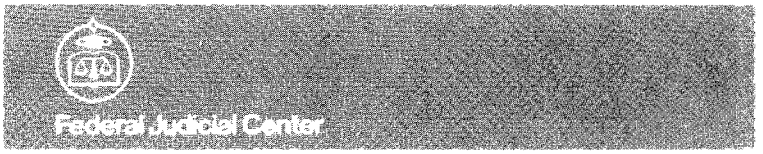
# Attorney Fee Petitions: Suggestions for Administration and Management



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# ATTORNEY FEE PETITIONS: SUGGESTIONS FOR ADMINISTRATION AND MANAGEMENT

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# FOREWORD

The interest of federal judges in fair and efficient procedures for the fixing of attorneys' fees, as the authors point out at the beginning of their report, can hardly be doubted. More than one hundred federal statutes now provide for the awarding of attorneys' fees and, understandably, the cases have proliferated. Judge Edward Tamm put it well when he observed that "federal judges may be excused for adding attorneys' fees cases" to the old adage about death and taxes. Administration of these provisions has proved both difficult and time-consuming, often proving more burdensome than disposition of the underlying litigation.

In 1980 the Federal Judicial Center published *Attorneys' Fees in Class Actions* by Prof. Arthur R. Miller, which surveyed in some detail the various federal courts' definition of justifiable fees. That report also made suggestions designed to assist federal judges in the management aspect of such cases. Building on this seminal work by Professor Miller, after five years of further developments, the authors of this report analyze cases, statutes, local rules, and other relevant materials, all from a case management perspective.

The report first considers the announcement of guidelines at the pretrial phase, then examines the fee application process and the steps involved in applying the lodestar method. Finally, it offers alternative approaches to the troublesome problem of simultaneous negotiation of the attorney fee issues and the merits of litigation.

Throughout their consideration of the fee application process, the authors refer to techniques for streamlining the repetitive aspects of managing attorney fee applications and disputes, such as use of standardized formats for fee applications, adoption of fee schedules to simplify decisions about market rates, and use of local rules to establish a standard process for discovery and settlement. In their consideration of the pretrial phase, the authors explore alternative uses of nonjudicial personnel to handle routine aspects of the fee application process.

It is our hope that this report may prove helpful. We realize that the quest for optimal procedures to deal with attorneys' fees will

continue, and we would be grateful for any comments or suggestions you may care to share with us.

A. Leo Levin

# INTRODUCTION

> To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases.[1]

As attorney fee cases in federal courts have proliferated in the last decade, there are more than one hundred federal statutes that provide for an award of attorneys' fees in specified circumstances.[2] Recent amendments to the Federal Rules of Civil Procedure have expanded the authority of federal courts to award attorneys' fees as sanctions for violations of the rules.[3] These amendments have increasingly drawn federal courts into the business of resolving disputes about the amount of attorneys' fees to be awarded to one litigant's counsel at the expense of the other party.

Courts now regularly monitor information provided in support of fee requests. Because of these major new demands, courts need to develop systems for managing the information supplied to them and for efficiently deciding disputes about attorneys' fees. This report is designed to assist courts in establishing such systems.

Each phase of the evolution of a case differs in its potential impact on the recovery of attorneys' fees. Depending on the degree of planning and case management involvement by the court, action at any stage may either avoid future problems or create them. Therefore, we will suggest attorney fee management techniques at each stage of the litigation process. In chapter one, we will describe ways in which the courts' authority has been used efficiently to simplify and objectify the fee request process at the pretrial phase. We will begin by comparing the structure of civil fee statutes to the fee provisions of the federal Criminal Justice Act and then turn to discussion of various issues that arise in the pretrial phase of a case. In later sections, we will deal with issues relating to settlement of attorney fee issues and to judicial consideration of applications for attorneys' fees.

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1. Judge Edward Tamm in Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982).
2. E. Richard Larson, Federal Court Awards of Attorney's Fees (1981).
3. *See, e.g.*, Fed. R. Civ. P. 11 and 16(f) and Advisory Committee Notes.

## Criminal and Civil Fee Provisions

In the federal criminal fees recovery arena, the Criminal Justice Act applies, allowing for recovery of fees for defending indigents. Rates peak at $60 per hour, up to a maximum of $2,000 for one or more felonies and $800 for one or more misdemeanors.[4] Under the statute, the attorney must submit a sworn statement with records documenting the time expended, services rendered, and expenses incurred. Attorneys must also report if they have filed applications for compensation from other sources.

Similarly, the Equal Access to Justice Act, which had lapsed at the time this report was written, provided for recovery to plaintiffs who prevail in an adversary adjudication before an administrative agency unless the government's position was substantially justified.[5] This law primarily allowed small businesses, people of moderate incomes, and nonprofit organizations to challenge unreasonable government actions.[6]

EAJA fees were capped at $75 per hour, unless exceptional factors justified a higher fee.[7] The recovery process provided that an attorney fee request be made within thirty days of final judgment. This request must have alleged that the government's position was not substantially justified and must have included an itemized statement from attorneys and expert witnesses stating the time expended and the rates at which fees and expenses were computed.[8]

In a substantial number of federal civil actions, statutes provide for attorney fee recovery without setting a mandatory maximum hourly rate. For example, the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), the Securities Exchange Act (15 U.S.C. §§ 78i(e), 78r(a)), and the Clayton Act (15 U.S.C. § 15) all have such provisions. The rationale is that Congress intended to allow "reasonable" fees, determined on a case-by-case basis, to create an incentive for attorneys to take such cases.

In addition, the allowance of reasonable fees serves to deter defendants from violating plaintiffs' statutory rights. Losing defendants must not only pay their own legal fees plus damages, they must also assume responsibility for the plaintiffs' attorneys' fees. A reduction in delay and intransigence in the litigation may also result from the award of attorneys' fees because defendants may be liable for both sets of fees.

4. 18 U.S.C. § 3006A(d)(1), (2).
5. 28 U.S.C. § 2412(d)(1)(A).
6. 28 U.S.C. § 2412(d)(2)(B).
7. 28 U.S.C. § 2412(d)(2)(A).
8. 28 U.S.C. § 2412(d)(1)(B).

Some statutes include provisions designed to deter bad-faith litigation practices of plaintiffs. For example, the Civil Rights Attorney's Fees Awards Act provides for attorney fee awards to defendants upon a finding that the suit was clearly frivolous, vexatious, or brought for harassment purposes.[9]

Courts have extensive authority to fill the vacuum created by congressional use of the term "reasonable" in attorney fee award statutes.[10] In addition to their traditional equitable jurisdiction over fees and rates charged, courts have the right to establish local rules to govern the timing and content of attorney fee requests.[11] Some rules have been adopted, but, on the whole, they deal with the form and time of filing of applications rather than the type of activity that can be compensated (see chapter 3). From this brief comparison of the civil statutes with the Criminal Justice Act and the Equal Access to Justice Act, we can see that Congress has given the courts much wider discretion in the general civil arena than in the EAJA or the CJA. Consequently, courts must undertake the burden of articulating objective guidelines for administration of the civil statutes to bring some order to a potentially chaotic field.

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9. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* Larson, *supra* note 2, at 314, 318-19.

10. Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y, 421 U.S. 240 (1975).

11. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 454 & n.16 (1982).

# I. ESTABLISHING GUIDELINES FOR MANAGEMENT OF ATTORNEY FEE REQUESTS

## Initial Conference

Under the new Federal Rules of Civil Procedure, the trial judge increasingly has the opportunity to exercise early and comprehensive control over a case.[12] At the initial case conference, the court may address the issue of attorneys' fees and clarify any ground rules it wishes to establish to guide counsel in the event that fees are awarded.[13]

### Agenda

Before setting an agenda for the initial pretrial conference, the court may want to consider discussion of some or all of the following topics, each of which will be discussed more fully below:

- Pronouncement of a general intent to control attorneys' fees, referring to appropriate cases
- Promulgation of explicit guidelines concerning the type of legal activity that will be compensable (e.g., the number of lawyers who will be paid for attendance at a deposition or pretrial conference)
- Formation of a procedure for organizing counsel in a complex case, with consideration of how lead counsel will be selected and ground rules and limitations on the use of committees
- Establishment of discovery schedules and limitations as well as controls over other pretrial and trial procedures with a

12. *See* Fed. R. Civ. P. 16(b); Jaquette v. Black Hawk County, 710 F.2d 455 (8th Cir. 1983); *see also* A. Miller, Attorneys' Fees in Class Actions 4–5, 343–45 (Federal Judicial Center 1980).

13. Of course, there is no presumption that fees will be awarded, and the court may want to emphasize that discussion of attorneys' fees does not imply a judgment that plaintiffs will prevail. *See In re* Continental Ill. Sec. Litig., 572 F. Supp. 931, 932 (N.D. Ill. 1983).

view toward elimination of unnecessary skirmishing and inflation of attorney hours

- Creation of a format and, if appropriate, a timetable for reporting hours and requesting fees
- Announcement of a procedure for regular monitoring of fees through nonjudicial personnel, if the court so decides
- Statement of a position regarding limitation of a fee award to the amount specified in a contingent fee contract.

Generally, a court's guidelines on attorneys' fees will be fairer and easier to enforce if announced in advance so that counsel have an opportunity to alter any nonconforming practices. When the order includes a special format for reporting fees, advance notice of the court's preference may be crucial to ensure compliance.

**Explicit Guidelines**

The court can either explicitly set forth the standards for attorney fee recovery or merely raise the issue with the attorneys and indicate an intent to monitor fees closely in accord with relevant case law. Within the limits of the case law, the court may want to give guidance as to how the court plans to exercise the appropriate discretion.

In *In re Continental Illinois Securities Litigation,*[14] Judge John F. Grady issued a comprehensive pretrial order that focused primarily on issues relating to attorneys' fees. Judge Grady crafted an approach based on individual responsibility and independent authority and action by counsel. Specifically, he ruled that

1. no more than one attorney for the plaintiffs would be compensated for appearance at a deposition of a witness or for court appearances for a motion, argument, or conference,[15]
2. "incessant 'conferring'" with cocounsel would not be compensable,[16]

14. 572 F. Supp. 931 (N.D. Ill. 1983). For a study of reactions of attorneys to that order, with ideas for modification of it, see T. Willging, Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial (Federal Judicial Center 1984).

15. *In re Continental,* 572 F. Supp. at 933; for a similar order, *see* order of Judge Santiago E. Campos, District of New Mexico; *see also* Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) ("where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time"); *see also* Miller, *supra* note 12, at 273–75, 353–55.

16. *In re Continental,* 572 F. Supp. at 933.

3. senior partners "will be paid only for work that warrants the attention of a senior partner," excluding review of documents and research that could be performed by a beginning associate,[17]
4. "no fees will be allowed for general research on law which is well known to practitioners in the areas of law involved,"[18]
5. reading documents not required to perform a specific task in the case will not be compensated,[19]
6. billings for communications between lead counsel and attorneys for individual class members would be limited,[20]
7. travel expenses would be restricted to those absolutely necessary, emphasizing use of local counsel whenever practical and rejecting first class travel[21] (see also chapter 7).

Courts may glean other specific guidelines from case law. To the extent that the court's practices extend into areas not explicitly covered by relevant precedent, issuance of a formal order or announcement of the court's standards at a pretrial conference will obviate any claims of unfairness based on lack of notice.

