MEDICAL MALPRACTICE CONTINGENCY FEE SCHEDULE NEEDS AMENDMENT

By Alan W. Clark*

Judiciary Law section 474-a, as amended effective July 1, 1985 sets forth a contingency fee schedule and provision for application for increased fee in extraordinary circumstances. In practice, the fee schedule creates inherent conflict, is unfair and deprives many victims of malpractice the opportunity to hire competent counsel. Applications for enhanced fees are rarely granted. The proposed Amendment set forth in NYAB 7448 provides much needed changes to the Statute.

Pursuant to major legislative reforms addressing an alleged crisis in rising medical malpractice premiums and health care costs, Judiciary Law section 474-a was amended effective July 1,1985 substantially reducing contingency fees allowable in medical malpractice cases. NY CLS Jud § 474-a. The statute, previously allowing a 1/3 contingency fee retainer on the net sum recovered after deduction for chargeable disbursements was reduced to not exceed the following schedule:

"30 percent of the first $250,000 of the sum recovered; 25 percent of the next $250,000 of the sum recovered; 20 percent of the next $500,000 of the sum recovered; 15 percent of the next $250,000 of the sum recovered; 10 percent of any amount over $1,250,000 of the sum recovered." (also to be calculated on the net sum recovered after deduction for chargeable disbursements).

A new subsection 4 was added to the statute providing:

"In the event that claimant's or plaintiff's attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery…"

Subsection 5 provides that any medical malpractice contingency fee in any claim or action brought on behalf of any infant is still subject to court approval required under NY CLS Jud § 474.

The fee schedule applies to wrongful death claims and actions based upon medical malpractice. (*In re Gonzalez*, 150 Misc 2d 205 [Sur Ct, Bronx County 1991]); Estate of Aurora Cortes, 1992 NYLJ LEXIS 7722

The application of this mandatory fee schedule has brought about a dramatic reduction in attorneys fees recoverable in medical malpractice actions. For example, on a 1-million-dollar recovery the attorney fee has been reduced. from 1/3 of the net settlement to overall 23.7% or almost a $100,000 reduction in attorneys fees. On a 1.8-million-dollar net recovery the fee reduction is from $600,000 (1/3) to $329,000 (18.3%), slightly more than half of what it was before the amendment.

The Bill Jacket for Judiciary Law section 474-a notes the following criticisms of the amended fee schedule:

“The proposed bill seeks to amend subdivision 2, 3 and 4 of Sectiсn474(a) of the judiciary law. Under existing law, the attorney and client may agree to either a schedule of compensation (a sliding scale) or a flat 1/3 of the entire award. The sponsor’s memorandum cites the McGill Panel's conclusion "that medical malpractice awards, particularly in settled cases, are often substantially weakened to provide for the attorney's fee and that 'sound limits on contingent fee arrangements are necessary to diminish the distortion of such high awards on the system'". The sponsor's memorandum also expresses the hope that plaintiff's attorneys will be encouraged to accept reasonable settlements that protect the plaintiff s interests. The sponsor’s memorandum does not address the obvious concern that this bill is intended to have a coercive effect on settlement by one party to the advantage of the other party. There is something wrong with a bill which has the apparent punitive mission of making it economically undesirable for plaintiff’s lawyers to represent their clients with all the enthusiasm of the lawyers who represent the doctors, hospitals, and insurance companies.”

“The proposed fee schedule would substantially reduce contingent fees in medical malpractice actions to a level which would discourage plaintiffs’ attorneys from concentrating their efforts on these difficult cases which over the years may have

lost at trial more than 75% of the time. Obviously, plaintiffs without great wealth cannot hire competent counsel on any basis other than contingent. Large insurance companies can afford to pay for the best legal talent to represent their interests. This proposal to reduce drastically the fees of plaintiff's attorneys, cannot be approved. The medical malpractice insurance "problem" is not solved by fashioning legislation that makes access to the courts less likely for those who need it by making it economically unjustifiable for highly skilled attorneys to represent the victims of malpractice by physicians and hospitals." (laws !985 Chapter 0294, page 8, Report No.95, Committee on State Legislation).

