Members of the Workers' Compensation Board:

On behalf of the members of the Injured Workers' Bar Association (IWBA), we respectfully submit the following comments regarding (1) the proposed amendments to 12 NYCRR 300.17; (2) Subject Number 046-943; and (3) revised form OC-400.1 (4-17). We encourage the Board to revise the regulation, Subject Number, and form to accomplish the following goals:

- Ensure that legal representation is widely available to injured workers, including low-wage workers, immigrant workers, and those with "medical-only" cases.

- Recognize that existing practice, procedure and policies regarding attorney fees are adequate and do not result in excessive fees or unreasonable costs to workers or employers.

- Recognize that legal representation of injured workers before the Workers' Compensation Board is fundamentally a contingency fee practice, and that attorney fees should not be tethered to "time spent" to any significant extent.

- Consider the legal resources available to injured workers in pursuing their claims as compared to those available to employers and insurance carriers defending those same claims.

- Minimize, to the greatest extent possible, the amount of time, effort, and resources attorneys are required to devote to preparing and completing forms related to fee applications.

Legal Representation is an Important Right for Injured Workers.

Our members are dedicated to obtaining workers' compensation benefits for injured workers throughout New York State. We believe that legal representation is essential to the preservation of their procedural and substantive due process rights, as well as to their receipt of full and proper benefits under the law. Indeed, a worker's access to justice depends on his or her access to representation.

The Brennan Center for Justice has observed that "[i]n order for 'equal justice for all' to be more than a hollow promise, people require access to the courts that is meaningful, with representation by qualified counsel, the opportunity to physically enter the court and to understand and participate in the proceedings, and the assurance that their claims will be heard by a fair and

capable decision-maker and decided pursuant to the rule of law." Access to Justice: Opening the Courthouse Door, Udell and Diller, Brennan Center for Justice White Paper at p. 1, 2007.

The Brennan Center stated that "the crisis of representation for low-income people in civil cases persists, and grows worse, because of chronic funding shortages, state and federal restrictions, shortfalls in pro bono help, **and a rollback of financial incentives for attorneys in private practice to bring critical cases**." Id. at p. 4 (emphasis added).

The New York Law Journal has reported on this specific problem in New York, with the Appellate Division, First Department holding hearings to seek a solution to the crisis. First Department Kicks Off Hearings on Civil Legal Services for Poor, New York Law Journal, September 29, 2010 at p. 1. At the First Department's hearings, judges called attention to the problems posed by pro se litigants, and the lack of attorneys available to provide representation – primarily due to the lack of adequate fee arrangements – was cited as a critical issue. Id. A similar problem afflicts the state's criminal justice system. See, e.g., Analysis of the Indigent Legal Services Fund Maintenance of Effort Provisions, New York State Public Defenders Association, March 2009.

The widespread ability of injured workers to obtain representation is a significant benefit to the Board, which to date has not been confronted with a crisis similar to the criminal or civil justice systems. The continued provision of reasonable and adequate attorney fees, without imposing unnecessary burdens on the legal profession, is important to ensure widespread representation of injured workers.

The United States Supreme Court has held that an administrative system in which the agency must approve attorney fees should take "into account the quality of the representation, the qualifications of the representative, the complexity of the legal issue involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." United States Dept. of Labor v. Triplett, 494 U.S. 715, 718, 110 S. Ct. 1428, 108 L. Ed. 701 (1990). It may not, however, create a system in which attorneys are needed but "the fee limitation would make attorneys unavailable to claimants." Triplett, 494 U.S. at 722. Notably, in upholding the constitutionality of the fee regulation at issue, the Supreme Court relied upon "the existence in this country of a thriving contingent-fee practice" as permitting attorneys to compensate for the risk of an inadequate fee in some cases by receiving a larger fee in others. Triplett, 494 U.S. at 726.

On constitutional grounds, courts in Florida, Utah and Alabama have each recently struck down limitations on attorney fees that adversely impacted the ability of injured workers to secure representation. Castellanos v. Next Door Co.; Injured Workers Association of Utah v. State; Clower v. CVS Caremark Corp.