### Organization of Counsel

In a case in which the court expects a large number of attorneys to participate, such as an antitrust or securities case, the court may choose to exercise some control over the organization of counsel. In *In re Fine Paper Antitrust Litigation,* the court found it "inevitable" that plaintiffs' committee structure "would generate wasted hours on useless tasks, propagate duplication and mask outright padding."[22]

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17. *Id. Cf.* Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 365–66 (D.D.C. 1983), *rev'd on other grounds,* 746 F.2d 4 (D.C. Cir. 1984), in which the district court granted presumptive validity to decisions of counsel to allocate any type of legal work to senior partners. The circuit affirmed, on the theory that market factors will dictate proper allocation of work among potential actors. *See also* Miller, *supra* note 12, at 369–70.
18. *Continental,* 572 F. Supp. at 933.
19. *Id.* at 933–34. This guideline apparently originated in abuses in *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 86 (E.D. Pa. 1983), No. 83-1172, slip op. (3d Cir. Dec. 13, 1984) (for example, one lawyer apparently read every piece of paper filed in the case over a three-year period, generating 225 hours of work that were not allowed). *Cf. In re* "Agent Orange" Product Liab. Litig., M.D.L. No. 381, slip op. at 84 (E.D.N.Y. Jan. 7, 1985) (only attorney with primary responsibility for particular issue compensated for reading and reviewing documents or legal memorandums).
20. *In re Continental,* 572 F. Supp. at 934.
21. *Id.*
22. *In re Fine Paper,* 98 F.R.D. at 75; *see generally* Miller, *supra* note 12, at 343–44.

Courts have implicit authority to inform counsel as to what type of structure will be deemed reasonable in its review of an application for attorneys' fees. Addressing this issue at the outset may prevent abuses such as the ignominious waste reported in *Fine Paper*. An example of the "litigation by committee" approach in that case is that "fifty-one plaintiffs' lawyers, including twenty-one partners from nineteen different law firms, and deputy attorneys general devoted a total of over 4,500 hours" to preparation of a pretrial memo at a cost to the class of more than $1 million; 4,200 hours were devoted to development of a damage theory that the court declared not viable.[23]

The court may decide to allow plaintiffs' counsel to select a management structure, subject to ratification, modification, or rejection by the court. Alternatively, the court may impose its own conditions for a structure that will be deemed reasonable for purposes of awarding fees. In *Continental Illinois*, the court suggested that "plaintiffs' counsel confer together with a view toward submitting a proposed roster that will be no larger than necessary to provide effective representation."[24]

In reviewing a proposed committee structure, a court may want to consider

- the number of counsel who will be involved in a lead role and therefore find it necessary to maintain familiarity with all major facets of the case,
- the number and size of the committees,
- whether work assigned to a committee could be performed by an individual or a law firm,
- the degree of overlap among the committees,[25]
- the degree of complexity in the case,
- the track record of proposed lead counsel in prior fee applications,
- whether lead counsel made promises of work in the case in exchange for support for selection as lead counsel.[26]

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23. *In re Fine Paper*, 98 F.R.D. at 75.
24. *In re Continental*, 572 F. Supp. at 935.
25. For example, separate discovery committees for each defendant will spread discovery among a large number of firms and require considerable coordination among the multiple committees by an executive discovery committee. Concentration of discovery into one or a few law firms will reduce the duplication.
26. *See, e.g., In re Fine Paper*, 98 F.R.D. at 70–75. The court will likely have to elicit such information either through written procedures, such as an order requir-

**Control of the Litigation**

Working from the premise that abuse of discovery and other pretrial processes are primary correlates of high costs of litigation, a court may wish to consider imposing controls on discovery and other pretrial procedures as a way to control attorneys' fees.[27] Chief Judge Donald Lay has observed that "[i]n almost all cases the key to avoiding excessive costs and delay is early and stringent judicial management of the case. . . . Management conferences at the pleading stage, which simplify the extent of discovery as well as the issues involved, have proven successful."[28]

In conjunction with the scheduling order mandated by rule 16(b), to be entered within 120 days after the filing of the complaint, the court can take several actions that will affect attorneys' fees. For example, the court might analyze the proposed pleadings, motions, and discovery schedules with an eye toward limiting recoverable attorneys' fees. Commenting on the 1,000 hours in attorney time expended to achieve a $1,500 settlement in an employment discrimination case, Chief Judge Lay said:

> Lack of proper judicial supervision in the pretrial stage leads to excessive discovery, the development of complex and multiple issues, extended motion practice and long and expensive trials. Conversely, time expended wisely by counsel and the district judge at the early stages will save many hours of unnecessary labor later in the process.[29]

Another method of coordinating discovery is to use the rule 16 scheduling order as a blueprint for dividing fee-compensable work among a limited number of participating attorneys and even for eliciting a budget for the work. This technique is designed to prevent abuse and to redirect the attorneys' efforts.

Integration of attorney fee issues into the pretrial conferences and scheduling order is likely to make attorneys more cost- and time-conscious. Regular preparation of periodic fee petitions will increase the attorneys' awareness of opportunities to reduce costs. Advance budgeting can provide a benchmark for scrutiny of actual expenditures.

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ing disclosure of any such agreements, or by asking the question of counsel at the initial pretrial conference.

27. *See generally,* S. Flanders, Case Management and Court Management in United States District Courts (Federal Judicial Center 1977); P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978).

28. *Jaquette,* 710 F.2d at 463; *see also* Miller, *supra* note 12, at 338-41.

29. *Jaquette,* 710 F.2d at 463-64; *see also* Miller, *supra* note 12, at 338-41.

Courts may also choose to highlight fee implications of other pretrial and trial activities. A court may dictate that compliance with the scheduling order deadlines be a prerequisite for compensation or that a specific number of depositions or interrogatories appear appropriate. Conversely, defendants' challenge to attorneys' fees may be rejected because the defendants had agreed to the discovery schedule without protest, and they had participated in equally broad discovery.[30]

When these issues are raised, attorneys can make a reasoned decision about their own future activity. Time allocations will dictate that attorneys rank tasks in order of priority and omit repetitive work.

Most important, by calling attention to the issue of attorneys' fees and establishing prospective goals, the court engages lawyers for all parties in the effort to monitor fees. Plaintiffs will review their own fee applications carefully to exercise billing judgment and limit billing for activity disfavored by the judge. Attorneys for defendants will review the application with knowledge of the standards to be applied and can be expected to make pointed objections.

### Timing, Format, and Monitoring of Fees

One method of controlling attorneys' fees in pretrial proceedings is to require regular reports of time spent and to contemporaneously monitor and evaluate the reasonableness of those expenditures. Judge Santiago Campos of the District of New Mexico requires all attorneys seeking statutory fees to submit monthly time sheets. Continuous feedback from the court is likely to affect the amount of time spent by attorneys on future activities in the case. Specific suggestions regarding the timing and format of the petitions for attorneys' fees will be discussed in chapter 3.

Courts may want to remind attorneys to keep contemporaneous time records of all their case-related activities.[31] The court may also want to establish a plan for regular submission to the court of time sheets for attorneys' fees in selected complex cases. This could involve merely filing the documentation with the court at regular intervals. The records would then be analyzed at the end of the case if the plaintiff prevails. However, it may be more efficient for the court to supervise or conduct a threshold-level scrutiny of the

30. *Laffey,* 572 F. Supp. at 370.

31. Hensley v. Eckerhart, 461 U.S. 424 (1983); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982); Miller, *supra* note 12, at 344–45.

reasonableness of the hours, at least in lengthy cases, before the recollection of what occurred dims for all parties.

This investment of time and effort must be balanced against the likelihood that the time expended will either (1) prevent the need for further efforts if the plaintiff prevails, or (2) possibly be wasted if the defendant prevails. We expect that the time savings in carefully selected cases where the plaintiff is likely to prevail will more than offset the time expenditure in cases where the plaintiff does not prevail.

Use of nonjudicial personnel can ease the demands on the court that might otherwise arise from periodic monitoring of attorney hours. This topic is discussed in chapter 2.

### Contingent Fee Agreements

At the pretrial conference, a court may choose to inquire into the relationship between the attorney-client contractual agreement and the statutorily recoverable fees. There is a conflict among the circuit courts of appeals on whether the contractual agreement limits the award.[32]

Raising the issue early in the litigation may serve to prevent misunderstandings and forestall litigation.[33] If judges explain the

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32. The tendency has been not to limit the recovery of attorneys' fees to the contract amount. United Slate, Tile & Composition Roofers v. G&M Roofing & Sheet Metal Co., 732 F.2d 495 (6th Cir. 1984); Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983) (rehearing en banc), *rev'g in part,* 689 F.2d 929 (1982); Lenardo v. Argento, 699 F.2d 874 (7th Cir. 1983) (fee contract not automatic ceiling for civil rights actions); Manhart v. Los Angeles Dep't of Water and Power, 652 F.2d 904 (9th Cir. 1981), *vacated on other grounds,* __ U.S. __, 105 S. Ct. 2420 (1984) (title VII fee is not excessive merely because it exceeds contract); *but see* Pharr v. Housing Auth., 704 F.2d 1216 (11th Cir. 1983) (award limited by terms of fee agreement in 42 U.S.C. § 1983 action).

In *Cooper,* on rehearing en banc, the court concluded that (1) a contingent fee agreement does not limit the recovery of statutory fees (i.e., the contract amount is not a maximum), (2) the lawyer should reduce the fee to the statutorily granted amount if the client's statutory recovery is less than the contract amount, and (3) the attorney should be entitled to the entire award if the statutorily granted recovery is greater than the contract amount. 719 F.2d at 1506-07.

All three of these scenarios are in accord with the conclusion in *Hensley* that the fee award amount should reflect the market value of the services. Based on market value, it is presumptively reasonable to overrule a previous contract agreement that differs from the judicially determined market value of the services. In rejecting the panel's holding that the contract agreement should be a ceiling for recovery, the court, sitting en banc, noted that the upper limit was unnecessary since the fee granted would reflect the market value of the services. This in itself serves to limit the possibility of a windfall to the attorneys. The panel also realized that reliance on the contingency agreement formula for recovery could decrease the incentive for attorneys to take a case for injunctive or declaratory relief since the recovery would generally be smaller than in damages actions.

33. *See* N.D. Ill. R. 39(d) (court looks at contingent agreement for ethical reasons).

consequences of the contractual agreement between plaintiffs and their lawyers early in the proceedings, the attorney and client have the opportunity to amend the agreement or expand the coverage. If the court indicates that a contract will limit the recovery of statutory attorneys' fees, and that the maximum allowed recovery will be that amount stated in the contract, the parties can agree to an amendment if they did not intend to be so limited.

### Use of Attorneys' Fees as Discovery Sanction

Certain courts have found abuse of discovery a valid reason for denying recovery of attorneys' fees.[34]

In *Litton Systems v. AT&T,* the court found plaintiffs' misuse of discovery an adequate basis for denial of attorneys' fees of more than $10 million. Although the judge decided before trial that sanctions would be invoked, he deferred selecting which sanctions until after the trial ended. Alternatively, the court could have denied fees for activities already completed, putting the attorney on notice that, prospectively, similar behavior would cost money.

A court might look at several factors to determine the propriety of denying statutorily granted attorneys' fees as a discovery sanction. Issues for the court to consider include

1. whether discovery abuse should be considered "special circumstances" for which fees should not be recovered,[35]
2. whether the sanction can prospectively damage the client's case. If the plaintiff's attorneys' abuse of discovery causes the judge to deny all recovery of fees, the sanction could backfire on the client. The attorney may decide to cut his losses and invest a minimal effort. Unless blatant, this behavior would be hard to prove for disciplinary purposes and hard to control for trial purposes.

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34. *Jaquette,* 710 F.2d at 463; Litton Systems v. American Tel. & Tel. Co., 91 F.R.D. 574 (S.D.N.Y. 1981).

