



# New York State Defenders Association, Inc.

## *Public Defense Backup Center*

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To: John W. McConnell, Counsel, Office of Court Administration

Re: Comments on Proposed Increase in the Hourly Rates of Compensation of Court-Appointed Experts Pursuant to Judiciary Law § 35 and County Law § 722-c

Date: October 11, 2017

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Thank you for the opportunity to submit comments regarding the proposed increase in the hourly rates of compensation of court-appointed experts pursuant to Judiciary Law § 35 and County Law § 722-c.

The New York State Defenders Association (NYSDA) is a not-for-profit membership association; its mission is to improve the quality and scope of publicly supported legal representation to low income people. Most of NYSDA's over 1,700 members are public defenders, legal aid attorneys, assigned counsel, and private practitioners throughout the state, along with others who support the right to counsel, including client members. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center (Backup Center), which offers legal consultation, research, and training to nearly 6,000 lawyers who represent individuals who cannot afford to retain counsel in criminal and family court cases. As part of its support services to public defense providers and state and local governmental entities, NYSDA provides consultation and technical assistance about legal and policy issues relevant to criminal and family court systems, delivery of defense services, and barriers thereto.

### **I. Proposed Increase in Hourly Rates of Compensation Would Help Support the Right to Present a Defense**

NYSDA supports the proposal to increase the hourly rates of compensation of court-appointed experts pursuant to County Law § 722-c and Judiciary Law § 35. Public defense clients have a right to present a defense<sup>1</sup> and are entitled to funds for investigative, expert, and related auxiliary services.<sup>2</sup> County Law § 722 specifically provides that “each plan for public defense representation “shall ... provide for investigative, expert and other services necessary for an adequate defense.” And state and national professional standards require that attorneys have access to and use such

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<sup>1</sup> See, e.g., *Crane v Kentucky*, 476 US 683 (1986); *People v Aphyalath*, 68 NY2d 945 (1986).

<sup>2</sup> “Essential to any representation, and to the attorney’s consideration of the best course of action on behalf of the client, is the attorney’s investigation of the law, the facts, and the issues that are relevant to the case.” *People v Oliveras*, 21 NY3d 339, 346 (2013).

services. See New York State Office of Indigent Legal Services (ILS Office), *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*,<sup>3</sup> Standards 3 (access to and use of investigative services as needed to provide quality representation) and 4 (access to and use as needed the assistance of experts); ILS Office, *Standards for Parental Representation in State Intervention Matters*, Standards G (Model of Representation – Multidisciplinary Practice), O-1 (Ongoing social work support), and O-7 (Expert witnesses); American Bar Association, *Criminal Justice Standards*, *Defense Function*, Standards 4-4.1 (Duty to Investigate and Engage Investigators) and 4-4.4 (Relationship with Expert Witnesses); see also New York Rules of Professional Conduct, 22 NYCRR Part 1200, Rule 1.1(a) (a lawyer must “provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); ILS Office, *Standards for Parental Representation in State Intervention Matters*, Standard B (“Experience and Training. Counsel must possess sufficient experience, training, knowledge, and skills necessary to provide high quality representation to clients in state intervention matters.”).

These constitutional, statutory, and professional mandates can only be meaningfully fulfilled if statutory rates and court guidelines authorize fees that investigators and experts are willing to accept. While some qualified individuals may offer to work at reduced rates for public defense cases, this is not a practicable basis for a guideline. Setting rates at a level which will attract only those professionals willing to work for a deflated rate shrinks the pool of available experts and severely limits options for quality services.

#### **A. Hourly Rate Guidelines Should Be Based on the Full Cost-of-Living Increase**

The hourly rate guidelines should be updated to the full cost-of-living amount, not just the proposed rate. For the physician, psychologist, and social worker categories, the proposed rate does not align with the full cost-of-living increase. Unfortunately, no explanation is provided for why the proposed rate does not match the full cost-of-living increase. Unless there is some evidence that the 1992 hourly rate guidelines were higher than the actual hourly rates that experts charged for their services at that time and/or that hourly rates have not increased at a rate similar to the standard cost-of-living adjustment, there is no justification for adopting new guidelines that are below the full cost-of-living increase.

We support the proposal to align the rates of physicians and psychiatrists. There is no reason why a psychiatrist’s expert witness rate should be, or in reality is, less than that of any other type of physician.