We therefore believe that the Board's regulation, Subject Number and form should be revised to minimize the paperwork and regulatory burden on attorneys and to ensure that the system

continues to provide reasonable and adequate attorney fees so that widespread representation of injured workers will continue to be encouraged.

Current Attorney Fees Are Not Excessive.

It has been widely reported that New York's workers' compensation system involves $10 billion annually. See, e.g., https://www.nysenate.gov/newsroom/press-releases/george-amedore-jr/senators-call-sensible-workers-comp-reform-budget. In a speech to the Society of New York Workers' Compensation Bar Association on May 18, 2017, Chairman Munnelly stated that the Board approved $300 million in attorney fees in 2016 – about 3% of all system costs. However, unlike many other states, employers and insurers in New York bear no cost at all for an injured worker's legal expenses. Attorney fees awarded by the Board are a lien on the worker's award, and are thus part of indemnity benefits paid to injured workers.

In cases where no indemnity benefits are payable and the claim is limited to one for medical treatment, there is no provision for any legal fee at all. Attorneys provide representation in many such cases despite the lack of any mechanism for payment. However, in many others the worker is unable to obtain representation due to the absence of attorney fees. There are also a significant number of cases in which the indemnity benefits due are inadequate to properly compensate an attorney for the time spent or result achieved in the case. Nevertheless, there is widespread representation in these cases because attorneys are fully compensated by fees awarded in other cases.

Because claimant attorney fees are tied to indemnity benefits, they increase only when benefits rise. This did not occur for fifteen years between 1992 and 2007 as the maximum benefit rate remained frozen at $400 per week. Just as the 2007 legislative reforms corrected the historic inadequacy of benefits for injured workers, it also corrected the decade-and-a-half stagnation of fees for attorneys, who confronted rising costs without the corresponding ability to raise their fees.

We therefore believe that attorney fees are not excessive by any measure. To the contrary, even under existing policy and procedure, the Board's awards of attorney fees do not adequately consider the full range of services provided by attorneys, or the full scope of the benefits they obtain for injured workers. As noted above, claimant attorney fees are a miniscule percentage of the value of all benefits secured for injured workers, and are no cost whatsoever to employers or insurance carriers.

Representation Of Injured Workers Is Fundamentally A Contingency Fee Practice.

Representation of injured workers before the Board is akin to a contingency fee practice. Attorneys are prohibited by law from entering into hourly retainer agreements that would ensure adequate payment for "time spent." Many cases (which may in fact be a significant majority of

the cases in which representation is provided) result in either no award or one that is insufficient to provide for payment of an adequate attorney's fee. Each one of these cases represents a benefit to the injured worker, a benefit to the Board, and a cost to the attorney in time spent and resources required.

The American Bar Association has quoted the Pennsylvania Supreme Court's discussion of this subject as follows:

> If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.

American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 94-389, December 5, 1994 at p. 1.

Although workers' compensation is a "no-fault" system, the same principle applies. In Post v. Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351 (1915), the Court of Appeals held that

> The act was passed pursuant to a widespread belief in its value as a means of protecting workingmen and their dependents from want in case of injury when engaged in certain specified hazardous employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity, and to make reasonable compensation for injuries sustained or death incurred by reason of such employment a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act.

Post, 216 N.Y. at 553.

In workers' compensation, as in personal injury, the legislative goal is to ensure widespread representation of the injured and disabled despite their lack of financial resources. It has done so by endorsement of contingency fee arrangements, in which the attorney accepts "the risk that

payment will be either inadequate for the services performed, or entirely absent." A Critical Survey of the Law, Ethics and Economics of Attorney Contingent Fee Arrangements, Shajnfeld, 54 New York Law School Law Review 773, 788 (2009/2010). By endorsing contingency fee arrangements, the Legislature has recognized that "[g]enerally, contingent fees may exceed hourly fees for the same work" because of the risk assumed by the attorney, including "the possibilities that (1) the client fires the attorney before recovery but after significant work has been undertaken; (2) the client demands that the attorney accept a low settlement offer from the opposing party, or rejects a reasonable offer in favor of risky litigation; (3) the applicable law changes during the pendency of the case; (4) the case is lost; [or] (5) the case is won, but the award is minimal." Id.