35. This result is supported by the legislative history of the Civil Rights Attorney's Fees Awards Act. The legislative history of the CRAFAA is frequently relied on, by analogy, for the policy underlying other fees statutes that do not mention the standard for nonrecovery of fees. Perhaps because of the special circumstances provision, the question has never been resolved of whether the Federal Rules of Civil Procedure or a court's inherent authority to police attorneys' conduct can be a sufficient basis to deny fees, despite the public policy articulated by Congress in the CRAFAA and similar statutes favoring the routine award of fees. However, under the CRAFAA and many other fee statutes, only reasonable attorneys' fees are legislatively mandated, so the judiciary may interpret recovery for unprofessional or abusive behavior by attorneys to be unreasonable. This provision, read in conjunction with the use in Fed. R. Civ. P. 37 and Fed. R. Civ. P. 26(g) of attorneys' fees as sanctions, allows resolution of the issue.

3. whether the severity of the sanction is proportionate to the infraction committed by the attorney. Complete denial of attorneys' fees is quite a severe sanction, appropriate only in extreme circumstances,[36]

4. whether fees can be recovered by the defendant when the case is "frivolous, unreasonable or groundless."[37]

There is a fine line between denial of recovery of fees as a sanction and reduction of fees because of excessiveness or wastefulness. To some degree, both will serve to deter similar behavior if the economic sanction is strong enough. However, denial of fees can undermine the goals of statutes providing for attorneys' fees. For example, if denial of fees is used as a sanction only in cases where fees are statutorily recoverable, attorneys may be discouraged from taking these cases since they may be incurring risks that would not be present in other cases.

Three approaches can help reduce the dilemma. First, any discovery abuse should be stopped at the beginning. Second, denial of fees should not apply prospectively, but should only apply to abuses already committed. Third, courts should carefully distinguish between fees being reduced because they are excessive and fees denied as a sanction.

The third approach preserves a conception of what hours are reasonably compensable without other circumstances. A two-tier plan will achieve this result. First, determine the compensable hours, and second, apply any deductions due to sanctions. Then there will be no confusion as to why hours are not compensated, both in the instant case and in future cases.

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36. In one case, an attorney who requested eight hundred hours of fees was denied all fee compensation because the request was "manifestly unreasonable." Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980). In that case, the trial court defended the propriety of this harsh sanction on the basis that attorneys would not be deterred from making outrageous fee requests if the worst that would result would be a reduction in the fees. The court of appeals affirmed. *Id.* at 1059; *see also In re* Chicken Antitrust Litig., 560 F. Supp. 963 (N.D. Ga. 1980) (refused to compensate attorney because first request was excessive and second showed record keeping was unreliable).

37. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Other statutes state that the litigation must be in good faith for plaintiff to prevail. This may appear to be a distinction without a difference but the proof of the bad faith standard is considerably more subjective than proof of legal groundlessness. Hughes v. Rowe, 449 U.S. 5 (1980) (fees act standard should be no less stringent than *Christiansburg;* Larson, *supra* note 2, at 94).

## Final Pretrial Conference

In the final pretrial conference or order, the court should reiterate or expand the standards for recovery applicable to the trial process. Again, the number of attorneys who can be compensated for participation, as well as whether a different rate will apply to trial work, should be determined prior to trial. The economic differential between rates for lead trial counsel and others may also be established before trial.

As the trial date approaches, the opportunities for judicial supervision of settlement will increase. Although attorneys' fees are not a club to bludgeon parties into agreement, they can be a factor in settlement.

Attorney fee awards may also affect pretrial motions practice. For example, in *Wells v. Oppenheimer & Co.*,[38] the judge awarded attorneys' fees for successful opposition to a motion for summary judgment. The judge had previously warned the attorney that a motion for summary judgment was probably a waste of time and that he would be generous in awarding fees to the prevailing opponent to such a motion.[39]

This approach conflicts with the general proposition that defeating summary judgment is not seen as a decision on the merits, and that attorneys' fees are generally only granted to prevailing defendants on proof of plaintiffs' bad faith. The judge handled the apparent conflict by rejecting the subjective good faith standard, noting that a good lawyer can convince himself of anything. The judge's prior warning about the motion provided a more objective standard of good faith.

As in the pretrial work, the judge should explain the extent of conferencing that will be compensated. While this may not change from phase to phase, there may be greater needs for information-sharing at certain intervals. The greatest need may be at trial, when the time demands may require short-term application of the talents of many attorneys. In other cases, the crunch may come during discovery, or later, in the determination of damages. Once a plan has been formulated and followed, the majority of the attorney fee information will be organized and ready for judicial scrutiny. In fact, under some of the suggested schemes, at least some primary scrutiny will already have occurred. Consideration of who can best monitor fee requests is now in order.

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38. 101 F.R.D. 358 (S.D.N.Y. 1984).
39. *Id.*

# II. USE OF NONJUDICIAL PERSONNEL

Courts have a number of alternative approaches to monitoring fee petitions that can help increase the efficiency, predictability, and accuracy of the process. For example, the court may use a variety of courtroom personnel, such as clerks or magistrates, appoint a special master or guardian ad litem, or assign specific responsibilities to the litigants. The existence of these alternatives raises the question of whether the judge's time is best spent on managerial tasks and, if not, who else could more efficiently do the work. Use of nonjudicial personnel can shape the fee petition for decision by identifying information relevant to the court's decisional standards and organizing the information for decision by the court.

## Factors Affecting Choice Among Alternatives

Each actor brings advantages and disadvantages to the attorney fee application process. However, one factor common to all the alternatives is that the insertion of another party into the fee determination process will tend to diffuse the decision-making process away from the judicial officer,[40] who has personal knowledge of the quality of the legal work. An overriding consideration should be the realization that, for truly noncomplex cases, addition of another individual may create a procedure that is too burdensome for the work it is intended to accomplish. In conjunction with the implementation of any of the alternatives, a threshold determination should be made, designating which cases are appropriately referred to the process.

In deciding which of the alternatives to use, a court should consider

- the experience and expertise of the personnel with regard to the subject matter of the litigation, review of attorney fee issues, and familiarity with law office billing practices,

40. In some courts, the magistrate does a substantial amount of the pretrial work and some trial work. *See generally* C. Seron, The Roles of Magistrates: Nine Case Studies (Federal Judicial Center, in press); *see also* 28 U.S.C. § 636.

- the experience of the various nonjudicial personnel with prior aspects of the litigation and their relative ability to judge the value of the legal work in relation to the outcome of the case,
- the cost to the court and the parties of the procedures under consideration,
- freedom from conflicts of interest on the part of an attorney or guardian ad litem for the class,
- whether a party has requested and is entitled to an evidentiary hearing on a disputed issue of material fact,[41]
- whether the court is seeking assistance with a ministerial, administrative function, with a decision-making function, or with both,
- the complexity of the case and the need for direct judicial supervision of the parties and the process.

To take advantage of the benefits of pretrial action regarding control of attorneys' fees (see chapter 1), the court should decide as early as possible in the litigation which of the above approaches is most suitable to the anticipated size and complexity of the case.

## Consideration of Alternatives

### Deputy Clerks

Deputy clerks will generally have the capacity to review the petition and classify the information according to categories assigned by the court (e.g., time spent on functions such as legal research or conferring with cocounsel, and time devoted to specific activities such as conducting depositions or drafting a memorandum in support of a motion for summary judgment).[42] A deputy clerk can also monitor the timely filing of fee requests and compare court records to attorneys' records to catch errors or provide additional informa-

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41. *See, e.g., Copeland,* 641 F.2d at 905; Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); *see also* Miller, *supra* note 12, at 226–28.

42. *See generally Lindy Bros. Builders,* 487 F.2d at 167 ("without some fairly definite information as to the hours devoted to various general activities, e.g. pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g. senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought"); *see also* Miller, *supra* note 12, at 344–45.

tion (e.g., about fee petitions pending before other judges).[43] The clerk could also perform all the administrative duties, such as notifying attorneys when they have failed to meet the requirements of a court order, without adding a new layer of bureaucracy.

A major disadvantage of the use of deputy clerks is that they have no decision-making authority and frequently no legal training. Clearly, the clerk has no power to hold hearings, procure evidence, disallow hours claimed, or otherwise make decisions. However, a deputy clerk can perform the ministerial function of reviewing bills of costs and making awards of costs, subject to objection by a party and review by the court.[44]

### Law Clerks

The court may use law clerks to review the petition, perhaps to perform some of the tasks described above for the deputy clerk, and to make a preliminary evaluation of the legal issues involved in the fee petition, such as a determination of the issues upon which plaintiff has prevailed under the standards of *Hensley v. Eckerhart,*[45] or identification of items of duplication or excessive time expenditures. An advantage of using law clerks is their familiarity with case law and with the legal proceedings in a case under review.[46] A disadvantage is that a clerk may lack the experience and intuition to determine which expenditures are acceptable. Annual or biennial turnover of clerks institutionalizes such inexperience.

### Magistrates

The court can use magistrates, appointed under either rule 53(b) or 28 U.S.C. § 636(b)(1)(A), to formulate pretrial procedures for submission of fee petitions and to gather evidence, conduct hearings, and make a preliminary decision on the merits of the fee petition.[47] Magistrates share with the judge a general knowledge of

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43. *In re Agent Orange,* M.D.L. No. 381, slip op. at 65–68 (clerk's office staff, augmented by the hiring of three recent law school graduates as assistant clerks, tracked fee petitions and related attorney submissions and made recommendations based on criteria set by the judge. *Id.* at 68–77).

44. Fed. R. Civ. P. 54(d); this is the procedure followed in the Northern District of Illinois. Independence Tube Corp. v. Copperweld Corp., 543 F. Supp. 706, 709 (N.D. Ill. 1982).

45. 461 U.S. 424 (1983).

46. *In re Agent Orange,* M.D.L. No. 381, slip op. at 65 (one law clerk supervised temporary clerks in reviewing petitions under court-established guidelines; a second law clerk researched related legal issues).

47. Yates v. Mobile County Personnel Bd., 719 F.2d 1530 (11th Cir. 1983) (magistrate's fee recommendation reviewable in full by district court); Kaye v. Fast Food Operators, Inc., 99 F.R.D. 161 (S.D.N.Y. 1983).

the law and the court's processes. Having a similar basis of knowledge allows the magistrate to make decisions from the perspective of the court and to consider the same type of issues the judge deems to be of paramount importance. Knowledge of scheduling and discovery procedures allows a magistrate to make decisions on the reasonableness of time spent on certain tasks.

The ability to hold hearings and recommend decisions heightens the magistrate's value. Repeated assignments to review attorney fee petitions will enable a magistrate to accumulate expertise in repetitive aspects of attorney fee issues such as determination of community rates for legal services and evolving case law.

In complex cases, however, magistrates may not have expertise in a narrow specialty area. In such cases, appointment of a master should be considered.

### Special Masters

The court can select and appoint special masters, based on their expertise in the subject matter of the litigation or in attorney fee issues or both, to review petitions, collect evidence, conduct hearings, and report findings of fact and conclusions of law to the judge.[48] Masters can play a useful role in complex litigation, where a novice or outsider is hard-pressed to tell what time expenditures are normal. However, masters may be more likely to grant hours that are traditionally expended in complex litigation, given their association with that practice, while an outsider may be more critical. As the *Fine Paper* litigation demonstrates, customary practices do not necessarily produce reasonable attorney fee petitions.

A possible disadvantage of the use of a master is that the parties must pay for the cost. The result may be simply to shift the savings effected by the master's scrutiny of the fee petition to the master. Nevertheless, such an appointment may have a salutary effect on future cases.