Nevertheless, the amended fee schedule set forth in Judiciary Law 474-a was signed into law and applies to all medical malpractice retainers signed on or after July 1, 1985.

Application for an enhanced fee under subsection 4 of the statute requires a threshold showing of inadequacy, such as financial hardship on the attorney before determining whether extraordinary circumstances exist. (*Yalango by Goldberg v Popp*, 84 NY2d 601 [1994]). Here, the Court of Appeals reversed the Order of the Appellate Division and denied the enhanced fee application based on lack of evidentiary showing to overcome the presumption of adequacy. The Court holds:

"Inadequacy of the statutory fee schedule is the touchstone of the section 474-a (4) inquiry. The analysis must begin with the recognition that the section 474-a (2) scheduled fees are presumptively reasonable in all malpractice cases *(see, Gair v Peck,* 6 NY2d 97, 113, 114, *supra).* To succeed on a request for excess compensation, then, the applicant bears the burden of rebutting that presumption by establishing that the fee schedule was inadequate to compensate counsel for the representation provided in the particular case *(id.; Matter of Clinton,* 157 Misc 2d 506, 510, *supra).* Thus, before departing from the statutory fee schedule, the court must make a threshold finding that a departure from the fee schedule is justified because the authorized fee did not equitably compensate counsel. That a threshold showing of inadequacy must be made before relief based on extraordinary circumstances may be granted is self-evident from the plain and unequivocal language of the statute which expressly calls for that predicate…"

The factors that are relevant include economics of the litigation and concomitant financial hardship on Plaintiff's attorneys. Governing emphasis should be placed on whether the award--viewed as a whole or broken down to its hourly equivalent--equitably compensates counsel for "the amount of time reasonably and necessarily spent" in litigating the claim *(People v Perry,* 27 AD2d 154, 161). (*Yalango by Goldberg v Popp*, 84 NY2d 601, 608 [1994])

The court analyzed the factual circumstances as follows:

"Respondent was awarded $ 338,731.74 by application of the statutory percentages. Relying on respondent's estimation that it expended 620 hours in representing plaintiff, respondent was compensated at a rate of almost $ 550 per hour. Respondent does not--nor could it--claim that this rate was somehow unjust. Additionally, based on that 620-hour figure, respondent's representation of plaintiff roughly averaged only 10 hours per month over a five-year period. Under these circumstances, respondent would be hard-pressed to establish that its services necessarily expended in pursuit of plaintiff's claim caused it to forego other practice or otherwise imposed some financial hardship *(cf., Matter of Armani,* 83 Misc 2d 252, 258; *see also, People ex rel. Conn v Randolph,* 35 Ill 2d 24, 27, 219 NE2d 337 [departure from fee schedule in indigent criminal defense case where attorneys were required to live away from home and to suspend their practices throughout year-long trial]). Indeed, the procedural history of this case never progressed beyond pretrial settlement negotiations, and counsel was not required to suspend its practice to attend to a protracted or all-consuming trial *(cf., People v Perry,* 27 AD2d 154, 158, *supra).* Accordingly, a remittal to Supreme Court, as Judge Levine ultimately recommends *(see,* Levine, J., concurring-dissenting opinion at 612), would constitute an inefficient use of judicial resources." (*Yalango by Goldberg v Popp*, 84 NY2d 601, 608-609 [1994])

As to the issue of extraordinary circumstances, the Court notes:

"Because respondent has failed to demonstrate that the compensation in this case was inadequate, we need not address whether extraordinary circumstances existed in this case. We note, however, that factors such as the degree of diligence or success achieved by counsel, the essential factors relied upon by respondent here in seeking excess compensation, do not render a case extraordinary for purposes of the section 474-a (4) application *(see, Matter of*