Stated differently, "[a]n attorney takes a risk the instant she accepts a matter on contingency. The case may require years of effort and produce no recovery. It may resolve itself within minutes of acceptance through no effort of the attorney. It may, as most cases do, fall somewhere in between these two extremes. … The attorney must be compensated for taking risk, or she will not take it. While it may seem distasteful to allow an attorney to collect a large contingent fee in a case where victory proves to be all but assured shortly after retention, consider that the attorney generally does not enjoy the ability to rescind a fee agreement should success prove more elusive than at first expected. It would be unfair to force attorneys to revisit fee levels in winning cases, but not allow them to do so in losing cases." Id. at p. 791.

To the extent that the proposed regulation, subject number, and form focus on documentation of "time spent," or minimize consideration of the extent of the benefits or award obtained for the client, this undermines the essential nature of the representation before the Board as a contingent fee arrangement. It fails to properly recognize attorneys for the risk assumed "the instant she accepts a matter," disregards the possibilities – and in many instances the strong probabilities - that the attorney will be compensated inadequately or not at all, and will ultimately result in the loss of representation for the very class of individuals the Legislature sought to protect.

We therefore believe that in order to permit low wage and immigrant workers to pursue their claims, and in order to continue to encourage attorneys to represent injured workers in matters where there is likely to be little or no attorney fee awarded, the Board must recognize and honor the fundamental nature of legal practice in the system on a contingency fee basis.

We would further note that the Board's current structure for petition and approval of attorneys' fees renders it nearly impossible to comply with Rule 1.5 of the Rules of Professional Conduct in explaining a concrete fee arrangement to a potential client. Rule 1.5 (b) and (c) provide, respectively, that "A lawyer shall communicate to a client the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible," and (with respect to contingency fee cases), "Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal…" The Board's current fee structure and proposed regulation

render it nearly impossible to strictly comply with the Rules of Professional Conduct relative to attorneys' fees.

Attorney Fees Related To Representation Of Injured Workers Are Significantly Less Than Defense Expenditures by Employers And Insurers.

There is no question that the resources available to the insurance industry in defending workers' compensation claims far exceed those available to injured workers. The insurance industry is a multi-billion dollar enterprise with unlimited access to attorneys, investigators, "independent" medical examiners, and a host of other services to defend claims. There is no limitation on an insurer's right or ability to pay its attorneys or to finance its defense, nor is there even the minimal requirement of transparency and disclosure regarding defense costs that might bring the disparity of resources into sharper focus. Defense costs and fees are wholly unregulated and unsupervised by the Board.

By contrast, the injured worker's resource is limited to seeking an attorney who will undertake representation on a contingency basis, in which the attorney receives a small portion of the benefits available to the worker, subject to review and scrutiny the Board, and without access to any other services beyond those the attorney or the injured worker are able to fund out of their limited resources. The proposed regulation, Subject Number and form would further restrict the legal resources available to injured workers, and would exacerbate existing inequities in the system.

The Workers' Compensation Research Institute (WCRI) has reported that defense litigation costs have skyrocketed since the 2007 statutory reforms. See, e.g., https://www.wcrinet.org/reports/monitoring-trends-in-the-new-york-workers-compensation-system. It is estimated that the full range of "defense and cost containment expense" for employers and insurers – including payments to defense counsel, investigators, and more – is approaching $500 million annually. The fact that this figure nearly doubles the Board's estimate of claimant attorney fees, serves to exemplify the disparity in the litigation resources available to injured workers as opposed to insurers. It is also indicative of the increasing complexity of the workers' compensation system, and the importance of providing injured workers with resources that are both adequate and at least remotely comparable to those available to employers and insurers.

We therefore request that the Board consider the respective resources available to injured workers as compared to employers and insurers prior to further regulating attorney fees, including the creation of new obligations for attorneys to meet and the limitation or reduction of attorney fees.