### Guardian Ad Litem

The court may choose to appoint counsel as a guardian ad litem to represent the interests of class members in protecting the common fund from an unreasonable incursion by attorneys seeking fees.[49] Here, payment would be from the common fund and the

48. Rule 53 authorizes the appointment of masters in exceptional cases, including "matters of account and of difficult computation of damages." Compensation for the master is to be charged to the parties or paid out of a fund generated by the action. *See also* Miller, *supra* note 12, at 341–43.

49. Miller, *supra* note 12, at 230–34, and cases cited therein. Once counsel for the

choice would rest on a judgment about whether the savings from the guardian's activities would exceed the cost.

## Appropriate Solutions

The best response may be a synthesis of a number of the alternatives, tailored to the resources of the parties to the litigation. Use of nonjudicial personnel is closely related to an evaluation of the willingness and ability of the parties to present and elicit evidence in the format desired by the court. The first solutions the court should consider are (1) imposing the burden on the plaintiff to provide specific information in support of the fee application[50] and to organize the application in a specific format;[51] and (2) assigning responsibility for scrutinizing the fee application to the defendant, if the defendant will be liable for payment of a fee (in a common-fund situation, the defendant will have little, if any, interest in opposing the fee petition).[52]

Assuming that the court decides to use nonparty, nonjudicial personnel to assist in processing attorney fee petitions, the court may choose to have the clerk serve as the clearinghouse and administrative arm for attorney fee matters. After the clerk collects and organizes the information, the magistrate can make a preliminary determination of the legal and factual issues involved in an award, subject to veto or revision by the judge. Under this procedure, each party does the task for which he or she is best qualified, with minimal overlap.

Another benefit of synthesizing a solution is that the approach allows for idiosyncratic differences between courts. A large court where the magistrates already have significant responsibilities may not wish to assign these matters to magistrates. Similarly, a judge who prefers to exercise strict case control may prefer to do his or her own review of the records after they have been organized and classified by the deputy clerk or law clerk. Alternatively, a judge may want to exercise personal control over more complex cases

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class file a fee petition, they have a conflict of interest with the class in a common-fund situation, Miller, *supra* note 12, at 212–24; Prandini v. Nat'l Tea Co., 557 F.2d 1015 (3d Cir. 1977); *In re Fine Paper*, 98 F.R.D. at 77; and perhaps even in a statutory award context because both may become creditors of the defendant. Under these circumstances, the rule 23(c) grant of authority to issue orders to protect the class probably authorizes appointment of new counsel to protect the class's interests in the fee application process.

50. *In re Fine Paper*, 98 F.R.D. at 235–37; Miller, *supra* note 12, at 203–04, 236–38.

51. *See, e.g., In re Continental*, 572 F. Supp. at 931; *In re Agent Orange*, M.D.L. No. 381, Magistrate's Pretrial Order No. 32 (July 24, 1984).

52. *See, e.g., Independence Tube*, 543 F. Supp. at 706.

while leaving direction of the more routine cases to the clerk or magistrate. However the process is structured, the integration of nonjudicial personnel into the fee recovery process can result in less burden on the judge and more efficient resolution of fee petitions.

# III. THE APPLICATION

Once the court has established its internal procedures for handling attorney fee petitions, a system for attorney submission of the petitions is necessary. The two major questions to be dealt with are when and how the petition must be submitted to the court.

## Timing of Fee Application

Because most statutes lack a deadline for submitting fee requests,[53] the courts are generally responsible for establishing the timeliness of fee applications. Courts have determined timeliness by categorizing attorney fee requests as costs, as part of the judgment, or as a separate and collateral order.

A postjudgment request for attorneys' fees is not a motion to alter a judgment under rule 59(e).[54] Therefore, the fee application need not be submitted within the ten-day limit in that rule. However, the Supreme Court refused to further define the fee-request procedure. Circuit courts were left to decide whether the request belongs under the auspices of another rule, such as rule 54(d) or rule 58, or whether a separate standard for timeliness by local rule or another procedure should be established.

A number of approaches can be taken to solve or eliminate this problem: Define attorneys' fees as costs; define the fee award according to the underlying transaction; eliminate the problem by local rule; define interim fee awards as nonappealable; and stay attorney fee awards during the pendency of appeals.

**Attorneys' fees as costs.** The Civil Rights Attorney's Fees Awards Act (CRAFAA) allows for recovery of "fees and other costs."[55] Cat-

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53. The Equal Access to Justice Act designates a thirty-day deadline; S. 141, proposed in the 98th Congress, would amend the Civil Rights Attorney's Fees Awards Act to require that fee requests be submitted within thirty days of final judgment. S. 141, 98th Cong., 1st Sess. § 722(A)(f) (1983).

54. *White,* 455 U.S. at 445 (1982).

55. Hutto v. Finney, 437 U.S. 678 (1978) (refers to attorneys' fees as costs without commenting on the effect on appeal).

egorizing attorneys' fees as costs allows their determination separate from the merits, without a deadline. Several circuits have adopted the literal construction of the statute and do not apply a deadline for a fee application.[56]

Since entry of judgment may not be delayed pending the determination of costs,[57] this method may be less effective in common-fund settlements, where the judgment and the fees are satisfied from one lump sum. Logic dictates that, in non-common-fund cases, fees and all costs be decided in a unitary process in which the court balances the benefits to attorneys and clients.[58] Later problems may arise when no deadlines have been applied to the fee application, such as determining whether the defendant has been prejudiced by the passage of time.[59]

**Underlying behavior.** Fee requests could be categorized by the underlying transaction (e.g., motion for sanctions, final judgment) rather than by their procedural posture. For example, fee requests for sanctionable behavior, such as discovery abuse, could be subject to deadlines for requests for sanctions under the federal rules, a scheduling order, or agreements between parties. The U.S. Court of Appeals for the Fifth Circuit has tried to alleviate some confusion concerning how to categorize fee requests by defining as part of the judgment any attorney fee awards arising from the plaintiff's bad faith in litigation.[60] Similarly, attorneys' fees awarded as a sanction can be determined in the same manner as other sanctions under rule 37. This approach adds a degree of flexibility in allowing fees to be considered either as part of the judgment or as costs in appropriate circumstances. The important factor in reaching that conclusion is the nature of the underlying activity, rather than any fixed procedural rule.

Although this approach is useful for more specialized functions of attorneys' fees, such as the examples above, the merely compensatory function of attorneys' fees can still fall under the rubric of either judgment or costs. The legislative history of the CRAFAA leaves room for both interpretations.

**Local rules on timeliness.** In an opinion cited in Justice Blackmun's concurrence in *White v. New Hampshire Department of Employment Security,*[61] the U.S. Court of Appeals for the Eighth

56. Gautreaux v. Chicago Hous. Auth., 690 F.2d 601 (7th Cir. 1982); Brown v. City of Palmetto, 681 F.2d 1325 (11th Cir. 1982); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).
57. Fed. R. Civ. P. 58.
58. Shadis v. Beal, 692 F.2d 924 (3d Cir. 1982).
59. Baird v. Bellotti, 724 F.2d 1032 (1st Cir. 1984).
60. Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971).
61. 455 U.S. at 445, 456 (1982).

Circuit suggests that district courts promulgate local rules to deal with the timeliness issues.[62] Local rules can address the timeliness of fee applications without delving into their procedural characterization. The time period allowed in existing rules generally runs from ten to thirty days from entry of judgment, regardless of whether an appeal is filed.[63] A number of districts also provide deadlines for objections to fee requests to further limit the time expended in fee skirmishes.[64] A major incentive to comply with deadlines is a provision that late application constitutes a waiver of the entitlement to fees.[65]

Two unique local rules highlight two competing philosophies while also attempting to establish and define procedures for fee requests and appeals. Delaware's local rule 6.3 states that fee award requests must be submitted within twenty-one days after the time for appeal has expired. The Southern District of Georgia's local rule 11.2(b) provides that a fee request must be filed at least ten days *before* the time for appeal expires.

Under the Delaware rule, fee applications may be considered separately from an appeal on the merits. This procedure may facilitate interim awards of fees and the separation of issues within the trial, both of which promote ease in determining hours expended on prevailing issues. The Georgia rule views attorneys' fees as less separable from the judgment on the merits, acknowledging that a defendant may accede to one dollar amount of liability merely for the benefit of finality, while contesting that same amount if a further appeal on the merits is expected. The Georgia approach is particularly applicable to common-fund cases, where defendants generally have little interest in opposing fee applications.

**Interim fees.** Both the CRAFAA and the Freedom of Information Act (FOIA) provide for interim awards.[66] Attorneys' fees will not be granted until a party has established the right to relief. Mere procedural victory, such as overcoming summary judgment, is insufficient to allow fee recovery at that time.[67] The court may

62. Obin v. District No. 9, Int'l Ass'n of Machinists, 651 F.2d 574 (8th Cir. 1981).

63. *See Baird,* 724 F.2d at 1032 (suggests a 45- to 60-day period to allow parties time to learn if appeal has been filed), *cert. denied,* __ U.S. __, 104 S. Ct. 2680 (1984).

64. N.D. & S.D. Iowa R. 2.9; D. Minn. R. 4(D).

65. N.D. Ill. R. 46; E.D. Va. R. 11(L); E.D. Mich. R. 17(e).

66. CRAFAA, S. Rep. No. 1011, 94th Cong., 2d Sess. § 5 (1976); 5 U.S.C. § 552 (a)(4)(E).

67. Hanrahan v. Hampton, 446 U.S. 754 (1980); *but see* Chu Drua Cha v. Levine, 701 F.2d 750 (8th Cir. 1983) (obtaining preliminary injunction is sufficient to sustain interim fee award, despite the tenuous nature of relief); Wells v. Oppenheimer & Co., 101 F.R.D. 358 (S.D.N.Y. 1984) (judge awarded fees for unsuccessful summary judgment motion as a sanction).

choose to award interim fees when to refuse would effectively prevent redress of the substantive claim.[68] Appeals of interim awards, however, have been rejected on the grounds of lack of jurisdiction.[69]

Based on purely procedural considerations, interim fee awards should be calculated conservatively.[70] This restraint will foreclose the necessity of figuring rebates and setoffs. Attorney fees should be determined in as unitary a process as possible to prevent errors of duplication or omission; however, the fact that an interim award was granted at earlier rates does not prevent the court from applying current rates to hours expended before the interim award.[71] The awarding of interim fees highlights the need for keeping very specific and well-documented records of which hours were compensated, which hours were deemed noncompensable, and last, which hours spent to date were not dedicated to the prevailing interim issue in question.[72]

Efficiency and continuity may dictate that interim fees not be challenged until the entry of final judgment. However, steps can be taken to protect the interests of the defendant who has been assessed the fees. For example, the defendant can request that plaintiff post a bond for the disputed amount. Precise review of records, perhaps by a clerk, will also protect the defendant from being double-charged.

**Fee decisions during appeals.** Rules concerning finality of appeal can serve to limit the amount of fractionalization of fee requests. To prevent unwarranted confusion on fee issues when interim fees are awarded, the appeal status of each separable and appealable issue may have to be strictly scrutinized. If both liability and fees are separately appealed, a stay would prevent the defendant from having to pay a fee award, only then to prevail on the merits in the higher court. However, if damages and fees are appealed separately, a stay should not protect the defendant since the dollar amount of damages is generally irrelevant in computing fees (see chapter 4). Another method is to stay altogether any attorney fee awards until an appeal on the merits is decided.[73] A stay of the fee

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68. Yakowicz v. Pennsylvania, 683 F.2d 778 (3d Cir. 1982). *See* Ware v. Reed, 709 F.2d 345 (5th Cir. 1983); Biberman v. FBI, 496 F. Supp. 263 (S.D.N.Y. 1980).