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<sup>3</sup> These standards were extended to include all trial level representation effective January 1, 2013. See Standards and Performance Criteria, available at <https://www.ils.ny.gov/content/standards-and-performance-criteria>.

## **B. Hourly Rates Must Be Guidelines, Not a Ceiling**

The August 8, 2017 memorandum does not state that the proposed hourly rates are intended to be guidelines. However, the original rates were described as guidelines in AO/73/92, and the May 17, 2017 Memorandum from the Attorney for Child Directors notes that the request was for “changes to the compensation rate guidelines ....” In the years since the 1992 guidelines were released, we have heard from public defense attorneys that some courts have treated the guidelines as a ceiling on hourly rates.<sup>4</sup> While the newly proposed guidelines are more in line with the current cost of retaining investigators and experts, some cases will warrant the retention of experts at an hourly rate above those rates.<sup>5</sup> We encourage the Administrative Board of the Courts to continue to treat the hourly rates as guidelines and to remind courts that they are guidelines and not hourly rate ceilings.

## **C. Guidelines Should Include a Provision for Adjustment or Review on a Regular Basis**

The cost of retaining experts, investigators, and other service providers increases on a regular basis<sup>6</sup> and any new guidelines adopted by the Administrative Board of the Courts should include a mechanism for review and adjustment of hourly rates.<sup>7</sup> This could be done by adding a provision for an annual cost of living adjustment or a direction that a particular office within the Unified Court System review the rates on a regular basis, perhaps yearly or every two years. This will ensure that guideline rates do not remain stagnant for another 25 years and will provide judges, public defense providers, and funders with a more realistic picture of the cost of these critical services.

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<sup>4</sup> See, e.g., ILS Office, *Implementing the Quality Improvement Objectives in the Hurrell-Harring v. The State of New York Settlement: 2016 Update*, at 32-33, available at <https://www.ils.ny.gov/files/Hurrell-Harring/Quality%20Improvement/Hurrell-Harring%20Updated%20Quality%20Improvement%20Plan%20111016.pdf> (noting that, although the 1992 Guidelines have not been updated in 24 years, the hourly compensation rates are still often used by courts and assigned counsel programs).

<sup>5</sup> There are a number of different reasons why a higher hourly rate may be warranted, such as where the case involves a specialized area of expertise or there are a limited number of experts in the relevant field.

<sup>6</sup> SEAK, Inc. (Skills, Education, Achievement, Knowledge) conducts regular surveys of expert witness fees. <https://www.seak.com/expert-witness-fee-study/>. In its 2014 report on the aggregate expert witness fee survey results, SEAK noted that expert rates had increased modestly since its 2009 survey; average fees for testifying at trial increased a total of 2.9% over the five-year period and the average fees for file review and case preparation have increased 12% over five years. <https://www.seak.com/wp-content/uploads/2014/07/Expert-Witness-Fee-Data.pdf>. And the 2017 report on the aggregate survey results noted that “[e]xpert rates have increased well beyond the rate of inflation since SEAK’s last survey in 2014.”

<sup>7</sup> In 2006, the Commission on the Future of Indigent Defense Services recommended that the Chief Administrative Judge “issue a new administrative order updating the hourly rate guidelines, and that OCA review the guidelines at least every two years and update them as needed.” *Final Report to the Chief Judge of the State of New York* (June 18, 2006), Addendum at AD-2, available at [http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

#### **D. Guidelines Should Be Expanded to Include More Categories of Experts**

The 1992 guidelines only address five categories of services, some of which overlap. In the past 25 years, the categories of experts used in criminal and family court cases has expanded. The guidelines should be expanded to include categories such as: interpreting/translation<sup>8</sup>; medical expertise in addition to physicians, such as nursing; DNA; mitigation; interrogation/false confession; eyewitness identification; forensic sciences (fingerprints, ballistics, blood spatter, arson, etc.); accident reconstruction; toxicology; pharmacology; engineering; biomechanics; cell phone and other technology; and forensic accounting. Having additional categories will remind judges, public defense providers, and other members of the criminal and family court systems of the wide spectrum of experts that may be needed in individual cases and rate guidelines will offer a starting point for assessing the appropriateness of a particular fee request. Whether or not new categories are added to the guidelines, the guidelines should state that it is not an exclusive list of possible experts that are covered by County Law § 722-c.