Attorneys Should Not Be Required To Devote Extensive Resources To Document "Time Spent" Or For Submission Of Forms.

Stated succinctly by Abraham Lincoln, "a lawyer's time and advice are his stock in trade." As a matter of policy, it is in the best interests of the client – in this case the injured worker – for the attorney's time and effort to be spent advancing his or her claim, instead of completing paperwork that serves no interest of the client and does not provide meaningful information to the Board about the quality of the representation or the result achieved. In every case, the WCL Judge has access to the period of time in which the attorney represented the injured worker, the nature of any disputes that may have arisen during the pendency of the claim, the amount of benefits that have been awarded and paid, the amount of the award at issue in connection with which a fee is being requested, the professional standing and reputation of the local attorney, and any input from the client. Most of the relevant information is in the Board's electronic case folder at the WCL Judge's fingertips, and there is little purpose to requiring the attorney to repeat it, or to penalizing the attorney for failure to do so.

We believe that the proposed regulation, Subject Number, and form unnecessarily elevate form over substance, inappropriately direct attention away from the quality of the representation and the result achieved and towards "time spent," and needlessly divert the time, attention and resources of attorneys away from representing injured workers and towards the creation and submission of "billing" documents that should play little or no role in the Board's determination of a proper attorney's fee.

We would also note the gross and seemingly inexplicable discrepancy between the severely punitive measure of reducing a potentially substantial attorney fee to $450 as penalty for what are effectively ministerial errors in contrast to the lesser penalties (typically between $250 and $1,500) imposed for what the Board deems to be improper attorney conduct (e.g. duplicate submissions, unnecessary hearings and/or adjournments, improper objections to Proposed Decisions, etc.). There appears to be no rational legal basis to impose a far harsher penalty for ministerial errors than for actions the Board deems to be improper attorney conduct.

Comments on the Proposed Regulation, Subject Number, and Revised OC-400.1 Form.

As to the proposed regulation, we submit the following comments:

Proposed Regulation 12 NYCRR § 300.17(b)(2): Judiciary Law § 90 provides that violations of the Code of Professional Ethics, and any discipline for such violations, are subject to the exclusive jurisdiction of the Appellate Division. There is no provision of the Workers' Compensation Law that provides the Board with authority to comment, determine, pass judgment on, or implement discipline relative to the Rules of Professional Conduct. Thus, to the extent the proposed regulation provides that the Board may decide that conduct "will be considered a violation of Rule 1.16 of the Rules of Professional Conduct," it exceeds the Board's statutory authority and is invalid.

Proposed Regulation 12 NYCRR § 300.17(c): The portion of the proposed rule that provides for the complete forfeiture of any attorney fee for failure to file a notice of substitution or withdrawal is unduly harsh. Although we recognize the Board's legitimate interest in ensuring proper notification of representation, non-representation, and substitution of counsel, where legal service has been rendered and a beneficial result achieved, the denial of an attorney fee in the entirety, as a matter of regulation and without the provision of any flexibility, is unduly punitive. In such circumstances, counsel should be awarded a fee based on *quantum meruit*, with an appropriate downward adjustment for any irregularity of service, taking into consideration all applicable facts and circumstances.

Proposed Regulation 12 NYCRR § 300.17(d): As to this subdivision of the proposed regulation, and all other relevant subdivisions, we suggest that an appropriate threshold for submission of a fee request would be $6,000, instead of $1,000. By way of reference, the federal government approves attorney fees in claims for Social Security Disability benefits on the basis of 25% of the past-due benefits or $6,000 under an "expedited retainer," without requiring counsel to submit a fee petition or detailed time sheet. A fee petition containing that information is required only when a fee is requested greater than $6,000. This provides a reasonable benchmark for the threshold beyond which a written fee request may be required. We would observe that the contingency figure of 25% is also instructive on the point that current attorney fees in workers' compensation cases (about 3% of system costs) are in no way excessive.