69. Hillery v. Rushen, 702 F.2d 848 (9th Cir. 1983); Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893 (2d Cir. 1982).

70. Palmer v. City of Chicago, 576 F. Supp. 252 (N.D. Ill. 1983) (use of a multiplier should be deferred until a final determination of fees). *But see* Smiddy v. Varney, 574 F. Supp. 710 (C.D. Cal. 1983) (fees to date, including multiplier, determined to be $127,458.62; court awarded interim fees of $125,000), *cert. denied,* 459 U.S. 829 (1982).

71. Chisholm v. United States Postal Serv., 570 F. Supp. 1044 (W.D.N.C. 1982).

72. *See* Powell v. United States Dep't of Justice, 569 F. Supp. 1192, 1204 (N.D. Cal. 1983).

73. D. Del. R. 6.3.

award would prevent the difficulty experienced in several cases where fee awards were granted, and then the decision on the merits was reversed on appeal.[74] This convenience must be balanced against the harm to the plaintiff caused by delay in receipt of fees, especially if such a delay is likely to affect the plaintiff's ability to participate in the appeal.

**Summary.** Courts have numerous options to constrain the fractionalization and profusion of fee disputes. The usefulness of any approach will be determined by the type and number of fee cases handled by the district, as well as the philosophy of the court on the nature of attorney fee awards. Once again, the court and the litigants will benefit from predictability tempered by reasonableness. We suggest adoption of a local rule establishing a general standard, with limited grounds for exceptions.

## Form of Fee Application

**Hours.** The starting point of the fee application is the time actually spent on the case. Most courts require contemporaneous time records; the others note that "prudent counsel" would maintain those records.[75] Each fee application generally must include the attorney's name, the date, the hours expended, and the nature of the work.[76] The court may also establish a form on which to submit fee requests to ensure uniformity and to simplify comparison of attorneys' requests.[77]

A court may request that detailed summaries of the hourly time sheets be submitted.[78] The organization may be by subject matter of the work, by attorney, or by firm. A preference for cumulative or periodic time sheets should also be noted. Each organizational schema provides the judge with information to monitor the hours spent on a project or the hours spent by individual attorneys.

Judges may also ask for daily time records to compare to the summaries. These daily records help apprise the judge of the progress and direction of the case. They impose only a small cost

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74. Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982); Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982).

75. *Ramos,* 713 F.2d at 546; New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136 (2d Cir. 1983) (required); Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982) (prudent counsel would keep); *see also* Buian v. Baughard, 687 F.2d 859 (6th Cir. 1982) (use of reconstructed time sheets may result in large reduction in compensable hours).

76. *New York State Ass'n,* 711 F.2d at 1136; *Ramos,* 713 F.2d at 546.

77. *In re Agent Orange,* M.D.L. No. 381, slip op. at 63.

78. *E.g.,* Ruiz v. Estelle, 553 F. Supp. 567 (S.D. Tex. 1982).

on applicants since daily record keeping is a requisite for the other schemas.

Billing judgment regarding hours to be charged the client is as important in fee litigation as in the actual billing.[79] Attorneys may note the exercise of billing judgment by merely omitting those hours from the summary, by including the hours as expended but not charged, or by advising the court of the percentage of the hours expended that were not billed.[80] Of course, the exercise of billing judgment must be brought to the attention of the presiding judge so that the court can distinguish actual hours from compensable hours.

**Proof of rates.** The attorneys must submit affidavits certifying that the hours claimed were actually expended on the topics stated. These affidavits are generally pro forma and cause little difficulty unless the attorney has behaved in a sanctionable manner.

The reliability of affidavits in providing the community rate or the reasonableness of the hours expended is more problematic. The affiants, generally fellow attorneys, have no incentive to disagree with the hours expended. This process, if it excludes any activities, sifts out only the most egregious excesses, leaving unquestioned any customary overlawyering. This process probably creates no time saving for the judge, who would note the blatant excesses sua sponte.

The usefulness of the testimony of half a dozen firms or sole practitioners as to what they charge may not be representative, and the costs of a more representative[81] and inclusive study can be prohibitive. A number of other sources could be relied upon, such as the annual surveys of the legal periodicals or the American Bar Association concerning attorneys' fees charged in certain locales for certain specialties. Several private reference services publish the results of surveys of hourly rates reflecting region, specialty, and lawyer's experience.[82] The court could use such information to create a fee schedule that would raise a rebuttable presumption of reasonableness, subject to challenge by either side only with appropriate documentation.

Affidavits concerning the attorney's legal qualifications and personal character also contribute relatively little to the process. A court form requiring the most limited information, such as number

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79. *Hensley,* 461 U.S. at 434, quoting *Copeland,* 641 F.2d at 880 (hours not properly charged to client not properly charged to adversary).

80. *Concerned Veterans,* 675 F.2d at 1327.

81. Elser v. IAM Nat'l Pension Funds, 579 F. Supp. 1375, 1379 (C.D. Cal. 1984) ($169/hour rate based on six Los Angeles firms not exhaustive enough showing).

82. *In re Agent Orange,* M.D.L. No. 381, slip op. at 90–91 (Judge Jack B. Weinstein cites both legal periodicals and reference services in determining a national rate).

of years out of law school, legal experience, and scholastic awards or bar commendations, may avoid some of the inevitable puffery. Alternatively, the fee awards could be based solely on the attorney's observable performance in conferences, pleadings and briefs, and court appearances. Even more strictly, compensation for all attorneys in a given speciality could start from a base rate, with the burden on the attorney to prove entitlement to a higher rate.

Billing scales of the attorney for comparable work in nonfee cases have not yet been universally required in the fee application, but they could provide useful information, particularly in conjunction with the elimination of affidavits. The lawyer's or firm's own rates, while not necessarily determinative, do provide a focus for the evaluation of fees.[83] Inclusion of attorney rates will also assist the court in determining whether any "billing judgment" regarding the rate has occurred.[84] However, holding as an absolute standard the fees commonly charged by the lawyer or the firm can discriminate against small firms, public interest firms, or sole practitioners.[85] Equating the hourly rate with the fee award appears to insufficiently motivate firms to prefer fee cases over other cases, contrary to a major goal of fee statutes.[86]

**Variable factors.** If the court is concerned about abuses such as billing for excessive hours or for work also charged to another client, the court may seek other relevant information, including (1) a list of clients for whom the attorney has spent 100 or more hours during the pendency of the case at hand,[87] (2) other class actions or similar fee cases that the attorney is currently handling or has recently completed,[88] and, (3) arrangements with other attorneys concerning fees, division of labor, and other apportionment of work or compensation.[89]

The above-mentioned factors may rise or fall in importance, depending on how the court weighs each in making the determination of a reasonable fee award. Courts will differ as to whether the rates charged to nonfee clients are the definitive rates, or if that rate is purely advisory. The factors to be weighed in making the determination of community rates will be discussed further in chapter 5.

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83. *Laffey,* 746 F.2d at 24 ("in almost every case, the firm's billing rates will provide fair compensation"); *Concerned Veterans,* 675 F.2d at 1325.

84. *Copeland,* 641 F.2d at 880; *Laffey,* 572 F. Supp. at 360.

85. *Laffey,* 746 F.2d at 9 (Wright, J., dissenting).

86. *Id.*

87. *In re Fine Paper,* 98 F.R.D. at 236.

88. *Id.*

89. *Id.*; *see* E.D.N.Y. R. 5 (attorneys seeking statutory fees in stockholder's derivative suits or class actions must disclose all fee and work-sharing agreements).

# IV. LODESTAR

The next stage in the attorney fee process is judicial determination of a reasonable fee. This chapter will discuss techniques for arriving at a determination of a reasonable fee by considering three separable steps: the standards for determining reasonable hours, the factors influencing community rates, and the circumstances in which an adjustment to the product of hours times rate would be appropriate.

If attorney fee questions could be distilled into one concept, that concept would be "lodestar." Defined as the number of hours reasonably expended multiplied by the prevailing community rate, the lodestar is true to its name as the guiding light of attorney fee determinations. The Supreme Court has declared that the lodestar is generally "presumed to be the reasonable fee."[90] Although this term has been the focus of numerous debates on the method of determining fees, many issues are now settled, providing an opportunity for courts to adopt standard procedures for management and resolution of attorney fee issues.

Attorneys' fees can be recovered primarily in two types of cases.[91] One is the traditional, equitable "common benefit" theory, where an attorney should be compensated for the work done to benefit a group. In a common benefit case, the plaintiff's action provides a broad benefit to an ascertainable class, and to saddle the plaintiff with the entire cost of litigation would unjustly enrich the bystanders. The cost of obtaining the recovery is deducted from the recovery to the group.[92] It is irrelevant whether the plaintiff intended that the class be a beneficiary of the litigation.[93]

An attorney fee award can also occur if a statutory provision allows fee recovery for litigating that type of case.[94] In both situa-

90. Blum v. Stenson, ___ U.S. ___, 104 S. Ct. 1541 (1984).

91. Attorneys' fees are also recoverable in a third type of case, where the losing party behaves in bad faith, vexatiously, or wantonly. *Alyeska Pipeline Serv.*, 421 U.S. at 240.

92. *See generally Alyeska Pipeline Serv.*, 421 U.S. at 257; *see also,* Miller, *supra* note 12, at 15-17.

93. Reiser v. Del Monte Properties, 605 F.2d 1135 (9th Cir. 1979).

94. More than one hundred federal statutes so provide. *See* Larson, *supra* note 2, at 323. The Attorney Fee Award Reporter publishes an updated list in each volume.

tions, the plaintiff must be a prevailing party to recover. To be compensated out of a common fund, an attorney must show that the hours were reasonably expended and that the fund benefited from the activity. If the activity merely benefits an individual, the work is not properly compensable from the common fund.[95] Therefore, although most circuits are silent on the point, appeals of attorney fee awards alone are probably not compensable in common-fund cases.[96]

In cases where fees are recovered under statutory authority, fees can be recovered by prevailing parties on prevailing issues.[97] Although the determinations for common-fund and statutory awards are identical in most cases, situations where they might differ will be noted throughout this report.

Once it is determined that fees are available, a system of calculating them must be chosen. The lodestar method establishes a procedure for this calculation—hours reasonably expended multiplied by prevailing community rate. Once that lodestar figure is formulated, it can be increased or decreased for several reasons. The apparent simplicity of the lodestar formula—hours multiplied by rate, plus adjustments—belies the complexity of interaction among numerous factors.

The lodestar approach evolved once the complexity of applying twelve factors, delineated in *Johnson v. Georgia Highway Express, Inc.,* became evident.[98] Some courts have blended the two approaches, using the lodestar to achieve a base figure while applying the *Johnson* factors as a multiplier to make adjustments.[99]

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95. *Lindy Bros. Builders,* 540 F.2d at 102.

96. *Id.* at 110; City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1102 (2d Cir. 1977); *compare In re Chicken,* 560 F. Supp. 706 (N.D. Ga. 1980) (can't allow fees for hours spent litigating fee petitions because case is controlled by equitable fund doctrine), *with Independence Tube,* 543 F. Supp. at 963 (antitrust is statutory fee case, and thus fees for appeal of attorney fees is allowed).

97. *Hensley,* 461 U.S. at 424.

