court, Nassau County, Mineola, New York.

We firmly believe in the right to counsel, especially for the indigent, but the existing publicly funded legal service system does not sufficiently serve the purpose it is intended to. We are in need of a greater level of qualified representation of indigent litigants in New York State. Quality attorneys often cannot afford – both financially and in terms of their time – to devote themselves to representation of indigent persons. As the ranks of these attorneys devoted to this work are increasingly dwindling, those who do devote their time, which is often substantial, are often overly burdened with an ever-increasing caseload of clients. Increasing the rate of pay for assigned counsel, establishing clear and defined financial eligibility criteria, limiting assigned counsel to those truly in need, and establishing caseload maximums are critical steps to further accomplish the goal of qualified legal counsel for those most in need.

A failure to raise rates, coupled with the lack of imposing caseload maximums and the failure to implement reasonable and sensible eligibility guidelines, leads to a true Catch-22. When attorneys cannot afford to participate on the assigned counsel panel, those attorneys who do participate are required to take on more and more cases, especially as the number of eligible litigants increases based on the current financial screening process, leading to an ever-decreasing supply of quality attorneys willing to do this important work.

- Raising the rate of pay for 18B Counsel – the current rate of pay is \$75 an hour. The rate was last raised in 2004, fourteen years ago, from \$40 an hour for in-court time and \$25 an hour for out-of-court time. As a result of the low rate of compensation, it is very difficult to attract and retain qualified attorneys to represent eligible indigent litigants. The Federal guidelines

provide for a rate of pay of \$140 an hour and we are seeking the equivalent for attorneys representing indigent litigants in New York State court. This would apply to all Family Court and Supreme Court proceedings in which litigants are eligible for assigned/18B counsel. Recently, amendments were made to increase compensation for Court-appointed mental health professionals and those rates now range from \$250 an hour for physicians and psychiatrists to \$75 an hour for social workers.

- Establishing criteria for determining eligibility for assigned counsel – often, litigants who do have the financial ability to retain counsel on their own are afforded the right to assigned counsel because the eligibility criteria established by federal guidelines permit individuals who are not truly indigent to obtain assigned counsel. In addition, the guidelines are not currently designed with a level of detail that might otherwise confirm that such litigants are actually not financially eligible to assigned counsel. As a result, litigants who cannot properly be screened under the existing criteria usurp resources that are intended for the truly indigent. This diversion of resources, resulting from implementation of the current eligibility guidelines in parental representation, leaves those who need publicly funded representation without the assistance of competent attorneys and, potentially, without representation at all. Moreover, providing publicly funded counsel to those who do not actually need it dis-incentivizes those litigants from making good faith efforts to resolve their cases and gives them unfair leverage since they have no “skin in the game”. This, in turn, creates an undue burden on the functioning of the judicial system.

The current system of financial eligibility has already detrimentally impacted on the legal profession as a whole, with qualified and dedicated counsel losing the opportunity to represent litigants, who do not or should not qualify for assigned counsel. The failure to realistically adjust the financial eligibility criteria, will only serve to further discourage experienced attorneys from being willing to represent, as assigned counsel, those truly in need. There needs to be an appropriate balance of resources so that skilled attorneys can appropriately manage their time.

- Establishing caseload maximums and/or caseload management procedures is essential to the continuation of competent legal representation for indigent litigants. There are currently no procedures in place to ensure that counsel are not assigned to more cases than are appropriate. This results in those attorneys who are still willing to accept assigned counsel cases being unable to devote

the necessary time and resources to those cases. Under the present system, attorneys who do accept assigned counsel cases are over-worked and overwhelmed with the number of cases they carry.

- Establishing a system to represent parents in pre-petition proceedings in Family Court is critical to defending the rights of indigent clients. Often, when a child protective service investigation is commenced, parents are unaware that the CPS caseworker has the ability, and often the intent, to commence an Article 10 abuse/neglect proceeding against them. Potential litigants are interviewed, as well as their children, without the advice of counsel, and their statements, whether true or not, whether credible or not, are then used in a neglect proceeding brought against them. Even more dire consequences occur when the unwitting family is ordered to court, on a few hours' notice, for an emergency proceeding to immediately remove their children from their care. These parents are then often confronted with the evidence against them, based upon their own statements to the CPS caseworker, and utilized in an emergency removal hearing. Their children are then either placed with family members or, very often, with strangers in foster care. Given the severe consequences to these families, the trauma to both the parents and the children, and the financial impact to the system, by placing these children in the publicly funded foster care system, it is critical to establish criteria for legal representation prior to the filing of the Article 10 petition. These unfortunate circumstances can be avoided if potential litigants are aware of their legal rights. The necessity of having competent counsel to offer advice and guidance is critical, not only for the purpose of avoiding the pitfalls of self-incrimination, but to assist parents in addressing their own issues and implementing constructive procedures to avoid a potential neglect proceeding. While child protective services is directed, in many instances, to offer services and assistance, without the family understanding their legal rights and obligations, this assistance often fails to avoid a court proceeding. In these circumstances and at this critical stage, as in all aspects of parental representation, it is essential to have qualified attorneys to proffer legal advice and guidance.

Taken together or separately, these important issues impacts the bar and the judicial system as a whole and, if not properly addressed, will continue to dilute the integrity of our profession. Now is the time for constructive action.

It is important to note the substantial support by the New York State Bar Association, in recognizing and addressing these issues. Recently, the New York State Bar Association Committee on Children and the Law voted unanimously to support the Report by the Criminal

Justice Section and the Committee on Mandated Representation, in recognition of the need for increased quality representation of indigent litigants, that recommends raising the hourly attorney rate of pay pursuant to County Law Article 18-b. The Committee also voted to request that Attorneys for the Child and assigned counsel appearing in Family Court be included in such a rate increase. The proposal is to raise the rate to \$140 per hour, establish automatic annual increases, and that same not result in an un-funded mandate to the counties of New York State. This resolution will be submitted for discussion and a vote by the NYSBA House of Delegates, at its meeting in November, 2018. We join with the New York State Bar Association in supporting the resolution.

Thank you for your consideration.