Clinton, 157 Misc 2d 506, 510, *supra).* The adjustment provision was not designed to reward successful results, nor diligent, thorough, or even exhaustive preparation on behalf of a client *(Reid v County of Nassau,* 158 Misc 2d 26, 30, *supra).* Notably, the percentages contained in the fee schedule are set at levels intended to provide " 'ample compensation for the *best efforts* and services of competent counsel' " *(Gair v Peck,* 6 NY2d 97, 103, 112, *supra* [emphasis added] [quoting preamble to Rule 4])…"(*Yalango by Goldberg v Popp*, 84 NY2d 601, 609 [1994])

The Court further explains,

"Similarly, neither the technical complexity of the medical issues *(cf., People v Perry,* 27 AD2d 154, 161, *supra)* nor the existence of a dispute concerning proximate cause will render the case "extraordinary" *(cf., McGrath v Irving,* 24 AD2d 236, 238). Medical malpractice actions are by their nature complex, warranting extensive and sophisticated preparation. In fact, it is quite routine and ordinary in a medical malpractice action for causation to be in dispute or attributable to multiple defendants *(see, Reid,* 158 Misc 2d 26, 30, *supra).* Moreover, it is customary for parties to "produce the testimony of various experts and to be technically well prepared to develop that testimony or to cross-examine witnesses produced by the opposite side" *(Morse v Palatine Ins. Co.,* 33 Misc 2d 205, 205-206). Finally, although counsel may engage in extensive travel in securing expert medical consultations, those costs do not constitute extraordinary circumstances impacting on the adequacy of the fee because they are reimbursable in full as disbursements for expert testimony or investigation in prosecuting the action *(see,* Judiciary Law § 474-a [3])." (*Yalango by Goldberg v Popp*, 84 NY2d 601, 610 [1994])

The Second Department has affirmed denial of increased fee application following successful outcome after a 9-day trial and total of 970 hours spent in litigation over 7 and ½ years. (*Siu Kiu Lam v Loo*, 155 AD3d 660 [2d Dept 2017]). The Court holding:

"Contrary to its contention, the nonparty-appellant law firm (hereinafter the law firm) failed to demonstrate that its statutory compensation in the sum of $376,198.50 under the Judiciary Law § 474-a (2) schedule was inadequate. The law firm expended approximately 970 hours, that included 9 days of trial, over the

course of the 7½ years it represented the plaintiffs in this medical malpractice action (*cf. Contorino v Florida Ob/Gyn Assn.*, 283 AD2d 67, 71, 726 NYS2d 121 [2001]). The record is devoid of any evidence that the amount of time spent on the representation of the plaintiffs resulted in an exceptionally low hourly rate of compensation, or that it caused the law firm any financial detriment (*see Yalango v Popp*, 84 NY2d 601, 608-610, 644 NE2d 1318, 620 NYS2d 762 [1994]).” (*Siu Kiu Lam v Loo*, 155 AD3d 660, 660 [2d Dept 2017])

However, the Second Department reversed the court below and granted increased fee application where inadequacy of the fee and extraordinary circumstances were clearly demonstrated. (*Contorino v Florida Ob/Gyn Assn.*, 283 AD2d 67, 70-71 [2d Dept 2001]). The Court stating:

“While the fee awarded to CG&M pursuant to the statutory schedule, $ 568,915.45, is by no means de minimis, we are persuaded that the fee is inadequate and does not equitably compensate counsel. As noted, CG&M spent an estimated 6,000 hours over more than eight years engaged in tenacious litigation. This case touched nearly every attorney in the firm, plus paralegals, support staff, consultants, and others. By devoting such an enormous amount of time and energy, not to mention such a large part of the firm's personnel, CG&M, of necessity, forfeited numerous other opportunities in pursuit of a just resolution of this case. Its statutory fee representing less than 15% of the settlement sum is clearly inadequate.