98. 488 F.2d 714, 717-19 (5th Cir. 1974). These factors are: (1) time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

99. Dowdell v. City of Apopka, 521 F. Supp. 297, 299 (M.D. Fla. 1981), *aff'd,* 698 F.2d 1181 (11th Cir. 1983). *See* Moore v. Jas. H. Matthews Co., 682 F.2d 830 (9th Cir. 1982).

Recognizing the overlap among the *Johnson* factors, as well as the subjectivity of their application, courts began to rely upon the basic "hours x rate" formula, best articulated in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[100] Once the lodestar is computed, adjustments for factors such as quality, contingency, and results obtained may be applied. Breaking down this formula into its component parts will demonstrate the profusion of factors compressed into each basic term.

## Determination of Reasonable Hours

The universally accepted foundation for a fair attorney fee award is the hours reasonably expended on the winning issues.[101] Even in common-fund cases, where the benefit to the class must be considered, computation of the reasonable hours is a preliminary step.

Numerous factors must be considered in attempting to determine a fair number of hours; of primary importance is the overriding statutory purpose—namely, to ensure that the award provides adequate incentive for attorneys to take statutory fee cases. Additional factors can be broken down, for the sake of analysis, into three categories: (1) What determines a "winning" issue? (2) What time expenditures are reasonable? (3) Are optional state administrative hearings, participated in prior to a successful court action, compensable?

### Prevailing Party/Winning Issue

**Plaintiffs and defendants.** Attorneys' fees can be granted only for work in which the applicant prevailed.[102] To prevail, the party must achieve at least "some of the benefits sought" by the litigation.[103] Both the legislative history of the CRAFAA and case law have established that a party may be "prevailing" even if the change results from settlement or from filing the suit. This rule, called the catalyst rule, establishes that the plaintiff need not be the sole cause of the change, but may merely provide a motivation for the change. In the Fourth Circuit, this rule has been applied to allow attorney fee recovery where the court found that defendants changed their position independently of the action in the law-

100. 487 F.2d 161 (3d Cir. 1973).
101. *Hensley,* 461 U.S. at 424.
102. *Id.*
103. *Id.*; NAACP v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3d Cir. 1982), *cert. denied,* 460 U.S. 1052 (1983).

suit.[104] However, even under the catalyst rule, mere procedural victory is insufficient to sustain an award of attorneys' fees.[105] Reversing a dismissal for failure to state a claim, for example, will not by itself support an award of attorneys' fees.[106]

The standard for recovery by prevailing defendants, articulated in *Christiansburg Garment Co. v. EEOC,*[107] is that the lawsuit must be "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Thus, prevailing defendants are likely to recover attorneys' fees only in egregious situations.

If time spent on successes can be severed from time spent on failures, no compensation for the hours spent on losing issues is allowed.[108] However, if the hours cannot reasonably be divided between winning and losing issues, all hours should be compensated, unless such compensation would constitute a windfall.[109] As always, the hours expended must reasonably relate to the result obtained.[110]

**Intervenors.** Congress, in passing the CRAFAA, did not mention how to deal with the situation of attorney fee awards for intervenors. Merely to treat intervenors as plaintiffs or defendants according to the side on which they intervene can lead to situations incongruous with the legislative intent behind the fee act.[111] Two situations in particular can lead to this problem—reverse discrimination suits and declaratory judgments.[112] For example, if a county or state has sued for a declaratory judgment that its voting districting plan conforms with the Voting Rights Act and is constitutional, intervening minority voters may be defendants. Limiting fees to bad-faith action by the plaintiff would fail to provide poten-

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104. Disabled in Action v. Mayor, 685 F.2d 881 (4th Cir. 1982) (plaintiffs merely expedited planning and achievement of goals).

105. *Hanrahan,* 446 U.S. at 754; Fast v. School Dist., 728 F.2d 1030 (8th Cir. 1984) (en banc), *reh'g and vacating,* 712 F.2d 379 (8th Cir. 1983).

106. Hickey v. Arkla Indus., 624 F.2d 35 (5th Cir. 1980).

107. 434 U.S. 412, 422 (1978).

108. *Hensley,* 461 U.S. at 424.

109. *Id.* at 438.

110. *Id.* at 440.

111. *Compare* Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978) (prevailing defendant-intervenors in reverse discrimination suit denied fees because no showing that plaintiffs acted vexatiously), *with* Baker v. City of Detroit, 504 F. Supp. 841 (E.D. Mich. 1980) (prevailing defendant-intervenors in reverse discrimination suit were awarded fees because their position was equivalent to civil rights plaintiff), *aff'd,* 704 F.2d 878 (6th Cir. 1983), *cert. denied,* __ U.S. __, 104 S. Ct. 705 (1984), *and* Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982) (same), *cert. denied,* 459 U.S. 1204 (1983).

112. *See* B. Tamanaha, The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation, 19 Harv. C.R.-C.L. L. Rev. 109 (1984).

tial minority intervenors with the incentive to enforce the civil rights law by intervening.[113]

Several courts have looked beyond the procedural posture of the intervenor and awarded fees if the intervenor contributed to success on the merits.[114] This approach does not create substantially more work for the court since the court preliminarily evaluates the strength of the intervenor's position in permitting the intervenor's participation in the case. The court then needs to determine which hours spent by the intervenor contributed to the success of the position, using the same methods to determine duplication and reasonableness as applied to a prevailing party's hour expenditure.

**Reasonable Hours**

To some extent, the definition of reasonable hours will be determined by the court's pretrial and scheduling orders. For example, if the court in the pretrial order has announced that it will compensate only one lawyer at a deposition, it will be very difficult to argue later to that same judge that the plaintiff should be compensated for the attendance of two attorneys. However, unexpected factors may have arisen which justify the attorney's position, and the attorney may bring these to the court's attention.

Hours may be deemed unreasonable for a number of other reasons. They may be duplicative, wasteful, or merely excessive in relation to the complexity of the issue.[115] Hours spent on two similar cases can raise overlooked compensation issues. A common oversight or abuse occurs when an attorney seeks to recover from both parties for the same work. Review of the allocation of hours may lead to full allocation to the first case or pro rata allocation to all cases.[116]

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113. *Id.*

114. *Compare Donnell,* 682 F.2d at 240 (deny fees to intervenor if their efforts make little or no independent contribution to result achieved), *and* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), *aff'd,* 458 U.S. 457 (1982), *with* Alabama Power Co. v. Gorsuch, 672 F.2d 1, 4 (D.C. Cir. 1982) (grant fees if work of value to court in decision making), *and* Silberman v. Bogle, 683 F.2d 62, 65 (3d Cir. 1982).

115. *Hensley,* 461 U.S. at 424; *see generally* Miller, *supra* note 12.

116. *Compare Laffey,* 572 F. Supp. at 364-65 (court refused to disallow fees for work performed by attorney benefiting a similar class action against another airline), *with* Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F. Supp. 828 (N.D. Cal. 1976) (decrease compensation by twenty hours because thirty hours of interrogatories billed in full in each of three cases); *see generally* Miller, *supra* note 12, at 286; Vallo v. Great Atl. & Pac. Tea Co., 16 Fair Empl. Prac. Cas. (BNA) 967 (W.D. Pa. 1977) (half charged to each plaintiff for hours benefiting both, so hours allowed).

This problem has seldom arisen in case law, either because the lawyers haven't raised it or the court had insufficient evidence to challenge it, given the hours presented to them.[117] But in certain pretrial orders, such as in *Fine Paper,* the judge may ask for information concerning work on similar cases during the fee recovery period.[118] Unreasonable hours may also arise from excessive conferencing or reading documents irrelevant to the specific issue under consideration.[119] Hours spent due to inexperience or mere ineffective effort may also be deemed unreasonable. All of these determinations by the judge may be based on common expectations of productivity, personal observation, and experience in other fee cases. Proof that hours are not duplicative or excessive may also be introduced, supported, or countered by affidavits submitted to the court.

In determining reasonable hours, the attorney should exercise billing judgment. An oft-cited quote from *Copeland v. Marshall* states that "hours that are not properly billable to one's client are not properly billable to one's adversary pursuant to statutory authority."[120] Law firms frequently adjust their bills to reflect the benefit of their services to the client. If the legal services did not produce the result anticipated by attorney and client, either the hourly rate or the number of hours will likely be adjusted downward. Similar behavior by lawyers in reviewing fee petitions can contribute to increasingly reasonable fee applications. If courts can prod lawyers to adopt this technique, the court will reap the benefits. Courts should consider explicitly rewarding billing judgment and penalizing overstatement of hours, perhaps in its hourly rate and multiplier decisions or in its written opinions.[121]

**Allowable hours for litigating appeals.** Fees for appeals have been granted in both statutory fee and common-fund cases.[122] The legislative history of the CRAFAA supports the proposition that appeals of substantive issues are compensable. The language of the CRAFAA that allows attorneys' fees for "proceedings to enforce" civil rights has been interpreted to include appeals, since any benefit achieved may be lost if the appeal is not diligently defended.[123] Every circuit allows fees for appeals.[124]

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117. See Miller, *supra* note 12, at 286–87.

118. *In re Fine Paper,* 98 F.R.D. at 48 (*see* pretrial phase, part 1). Such inquiry portends the beginning of discussion on the issue of duplicative recovery in different cases.

119. *In re Continental,* 572 F. Supp. at 933–34.

120. 641 F.2d at 891 (D.D.C. 1980).

121. *Cf. Jaquette,* 710 F.2d at 455.

122. Perkins v. Standard Oil Co., 399 U.S. 222 (1970).

123. *Hutto,* 437 U.S. at 678.

124. Larson, *supra* note 2, at 171.

Who has the responsibility for determining those fees for appellate services? The general practice of the courts is that district courts will determine the fees for appellate services.[125]

**Allowable hours for fee applications.** Hours spent on fee applications are generally compensable in statutory fee cases but not in common-fund cases.[126] Courts have been more willing to limit or reduce compensation for fee litigation, apparently because it is perceived as personal income-producing behavior rather than client-benefiting work.[127] In common-fund cases, hours for fee applications are not compensable.[128] In cases where the plaintiff's petition is deficient in form despite clear preexisting standards, a court may disallow the hours spent rectifying the deficiency.

In regard to fee applications, judicial control of hours expended in the application and imposition of standardized submission requirements help increase judicial efficiency. One key to making limitations stick is to control both the plaintiff's and the defendant's activities, perhaps by limiting the amount and form of documentation that will be accepted from each side. The court may also mandate disclosure of specified information regarding normal fees and hours between parties in contest fee cases. By establishing baseline information, the focus of any discovery arguments may be sharpened.[129]

**Factors irrelevant to hours/rate determination.** A number of factors have been deemed irrelevant to the determination of reasonable fees. One is representation by public interest or pro bono attorneys, as opposed to representation by private practitioners.[130]

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125. Larson, *supra* note 2, at 175. The Eighth Circuit does not follow this practice. In *Hutto*, 437 U.S. at 678, the Supreme Court affirmed an award that was determined by the appellate court without addressing the question of whether the district court or the appellate court was the proper forum for fee determination. However, the Court did not overrule its holding in *Perkins* that the district court should ordinarily determine fees.

126. *Prandini*, 585 F.2d at 47.

127. *E.g., Laffey*, 572 F. Supp. at 371.

128. *Lindy Bros. Builders*, 487 F.2d at 161.

129. *But cf. Laffey*, 572 F. Supp. at 370 ("court acknowledges that the pre-application discovery . . . does not appear to have eliminated [or even appreciably narrowed] the areas of controversy").