#### **E. Increased Guidelines Will Likely Encourage More Experts to Participate in Public Defense Cases and More Applications for Expert Witnesses**

The low hourly rates have discouraged many investigators and other experts from participating in public defense cases and also discouraged public defense attorneys from filing applications under County Law § 722-c. In its 2006 report, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Legal Services*, The Spangenberg Group indicated that it “heard from attorneys in many counties that it is difficult to find experts and investigators to take cases at the available rates.”<sup>9</sup> The report covered a number of related problems: lack of guidance on hourly rates; tacit pressure on defense attorneys not to apply for experts to keep costs down; courts “put in the position of guarding the county’s coffer”; and underutilization of experts as part of the culture of the practice.<sup>10</sup>

Ten years later, the New York State Office of Indigent Legal Services reported similar problems.<sup>11</sup> Noting that “[a]n additional and pressing barrier to quality representation is compensation rates for

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<sup>8</sup> Defense attorneys need access to independent interpreters to communicate with their clients. *See, e.g.,* ILS Office, *Standards for Parental Representation in State Intervention Matters*, Commentary to Standard F-5 (“The attorney must ensure access to a competent sign or other language interpreter for all interactions when a communication barrier exists between the client and the attorney .... Counsel should not rely on court interpreters for attorney-client communications.”); The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Legal Services* (June 16, 2006), at 70-72, available at <http://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>.

<sup>9</sup> The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Legal Services*, at 76.

<sup>10</sup> *See id.* at 72-77; *see also* Commission on the Future of Indigent Legal Services, *Final Report to the Chief Judge of the State of New York*.

<sup>11</sup> ILS Office, *Implementing the Quality Improvement Objectives in the Hurrell-Harring v. The State of New York Settlement: 2016 Update*, at 32-33.

non-attorney supports,” the report described one county where the rates provided by the assigned counsel program for investigators and interpreters were so low that experienced investigators and interpreters stopped taking public defense cases.

Increasing the guideline rates, and adopting a regular review of guideline rates, will likely encourage more investigators and experts to work with public defense attorneys. Defenders will gain access to more qualified experts and be encouraged to file applications under County Law § 722-c, thus removing a significant barrier to the provision of quality representation throughout the public defense system.

## **II. Amendment of Statutory Caps Critical to Quality Public Defense Services**

According to the August 8, 2017 proposal, it is anticipated that the Unified Court System will seek a legislative amendment to the statutory compensation caps in County Law § 722-c and Judiciary Law § 35(4). NYSDA supports such an amendment. For the increase in the hourly rate guidelines to be meaningful, it must be accompanied by an amendment to these compensation caps. Otherwise, the number of hours an expert is able to work on a case will be severely limited, except in cases where the court finds that there are “extraordinary circumstances” for exceeding the cap. For example, if the hourly rate guideline for a physician is increased to \$250, but the statutory cap of \$1,000 remains in place, then the physician will only be compensated for four hours of work. In most cases, four hours is not enough time for a physician to review all of the relevant medical records, let alone discuss those records and the relevant issues with the attorney. While some courts may agree that such a limitation meets the standard of “extraordinary circumstances,” others would consider this entirely ordinary and not approve an expenditure over the cap.

## **Conclusion**

Overall, NYSDA supports the proposal to increase the hourly rates under County Law § 722-c and Judiciary Law § 35. We encourage the Administrative Board of the Courts to accept the full cost-of-living hourly rate, not the lower proposed rates; alert judges that the rates are guidelines only, not a ceiling on hourly rates; regularly review the guidelines; and expand the categories of experts included in the guidelines. We expect that the increase will encourage more providers of expert services to agree to take public defense cases, which will make it easier for defenders to locate qualified experts and in turn improve the quality of representation provided to public defense clients.

However, without a change in the statutory caps on expert compensation, the increased guideline rates will not have a sufficient impact on the quality of public defense representation. Therefore, we also support the Unified Court System’s anticipated effort to seek legislative amendment to the Judiciary Law and County Law regarding the cap on expert compensation.

If you have any questions regarding these comments, please feel free to contact Charles F. O’Brien, Executive Director, or Susan C. Bryant, Deputy Director, at 518-465-3524.