The extraordinary circumstances of this case are readily apparent. The remarkable time and effort expended by CG&M attorneys reaped a sizeable recovery for their clients. While Judiciary Law § 474-a (4) provides for additional compensation applications to be decided "without regard to the claimant's or plaintiff's consent," we cannot ignore the enthusiastic and grateful support of the plaintiff parents for this application. They appreciate their attorneys' "tireless and most diligent efforts."

The Supreme Court denied CG&M's application primarily upon its reading of *Yalango v Popp (supra*). However, that case is easily distinguishable. In *Yalango,* the Court rejected the attorney's claim for additional compensation in a case that was settled before trial. This case was litigated for many years and the trial itself lasted nearly six weeks. The plaintiff's counsel in *Yalango* spent an estimated 620

hours on the case. CG&M attorneys devoted an estimated 6,000 hours to the instant matter. (*Contorino v Florida Ob/Gyn Assn.*, 283 AD2d 67, 70-71 [2d Dept 2001]).

The Surrogate's Court has denied increased fee application on wrongful death compromise based on Counsel hiring another attorney to handle appeal holding that absent specific agreement set forth in retainer providing for increased fee for handling appeal, the scheduled retainer includes the handling of all appeals. (*In re Estate of Clinton*, 157 Misc 2d 506 [Sur Ct, Bronx County 1993]). Thus, Counsel was not entitled to treat the fee paid to another attorney for handling appeal as a reimbursable disbursement, the Court holding:

"…under Judiciary Law § 474-a (2), retained counsel may not recover as a disbursement the fee that he paid to another attorney to perform appellate services because he would not have been entitled to greater compensation than the amount provided by the statutory fee schedule if he had performed these services himself. However, this determination should not be construed as requiring an attorney to prosecute, at counsel's own expense, an appeal from a dismissed medical malpractice action if the retainer agreement provides to the contrary. "(In re Estate of Clinton, 157 Misc 2d 506, 509 [Sur Ct, Bronx County 1993])

The Third Department has held that defending an appeal is considered part of the contingency fee schedule set forth in Judiciary Law section 474-a and does not automatically entitle counsel to increased fee. (*Matter of Cramer*, 24 AD3d 864 [3d Dept 2005]). The Court notes that the original retainer agreement is silent as to additional fee for handling appeal. Notably, the prior appeal resulted in a reduction of the verdict and "We further note that this statute makes no provision for an additional fee by agreement between counsel and client in the event of an appeal. Rather, Judiciary Law § 474-a (4) permits application to the justice who presided at the trial if, because of extraordinary circumstances, the fee computed pursuant to Judiciary Law § 474-a (2) renders compensation inadequate. " (*Matter of Cramer*, 24 AD3d 864, 865 [3d Dept 2005])

The First Department in a negligence action has approved the following language in retainer agreement as not violative of the Appellate Division rules governing retainers in personal injury actions:

"… "Client further understands that the services to be provided through this agreement will not extend through the prosecution of an appeal or representation on appeal brought by any of the parties to the lawsuit," and that "[c]client understands that SONIN & GENIS, ESQS may charge reasonable additional compensation . . . if the case is appealed . . .. This further representation will require a new fee [a]agreement."(*Stewart v NY City Tr. Auth.*, 125 AD3d 129, 130 [1st Dept 2014]).

The Court points out "…. the firm represented plaintiff throughout seven years of discovery, motion practice and trial preparation. Following a three-week trial, the jury returned an approximately $7 million verdict in plaintiff's favor. The firm successfully opposed defendant's posttrial motions, and entered a structured judgment which provided that the firm would receive attorneys' fees equal to one third of the recovery."(*Stewart v NY City Tr. Auth.*, 125 AD3d 129, 130-131 [1st Dept 2014]).