130. *Blum*, 104 S. Ct. at 1541. (N.Y. Legal Aid Society lawyers two to four years out of law school compensated at $95–$105 per hour.) Despite the universality of this provision and the clearness of the congressional intent, numerous cases have granted reduced rates to public interest attorneys or granted lesser rates to government attorneys because "public attorneys general . . . did not work under the same pressures as private counsel." *See generally* Larson, *supra* note 2, at 240; *e.g., In re Chicken*, 560 F. Supp. at 963 (granted rates from $200/hour for named partner to $60 for beginning associates; rates for attorneys general ranged from $50–$90/hour). Now that *Blum* has incontrovertibly established that public interest lawyers should be compensated at private rates, this practice should abate.

Another factor generally found irrelevant to the availability of attorneys' fees is the amount of damages. The awarding of nominal damages is an improper reason to disallow or reduce attorneys' fees.[131] Enforcing nonmonetary rights is as important as enforcing monetary rights for fee recovery purposes. This factor cannot, however, be categorically dismissed. A limited award of damages may reflect limited success in achieving the goals of the litigation. If this is the case, then the monetary recovery, while not inherently important, is important because of its correlation with success.[132]

The existence of a contingent fee agreement is of questionable relevance to determining fee entitlement. Most courts have held that these agreements do not limit the recovery of fees.[133] In these cases, the contingent fee agreement is neither a ceiling nor a floor for statutory fees; it is merely one factor to consider. At least one circuit has left open the possibility that dual recovery, of both statutory and contract fees, is possible.[134] Increased allowance of reasonable, but dual recovery would comport with the legislative intent of the fees act to encourage attorneys to take cases. Presumably, the lawyer would receive the larger of the contingent fee and the statutory award, and the statutory award would also serve to reduce the client's legal costs. Problems relating to contingent fee agreements can be prevented by raising the issue in pretrial proceedings, as discussed in chapter 1.

**Nature of the defendant of limited relevance.** A couple of courts have considered the relative impact of an attorney fee award on the parties. The comparative wealth of the parties sometimes emerges as an issue when the defendant is a state or local government that raises revenue from taxpayers. The nature of the defendants and the relative ability of each defendant to pay fees may be considered in order to distribute the burdens of the litigation equitably.[135] However, the relative wealth of the parties is not a reason totally to deny a fee award.[136]

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131. *E.g.*, Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240 (9th Cir. 1982).

132. *Jaquette*, 710 F.2d at 455; *Smiddy*, 665 F.2d at 261.

133. *Cooper*, 719 F.2d at 1496; Sanchez v. Schwartz, 688 F.2d 503 (7th Cir. 1982).

134. Sullivan v. Crown Paper Bd. Co., 719 F.2d 667 (3d Cir. 1983) (although dual recovery is possible, this case is inappropriate for dual recovery because there is only a single plaintiff, the case has limited significance beyond the immediate parties, and the legal issues are not novel or complicated).

135. Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982) (district court considered deputy's ability to pay in individual capacity when awarding fees), *cert. denied*, __ U.S. __, 103 S. Ct. 3115 (1984); Kennelly v. Lemoi, 529 F. Supp. 140 (D.R.I. 1981) (additional amounts, exceeding lodestar, should be measured by client's ability to pay, if not indigent); *contra Copeland*, 641 F.2d at 894.

136. Cohen v. West Haven Bd. of Police Comm'rs, 638 F.2d 496 (2d Cir. 1980) (court may take into account relative wealth of parties, but can't reduce because of status as municipality or unintentional violation).

Governments are liable for attorney fee awards unless protected by sovereign immunity.[137] Several states have attempted to limit their liability for attorneys' fees when the suit is brought by a state-supported legal services office. The courts are divided on the legislature's authority to decrease the amount of fees because of the public funding of the office.[138]

Fee recoveries from local governments are often the impetus for public complaints that attorney fee awards are overly generous.[139] Parties, and the public, may fear that the innocent taxpayers or consumers are bearing the brunt of sanctions that should remain with the wrongdoers, and that plaintiffs' counsel are reaping compensation disproportionate to the effort exerted. Part of the apprehension flows from the lump-sum nature of attorney fee awards. This perception, and the accompanying burden to the government, may be lessened by creative or extended payment schedules.[140] Another source of the dissatisfaction, perhaps unavoidable, is the belief that states are paying damages and attorneys' fees in cases that should have been settled. This problem is mostly likely to be dealt with by educational and political processes, and by case management that promotes early consideration of settlement.

### Administrative Hearings and Pendent Claims

**Hours spent on administrative hearings.** Compensation for work at administrative hearings at the state level has been challenged and approved.[141] The CRAFAA language allows compensation for "any action or proceeding to enforce" 42 U.S.C. § 1983, the most commonly invoked civil rights statute, and several other statutes have adopted such language.[142] Particularly where the statute in

137. *Hutto*, 437 U.S. at 678.

138. *Compare Shadis*, 692 F.2d at 924 (court voided a clause the state inserted into employment contract of legal services attorney in which attorney pledged not to sue the state for attorneys' fees in any cases), *with* Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980) (legislature has discretion to decide that legal service offices may not recover fees from state government in excess of the amount legislatively allocated for that program), *and* Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980) (Hawaii law requires set off of fees more than the amount allocated by legislature, but court may not refuse to award fees under that law).

139. *See, e.g.*, The Legal Fees Equity Act: Hearings on S. 2802 before the Subcommittee on the Constitution, of the Committee on the Judiciary, 98th Cong., 2d Sess. Sept. 11, 1984 (statement of Carol E. Dinkins, Deputy Att'y Gen., U.S. Dep't of Justice).

140. Brewster v. Dukakis, 544 F. Supp. 1069 (D. Mass. 1982) (court allowed two yearly payments by government without penalty for delay).

141. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

142. 42 U.S.C. § 1988; Larson, *supra* note 2, at 74.

question calls for exhaustion of those remedies before judicial review, such as in title VII, the work should be compensable. One circuit has held that success in a prelawsuit, nonmandatory state administrative hearing does not qualify as fee-compensable work when no civil complaint is ever filed.[143] However, the Supreme Court has ruled that hours expended in an optional, unsuccessful administrative proceeding are compensable if those hours are "both useful and of a type ordinarily necessary to advance" a successful court action on the same issue.[144] Where both a fee issue and a nonfee issue arise out of the same facts, prevailing on the nonfee issue (with no decision on the fee issue) does not preclude an award of attorneys' fees for the administrative hearings.[145]

**Compensability of pendent claims.** Deciding when success on pendent claims is a basis for a fee award presents many of the same issues as discussed above. Since section 1988 allows recovery for "any action or proceeding" to enforce section 1983, it follows that attorneys' fees can be claimed for state court actions fitting this description. The Supreme Court, in *Maine v. Thiboutot,*[146] held that a section 1983 claim may be brought in state or federal court. Section 1983 creates a claim for the deprivation of rights, privileges or immunities secured under the Constitution or laws.

In other cases where state and federal claims overlap or arise from the same facts, attorneys' fees are granted to the prevailing plaintiff.[147] In cases where the decision on the state claim precludes the decision on the federal issues, attorneys' fees can still be collected.[148] The rationale supporting this conclusion is that the

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143. Garcia v. Ingram, 729 F.2d 691 (10th Cir. 1984).

144. Webb v. Board of Educ., 53 U.S.L.W. 447 (U.S. Apr. 17, 1985). The holding in *Webb* was that the hours spent in an optional unsuccessful administrative proceeding are not automatically compensable, rejecting the conclusion of Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) (fees allowed at personnel board hearing to encourage use of administrative remedies).

145. *Cf.* Venuti v. Riordan, 702 F.2d 6 (1st Cir. 1983) (plaintiff not compensated for defense on criminal charge arising from unconstitutional ordinance, but fees granted for successful civil challenge to same law); United Nuclear Corp. v. Cannon, 564 F. Supp. 581 (D.R.I. 1983) (prevailing plaintiff not entitled to fees for time spent lobbying against statute as unconstitutional).

146. 448 U.S. 1 (1980). The case also established that 1983 claims not only need to be constitutional issues, but may be asserted for other violations of federal law.

147. *Gagne,* 594 F.2d at 336 (state and federal claims arose from common nucleus of fact); *Independence Tube,* 543 F. Supp. at 706 (generally no attorneys' fees are allowed for state claims, but here federal and state claims are inseparable).

148. Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982); *Williams,* 692 F.2d at 1032 (attorneys' fees allowed for state assault and battery claim although section 1983 monetary recovery prevented by good faith immunity defense).

complementary policy reasons for encouraging litigation on civil rights issues and for avoiding decisions on constitutional grounds when narrower grounds are available have both been strengthened.[149] However, when one loses on the federal issue and prevails on the pendent issues, fees generally will not be granted.[150]

In any event, the claim must arise under a statute providing a fee award.[151] Merely joining a constitutional or civil rights claim to a statutory nonfee claim is insufficient, particularly when the subject matter is strictly regulated. For example, in *Smith v. Robinson,*[152] the breadth of the Education of the Handicapped Act and the omission of an attorney fee provision were found to preclude the opportunity to assert an identical claim, merely for the recovery of fees, under 42 U.S.C. § 1983 or section 505 of the Rehabilitation Act. However, in reality it becomes difficult to separate issues and to decide whether these issues arise under statutes that allow fee recovery.

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149. *Bartholomew,* 665 F.2d at 910 (case removed to state court, where plaintiff lost on state claim, then prevailed on constitutional claim—fees awarded for state litigation because it promoted the goals of federalism and abstention, and plaintiffs should not be punished for this).

150. Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980); Bunting v. City of Columbia, 639 F.2d 1090 (4th Cir. 1981). *Cf. Williams,* 692 F.2d at 1032 (not every tort case will allow for fee recovery; must occur in official furtherance of duty and jury must have affirmatively found that plaintiff's constitutional rights were violated).

151. __ U.S. __, 104 S. Ct. 3457 (1984).

152. *Cf.* Rose v. Nebraska, No. 83-2678 (8th Cir. Nov. 26, 1984) (where due process claim arises out of same set of facts as an Education for All Handicapped Children Act of 1975 claim and is not merely attached for purpose of obtaining fees, an attorney fee award is appropriate).

# V. COMMUNITY RATES

The prevailing attorney fee rates in the community provide a standard for computing the value of the hours expended. The "market rates" generally arise by comparison with rates charged by lawyers of similar experience and expertise in similar cases.[153] Three issues generate a large number of the rate disagreements: whether local or national rates should apply, whether specialist or generalist rates should apply, and whether present or historical rates compensate most fairly. A fair rate also encompasses a number of individual factors, including the experience, education, reputation, and field of practice of the attorney. Courts repeatedly must decide how to balance all these factors to arrive at a fair rate of compensation.

## Local Rates

Local versus national fee arguments often create the most dissension because of both the increased prestige and the monetary rewards associated with national practice. Out-of-town lawyers have frequently been compensated at the rates prevailing in the city from which they hail, rather than at the rates for the locale in which the litigation occurs.[154] However, other courts have decided that local rates of the district where the court sits should prevail.[155] Because attempts to apply national rates have met with

153. *Blum*, 104 S. Ct. at 1547; *In re Agent Orange*, M.D.L. No. 381, slip op. at 27; *In re Fine Paper*, No. 83-1172, slip. op. at 37 (hourly rate must be "individually determined for each attorney, and for separate categories of activities engaged in by each attorney"); Henry v. Webermeier, 738 F.2d 188 (7th Cir. 1984) (court disapproves decrease of rate because no market rate set; court further distinguished between base rate [rate for office work on simple cases], average rates [average over all clients, regardless of difficulty of work], and composite rates [average of simple and difficult work]; the first two rates should not be decreased because of the simplicity of the issue or lack of trial, since the rate compensates for the simplest work).