Proposed Regulation 12 NYCRR § 300.17(d)(3): This portion of the proposed regulation is unclear, and compliance will be impractical and in some cases impossible. At the outset, the regulation provides that a fee request must be sent to the claimant at least 10 days prior to a hearing if the claimant is not present. In practice, there are many situations in which it is unknown 10 days prior whether the claimant will be present, or whether an award will be made. The regulation therefore makes it incumbent upon the attorney to mail every client a fee request at least 10 days prior to every hearing (it is noteworthy that attorneys generally receive hearing notices 14-21 days prior to the hearing date) to account for the possibility that an award may be made or the client may not appear. We respectfully suggest that this is an unreasonable and impractical burden for the legal profession.

The proposed regulation goes on to provide that "[t]he fee application **shall contain a statement signed by the claimant**" either agreeing with or objecting to the attorney fee requested. As a matter of practicality, counsel has no legal or ethical means of compelling the claimant to sign and return a copy of the fee application; counsel can only send the client a copy of the application and request its return. This is consistent with the final (existing) sentence of the subdivision which only requires service by the attorney, but appears to be contradicted by the proposed language immediately preceding, which requires signature by the client.

We believe that the proposed regulation should be revised to provide that where a fee application is submitted at a hearing at which the claimant is not present, a copy of the application shall be mailed to the claimant, proof of service filed with the Board, and payment of the fee shall be

withheld until either (1) the expiration of 10 days from the date of service or (2) submission of a copy of the fee request signed by the claimant. Under these circumstances, if the fee request is mailed to the claimant 10 days prior to the hearing, the fee may be approved and paid thereafter, but if either the claimant's non-appearance or the award is unforeseen, an opportunity is provided for the attorney to submit a fee application and for the claimant to be notified and provided an opportunity to be heard before the fee is approved and paid.

Proposed Regulation 12 NYCRR § 300.17(e): As set forth above, we believe that the proposed regulation improperly emphasizes "time spent" as opposed to the quality of the representation and the nature and extent of the result achieved. As written, this subdivision appears to indicate that the sole basis of an attorney fee for conciliation, administrative determination, or Section 32 awards is to be time spent, which we believe is inappropriate and contrary to law.

This is further exacerbated by the portion of the regulation that limits the fee application to "time spent" since the submission of a previous fee request, implying that if a previous fee was awarded then that necessarily fully compensated the attorney for service rendered up to that time, and thus any subsequent attorney fee can only be based upon further work performed. As discussed previously, in many cases attorneys perform substantial work that cannot receive an appropriate fee due to the inadequacy or non-existence of benefits available. In some instances additional benefits later come due based on the attorney's prior work, which was not fully compensated by the previous fee awarded. Thus, to the extent the regulation presupposes that any prior fee fully compensated the attorney for service rendered up to that point in time, it is improper and should be revised.

We again emphasize that the primary basis for the award of an attorney fee should be the nature of the service rendered and the result achieved for the client, in which the amount of the award should receive significant consideration, rather than "time spent."

Proposed Regulation 12 NYCRR § 300.17(f): Our previous comments as to proposed regulation 12 NYCRR § 300(b)(2) are equally applicable here, with the additional comment that the use of the term "unbecoming" is vague, subjective, and incapable of providing adequate notice about precisely what conduct the regulation seeks to address.

Proposed Regulation 12 NYCRR § 300.17(i): We believe that this portion of the proposed regulation should be revised to provide attorneys with the option to receive notifications from the Board electronically. We note that the Regulatory Impact Statement submitted with the proposed regulation states that "[t]here are no projected costs to regulated parties who may be affected by the proposed amendment." We strongly disagree with this assessment. The promulgation of a new form, new regulation, new requirements, and new means of service will result in significant costs to attorneys throughout the state. Every affected law firm will be required to hire or reassign staff for the sole purpose of complying with the numerous requirements imposed by the proposed regulation, Subject Number, and form. Every affected law firm will be required to make significant modifications to their information technology and office processes – in many instances at great expense - to come into compliance. The number of

pages generated, scanned, and submitted viz. the submission of fee applications is likely to expand dramatically, which will result in additional costs to the Board connected with scanning in addition to the significantly increased cost for law firms. The imposition of a requirement that law firms receive and process communication from the Board electronically will result in yet additional costs related to staff, technology and office processes.