The defendant then appealed the Judgement and Plaintiff's counsel entered into a separate retainer agreement with Plaintiff which was approved by the Court notwithstanding a reduction in the verdict on appeal which was stipulated to by Plaintiff's counsel. The retainer provides as follows:

"…." client further understands that the services to be provided through this agreement is only for prosecution/defense of an appeal only and for no other purpose, and is in addition to the retainer signed for the litigation and trial of this matter, wherein SONIN & GENIS, ESQS., are to receive ONE THIRD (33⅓%) OF THE NET RECOVERY." (*Stewart v NY City Tr. Auth.*, 125 AD3d 129, 131 [1st Dept 2014])

It should be noted that Judiciary Law section 474-a subsection 4 providing for application for enhanced fee specifically notes in pertinent part:

" … Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the justice shall make a written order accordingly, briefly stating he reasons for granting the greater

compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application."

In reviewing the relevant cases your author has not found any medical malpractice case in New York where the enhanced fee allowed even if specifically set forth in the original retainer agreement exceeded 1/3 of the net sum recovered. Most States allow medical malpractice contingency fees of between 1/3 to 40% of the net recovery. For example, California and Illinois allows a 1/3 fee after commencement of the action. (Cal. Bus. & Prof. Code, § 6146 (Deering, Lexis Advance through the 2024 Regular Session Ch 22)); (735 Ill. Comp. Stat. Ann. 5/2-1114 (LexisNexis, Lexis Advance through P.A. 103-593 of the 2024 Regular Session of the 103rd General Assembly)). In Georgia and Arizona 40% fees have been approved as standard and reasonable. Moraitakis v. Gregory Sysyn, 2014 Ga. State LEXIS 415; (*Ohliger v Carondelet St. Mary's Hosp. & Health Ctr.*, 173 Ariz 597, 845 P2d 523 [Ct App 1992]). In Kansas, the court has approved a 45% contingency fee recovery. (*Whittington v Newman Regional Health Ctr.*, 2015 US Dist LEXIS 143037 [D Kan Oct. 21, 2015, No. 14-CV-4008-DDC-KGG]).

Further, in many States that provide a medical malpractice contingency fee schedule the client may agree to waive the schedule and agree to a higher percentage of between 1/3 and 40% of the recovery. See (Conn. Gen. Stat. § 52-251c (LexisNexis, Lexis Advance through 2024 Regular Session approved on or before June 5, 2024)) which allows up to 1/3 and Florida Fla. Bar Reg. R. 4-1.5 and Minardi v. Fla. Health Sci. Ctr., 2016 Fla. Cir. LEXIS 34389 which court has approved up to 40% fee. Even in our sister State of New Jersey the malpractice contingency fee scale allows 1/3 of the first 750K, 30% of the next 750K, 25% of the next 750K and 20% of the next 750K. See N.J. Court Rules, R. 1:21-7. Many States refer to the Professional Conduct Rule 1.5 which allows reasonable fees based on what is usual and customary in practice. i.e. Ariz. Rules of Prof'l Conduct R. 1.5. In sum, it appears that New York mandates the lowest unconditional contingency fee schedule in the Country.

The proposed N.Y.A.B. 7448 presently pending makes substantial changes to Judiciary Law section 474-a. 2023 Bill Text NY A.B. 7448. The proposed bill amends the fee schedule provided in subsection 2 as follows:

“2. Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental, or podiatric malpractice action shall not exceed the amount of compensation provided for in the following schedule:

33.33 percent of the first $500,000 of the sum recovered;

30 percent of the next $500,000 of the sum recovered;

25 percent of the next $500,000 of the sum recovered;

20 percent of ANY AMOUNT OVER $1,500,000 of the sum recovered”

Moreover, the bill would amend section 4 providing for application for enhanced fee to read as follows:

“In the event that claimant's or plaintiff's attorney believes in good faith that THAT HE OR SHE IS ENTITLED TO GREATER COMPENSATION THAN the fee schedule set forth in subdivision two of this section, PROVIDES, AN application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney has an office. Upon such application, the justice, in his OR HER discretion, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. FACTORS TO BE CONSIDERED BY THE COURT IN ORDER TO GRANT THE APPLICATION FOR AN ENHANCED FEE SHALL INCLUDE WHETHER THE PERFORMANCE OF THE ATTORNEY WAS SUPERIOR, TAKING INTO ACCOUNT THE ATTENDANT CIRCUMSTANCES INCLUDING THE RESULT OF THE CASE IN LIGHT OF THE NATURE OF THE LIABILITY AND DAMAGES ISSUES, AND WHETHER THE CLAIMANT OR PLAINTIFF CONSENTS; PROVIDED THAT THE GRANTING OF THE APPLICATION SHALL NOT BE CONTINGENT ON SUCH CONSENT, AND PROVIDED FURTHER, THAT

THE ATTORNEY NEED NOT SUBMIT THE NUMBER OF HOURS EXPENDED (emphasis added in bold). If the application is granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application. “

The Bill provided a new subsection 5 allowing the client to waive the fee schedule set forth in subsection 2 and agree to a contingency fee not to exceed 1/3 of the net recovery. The pertinent text is as follows:

“A CLAIMANT OR PLAINTIFF MAY WAIVE THE PERCENTAGE LIMITATIONS OF SUBDIVISION TWO OF THIS SECTION IF A CLAIMANT OR PLAINTIFF VOLUNTARILY CHOOSES TO DEVIATE FROM THE PERCENTAGE LIMITATIONS SPELLED OUT IN THE MEDICAL MALPRACTICE RETAINER. IN NO EVENT SHALL THE ATTORNEY'S FEE BE GREATER THAN 33.33 PERCENT OF THE AMOUNT RECOVERED. 2023 Bill Text NY A.B. 7448. (emphasis added in bold).

The proposed amendments go a long way toward remedying the unfairness and deficiencies of the mandatory contingency fee schedule and inequities of the application process for granting a fee more than the schedule. For almost 40 years lawyers prosecuting medical malpractice cases have been restricted to the relatively low fee schedule set forth in Judiciary Law section 474-a. Further, the case law applicable to applications for increased fees as set forth above makes it extremely difficult to succeed. During the past 40 years litigation costs and expenses, especially in complex litigation such as medical malpractice cases has dramatically increased making it riskier than ever to prosecute these cases successfully to conclusion. More than ever lawyers are being compelled to prosecute only those cases that present catastrophic injuries and damages as the risk and cost of smaller cases can not be justified by the limited fees recoverable. The result is that many victims of medical malpractice who cannot afford to pay the high hourly fees charged by most experienced lawyers including defense counsel are being ignored and denied access to the courts.

CONCLUSION

The proposed amendment sets forth a more reasonable fee schedule which, although significantly increased, falls below the usual and customary 1/3

contingency fee generally permitted in personal injury claims other than those for medical malpractice. Moreover, the proposed section 5 allows for the client to waive the fee schedule and agree to contingency retainer which does not exceed 1/3 of the net sum refunded, thus providing a cap on fees, and obviating the need for increased fee applications. Should an increased fee application be made under revisions to subsection 4 the court would now be authorized to consider other attendant circumstances and factors including attorney performance, the result achieved in view of difficult liability and damages factors, whether the plaintiff consents to the increased fee (although not required) and further provides that the attorney would not need to submit the number of hours expended on the case. Practice reminder that the amendment still contains the proviso that the increased fee cannot exceed the fee fixed in the contractual agreement between the lawyer and client. In sum, the proposed changes make it more likely that the increased fee application would be granted especially in cases where attorneys achieve superior results in view of difficult liability and damages.

*

*Alan W. Clark is a trial attorney and Of Counsel to Duffy & Duffy, PLLC concentrating in medical negligence and personal injury law. Mr. Clark is board certified and recertified in Professional Medical Liability by the American Board of Professional Liability attorneys. He is a member of numerous bar associations including AAJ, NYSTLA, NCBA, NSTLA, NYSBA and NYSATLA. Mr. Clark has been published in the NYLJ and lectures on various medical malpractice topics.