It must be noted that the proposed regulation's emphasis upon time spent, documentation, and process is a radical departure from the previous 100 years of workers' compensation practice. The Board has never previously required the submission of contemporaneous time records or considered "time spent" to be an important consideration in determining awards of attorney fees. The proposed regulation thus imposes a significant burden on attorneys, much of which applies to service rendered in previous years in which such requirements did not exist. The proposed regulation will result in significant costs to attorneys attempting to come into compliance with its requirements.

In addition to the foregoing costs, the provisions of the regulation suggest that the regulatory goal is to reduce fees for attorneys who represent injured workers. This would obviously impose a significant cost upon the affected attorneys, and as discussed above would impose a significant indirect cost upon low wage workers and those with "medical only" cases who may no longer be able to secure representation if overall attorney fees are reduced systemically.

The Paperwork provision of the Regulatory Impact Statement is also inaccurate. As discussed above, there is little question that implementation of the proposed regulation will result in the creation and submission of vastly greater paperwork for fee applications.

We also disagree with the Compliance Schedule in the proposed regulation, which incorrectly states that "compliance will be easily achieved." As set forth throughout these comments, we believe that compliance will be extraordinarily difficult to achieve, in part because the proposed regulation and Subject Number impose new requirements for work performed in previous years, but also because compliance will require the implementation of many new procedures, the acquisition of new information technology, and the reallocation of resources by law firms throughout the state. It would be more reasonable to apply the new requirements, if at all, to clients retained after the date of implementation of the new regulation.

The Job Impact Statement is also likely inaccurate. Implementation and enforcement of the proposed regulation, with the anticipated impact on attorney fees, will reduce wages of thousands employed in law offices around the state, and may result in the loss of jobs in those offices.

The same issue affects the Regulatory Flexibility Analysis, which incorrectly states that "[t]he proposed rule will not have an adverse impact on small businesses." The hundreds of law firms that represent injured workers before the Board are small businesses; every one of them will suffer a wide range of adverse impacts from the proposed regulation, as outlined above.

As to Subject Number 046-943, we submit the following comments:

Part One: As stated above the threshold for submission of a written fee application should be raised to $6,000, instead of $1,000.

Part Two: We defer some of our comments regarding revised Form OC-400.1 to the following portion of this submission, which is specifically addressed to the form. However, we do have the following comments about the Subject Number viz. the form:

- The Subject Number's directive "that the claimant's attorney or licensed representative should be as specific as possible when describing the services rendered" raises the potential for a conflict between the Board's directive and attorney/client privilege. An attorney is not at liberty to disclose to the Board the substance of communication with the client, and in some circumstances even the information that the attorney communicated with the client on a certain date or time and in a certain manner may be adverse to the client's interests. Moreover, any information contained on the attorney's fee application or annexed time sheets will be available not only to the Board, but also to the employer and/or insurer. While it is appropriate for the attorney to provide a summary of the types of service rendered and the period of time in which the representation occurred, the directive to "be as specific as possible" raises grave concerns about the potential loss of full protection of client confidences, breach of attorney/client privilege, and disadvantage to the injured worker in litigation.

- As set forth previously, the issue of time spent is a minimal consideration in what is fundamentally a contingency fee arrangement, and the value of the attorney's service should be measured primarily by the extent of the award obtained and secondarily by the skill and efficiency with which that occurred. The emphasis on "time spent" only serves to increase fees for less skilled or less efficient attorneys, and to diminish them for those with greater skills, experience and efficiency. This is plainly contrary to sound public policy.

- The Subject Number and the revised form require the attorney to certify that "language assistance services were provided to the claimant to the extent required." There is no statutory authority upon which the Board is authorized to impose an unfunded mandate upon counsel to provide interpretation services. We note, however, that the Board is subject to an Executive Order requiring it to provide such language access services. The Board's obligation should not be transferred to private practitioners by Subject Number and form in the absence of any statutory authority.

Part Three: There is no question that the Board has the statutory authority to approve attorney fees, which are a lien upon the award to the injured worker. As set forth above, we believe that in evaluating such requests, the Board should recognize the public interest in maintaining a

system that enhances widespread access to representation, including low wage workers who are generally unable to retain attorneys on an hourly basis. The Board should also consider the fact that claimant attorney fees are not presently excessive; that the claimant attorney bar generally functions as a contingency fee practice; and that increased monitoring, regulation, and potential reduction of claimant attorney fees will further exacerbate the existing inequity of legal resources available to injured workers as compared to employers and insurers. Finally, the Board should take into consideration that it serves nobody's interest to implement a system in which an attorney will be required to divert significant time and resources away from attending to the interests of injured workers to prepare and submit fee applications primarily intended to reflect "time spent," which is (at best) a tertiary consideration in evaluating the attorney's service to the client.

Part Four: We agree with the Subject Number's observation that the attorney for an injured worker may provide extensive service and representation long after a fee has been awarded and the case closed. Indeed, it is our experience that this is the rule, rather than the exception. In such circumstances, however, there is no provision for an attorney fee based on the additional "time spent." We note that although the Subject Number mentions this situation in Part Four, there is no discussion about how the Board intends to take the requirement for continued unpaid representation into account in approving fee applications. To the extent that the Subject Number focuses on "time spent" as a significant factor in the approval of attorney fee applications, it cannot account for future time that will be required to be spent, nor can that time be quantified at the time the fee is requested. However, such is accounted for and encouraged by emphasizing the contingency fee aspect of the system, rather than a "time spent" basis.

As to revised Form OC-400.1, we submit the following comments:

Issuance of the Form: We note that the revised form was issued and made effective immediately, without awaiting submission of comments or adoption of the proposed regulation that largely provides the foundation for the revised form.

Basis of the Attorney Fee: The inclusion of check-boxes preceding Section A of the revised form that appear to limit consideration of the attorney fee to a specific award is improper and does not provide adequate consideration of the services rendered by the attorney. There are virtually no cases in which the attorney's service was rendered solely viz. a "schedule loss of use," "classification," or "Section 32 Agreement." Almost without exception the attorney has provided advice and representation to the client about a host of other issues related to the workers' compensation claim. While we recognize that the Board has attempted to address this by the inclusion of a box for "Other," the fact is that this "exception" will invariably swallow the rule. These boxes should be eliminated.

Attorney/Licensed Representative Certification: Section C should be revised in a manner consistent with our preceding comments regarding proposed regulation 12 NYCRR § 300.17(d)(3).

Claimant's Statement: The language in parentheses following "Claimant's Statement" should be deleted in accordance with our preceding comments regarding proposed regulation 12 NYCRR § 300.17(d)(3).

Fraud Statement: The fraud statement on the form should be deleted. Fee applications are submitted to the Board, not to "an insurer or self-insurer," and as discussed above, attorney discipline is the purview of the Appellate Division.

Conclusion

Thank you for taking the foregoing comments into consideration. We believe that the present system, in which claimant attorneys are compensated on what is essentially a contingency fee basis, achieves many important goals. First, it permits widespread access to benefits, particularly by low wage workers who would be unable to retain counsel on an hourly basis. Second, it has resulted in reasonable attorney fees, which depend upon the extent of the workers' wage and the amount of benefits obtained and thus inherently consider the worker's means. Third, it narrows the disparity in the resources available to injured workers in pursing their claims as compared to those available to employers and insurers in defending them. Finally, it properly permits attorneys to devote their time, effort, and resources to the representation of the injured worker, and does not divert them into compliance with a cumbersome regulation that erroneously emphasizes "time spent" over the result obtained for the client.

We hope that the Board will withdraw the proposed regulation, Subject Number, and revised form pending further discussion with the bar and injured workers themselves.

Very truly yours,

The New York Injured Workers' Bar Association
Dated: June 20, 2017