154. Maceira v. Pagan, 698 F.2d 38 (1st Cir. 1983); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), *cert. denied*, __ U.S. __, 103 S. Ct. 2428 (1984).

155. *Ramos*, 713 F.2d at 546; Avalon Cinema Corp. v. Thompson, 689 F.2d 137 (8th Cir. 1982); *compare* Louisville Black Police Officers Org. v. City of Louisville, 700 F.2d 268 (6th Cir. 1983) (generally look to community in which district court sits to

mixed success,[156] a local civil rights attorney might not be compensated at the same level as a nationally acclaimed attorney in the same case.

In certain cases (e.g., civil rights or environmental), the local market may be in question because the case may involve one state but be litigated in Washington, D.C.[157] The District of Columbia Circuit has held that the relevant market is the one in which the district court sits.[158] In cases where the ruling of an administrative agency is appealed directly to the circuit court of appeals, the physical site where the challenged behavior occurred is the relevant market. This rule has the advantage of simplicity and evenhandedness for plaintiffs and defendants. Of course, if no attorney with proper training is available in the district where the court sits, one may be procured and paid at the rates prevailing in that attorney's community.[159]

Local rates, if less than national rates, may also be preferable in order to discourage plaintiffs from unnecessarily hiring out-of-town counsel when local attorneys possess sufficient expertise to adequately represent the plaintiffs. Hiring local counsel would be less expensive, and there would be less delay in litigating these cases.[160]

Special cases that call for the application of rates greater than the prevailing community rate might include circumstances where local attorneys lack the expertise to conduct the suit; suits where the cause is so unpopular that local attorneys are unavailable to litigate; and suits so large and complex that national experts are

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establish rate; but court may, at its discretion, apply a national rate), *and In re Agent Orange,* M.D.L. No. 381, slip op. at 28 (court rejects district court community as base for rate, saying "such a parochial rule is inappropriate in a multidistrict litigation requiring participation of attorneys from many districts"), *with* Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981) (abuse of discretion to apply national rate when it doubles the rate actually charged, and there is no showing "in fact" of national practice); *see also Donnell,* 682 F.2d at 240 (local attorney awarded higher, out-of-town rates because of his unique knowledge).

156. See preceding footnote and cases cited therein. The Third Circuit, in the *Fine Paper* antitrust litigation, rejected the application of flat national rates, at least based on the information considered by the district court. *In re Fine Paper,* No. 83-1172, slip op. at 54. The court in the *Agent Orange* litigation, in applying national rates, distinguished its situation by presenting more information concerning the rates charged by attorneys and by noting that a "national bar" has developed. *In re Agent Orange,* M.D.L. No. 381, slip op. at 31.

157. *E.g.,* 42 U.S.C. § 1973(1)(e) grants attorneys' fees for enforcing voting guarantees of the Fourteenth and Fifteenth Amendments.

158. *Donnell,* 682 F.2d 240 (D.C. Cir. 1982) (district court was in Washington, D.C., but for Mississippi attorney who was needed for Mississippi law, applied Mississippi rates).

159. *Id.* at 252.

160. *In re Continental,* 572 F. Supp. at 934.

necessary to assist local attorneys in conducting the suit (i.e., reapportionment cases).

## Fee Schedules

In more routine cases, a court may wish to establish standards regarding applicability of local or national rates. Alternatively, a court may establish criteria for claiming compensation for a national practice. Based on experience with the fees cases in that court in recent years, a court can create a chart of the "prevailing community rate" in various types of cases.[161] The court can prescribe that this scheduled rate will be presumed reasonable. Thus, the court can establish a range of fees for complex cases or provide a standard base rate. As long as the rate provides reasonable compensation and is perceived by the lawyers as fair, the process could be streamlined by that determination. A schedule that is reasonably close to community rates will likely stimulate settlement by providing some degree of predictability to the outcome of a fee dispute.

An alternative method for organizing the fee schedule is suggested by the majority opinion in the recent decision in *Laffey v. Northwest Airlines, Inc.*[162] The court rejected the "market rate" approach as too cumbersome and unpredictable. However, that system would be maintained to establish fees for public interest or other groups with no billing history.[163] For private firms seeking attorneys' fees, a two-part process applies. First, the firm seeking compensation must produce evidence of the rates it has charged for private representation in similar cases.[164] Second, the fee must be "bracketed," which involves "establishing that it falls within the rates charged by other firms for similar work in the same community."[165]

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161. *Copeland,* 641 F.2d at 892; Johnson v. University College, 706 F.2d 1205 (11th Cir. 1983) (identical rate for each of plaintiff's lawyers—rate increased $5/hour for each year out of school), *cert. denied,* ___ U.S. ___, 104 S. Ct. 489 (1984); *but cf. Laffey,* 746 F.2d at 20 (creation of rate is task for Congress). *Compare In re Fine Paper,* No. 83-1172 at 51 (court rejected use of uniform rates due to lack of evidence in record supporting the rates chosen), *with In re Agent Orange,* M.D.L. No. 381, slip op. at 31 (court distinguishes this case from *Fine Paper* because analysis of "substantial national and local data available was undertaken by the court").

162. 746 F.2d 4 (D.C. Cir. Sept. 28, 1984).

163. *Id.* at 16, 24.

164. *Id.* at 41.

165. *Id.*

## Specialist Rates

Attorneys will argue for further specialization of fee rates. Currently, areas such as antitrust and securities fraud[166] command superior fee awards, while employment litigation trails behind, despite clear legislative intent to the contrary.[167] A court may, in its discretion, allow national rates for specialties, but it is under no compulsion to do so.[168] Other large areas of litigation tend to cluster around a median rate so that compensation rates vary most within the middle rather than at the extremes.

Perhaps part of the confusion has arisen from the apparent conflict between the legislative history requiring parity between fee awards for public interest and commercial lawyers and the legislative history supporting use of prevailing community rates. Community rates have often been determined with regard to the market for specialists, which leads to the differentiation between public and private attorneys.

In determining whether to apply a specialized rate, a court might consider the degree to which the legal profession acknowledges the area of law as a specialty; the degree to which individual factual issues and issues of causation required the lawyer to have particular substantive nonlegal knowledge; the city where the firm is located; and the type of work, such as drafting, research, negotiation, or trial.

The term "general rates" is somewhat a misnomer and might more appropriately be called "less specialized rates." One rate for all types of legal endeavor would provide the same compensation for varying levels of specialization and difficulty.

Within these rates—no matter how specialized—there remains room for further distinctions. One major distinction is for in-court versus out-of-court work. Courts have discretion to consider or ignore this factor. Despite the inherent fairness of attempting to compensate attorneys precisely, the consequence of this distinction may be negative for two reasons. First, granting a higher rate for trial work tends to denigrate the importance of settlement and negotiation. Secondly, the in-court/out-of-court distinction increases the depth of review eventually required for fee determination.

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166. *Jorstad,* 643 F.2d at 1305.

167. *See* Larson, *supra* note 2, at 240.

168. *Louisville Black Police Officers,* 700 F.2d at 268.

## Historical Rates

In the majority of cases, present rates have been awarded without comment if the litigation is not prolonged. However, in major litigation that may continue for many years, this issue has been at the core of fee disputes, particularly in times of high inflation. Generally, compensation for delay is not mandatory, though the Eleventh Circuit recently modified that rule.[169]

Several courts feel that awarding current rates compensates both for delay in payment and for any changes in rates which may have occurred in the interim.[170] Present rates are frequently granted, both for convenience of computation and to induce prompt settlement of the case.[171] In *Ramos v. Lamm,*[172] the Tenth Circuit stated that current rates will compensate almost equivalently to periodic billings, adjusted for inflation and interest.[173] The court also ruled that parties should be informed beforehand whether present rates will be applied to compensation, a ruling expected to enhance settlement and discourage the use of historic rates.

If the court adopts a system for regular monitoring of time sheets (see chapters 1 and 2), the court can simultaneously determine rates or at least note when rates change. This approach avoids the problem of trying to reconstruct what the prevailing rate was ten years ago. The plaintiff can be compensated by interest for the delay in compensation.

Purists will agree with the approach of the Second and D.C. Circuits, which hold that historic rates should generally be applied because they are more accurate than current ones.[174] However, the

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169. *Compare Concerned Veterans,* 675 F.2d at 1319 (delay, if small, can be ignored, as can delay caused by plaintiff), *with University College,* 706 F.2d at 1205 (delay must be reflected by upward adjustment of lodestar if not using current rates).

170. *Gautreaux,* 690 F.2d at 601; Paschall v. Kansas City Star Co., 695 F.2d 322 (8th Cir. 1982) (either bonus or use of current rates compensates for delay in receipt of money); *Copper Liquor,* 684 F.2d at 1096 (dicta that the prevalent practice in federal courts today is to use current rates "to compensate counsel for inflation and delay in receipt of payment").

171. Delay in payment can be considered either in awarding a multiplier or in determining an appropriate rate. *In re Fine Paper,* No. 83-1172, slip op. at 47–48, 77. Allowance for delay in payment is subject to the court's discretion. *Id.*

172. 713 F.2d 546 (10th Cir. 1983).

173. *Cf. In re Agent Orange,* M.D.L. No. 381, slip op. at 93 (court computes that a pure historical rate plus multiplier would exceed the current rate; therefore, the current rate does not overcompensate and is considerably easier to administer, and thus is the preferred method).

174. *Laffey,* 746 F.2d at 25; *New York State Ass'n,* 711 F.2d at 1136.

initial accuracy of the compensation may be clouded by the adjustments for inflation and the lost opportunities for alternative investments that, in the interest of fairness, must also be applied.

## Paralegal Rates

A less debated, but potentially more abused, source of fees is the money charged for work performed by law students and paralegals. Less documentation and more guesswork appear to enter into the determination of such compensation, particularly because, until recently, paralegal pay levels were not subject to much scrutiny. Furthermore, this is an area where potentially large profits are made—the disparity between the billing rate and the pay schedule of students and paralegals may be greater than for attorneys, especially at the partnership level.[175]

Several courts have deemed paralegal or law student rates to be excessive and have reduced the fee award accordingly.[176] In *In re "Agent Orange" Product Liability Litigation,*[177] Judge Weinstein approved of the policy of reimbursing for paralegal time at "rates that reflect the costs of salary, overhead and a profit." This approach creates incentive to use the lowest-paid employees, although that policy could not be implemented because many attorneys only recovered expenses, and paralegal time was thus treated as an expense.[178] However, the fact remains that it may be cheaper for the opposing party to pay a reasonable rate for the student to learn than to pay for the time of an attorney.

## Discovery of Rates

Fee applications have taken on an unprecedented importance in litigation, sometimes beyond the merits of the case.[179] Not only are the numbers of fee cases increasing, but procedures for determining fees are becoming increasingly complex and time consuming. Hearings, appeals, and remands on fee issues can continue for years.

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175. The Chief Justice has criticized the high rates recovered for work by law students, resulting in profit to the firm for allowing the student to learn. Louisiana v. Mississippi, __ U.S. __, 104 S. Ct. 1645 (1984) (Burger, C.J., dissenting in part).

176. New York State Ass'n, 711 F.2d at 1136; Benitez v. Collazo, 571 F. Supp. 246 (D.P.R. 1983).

177. M.D.L. No. 381, slip op. at 84 (E.D.N.Y. Jan. 7, 1985).

178. *Id.*

179. *Hensley*, 461 U.S. at 424 (Brennan, J., dissenting in part).

In addition to establishing new standardized procedures, it also is important to streamline existing procedures. In a recent survey, 97.5 percent of the federal judges who responded stated that they sometimes hold oral arguments on fee applications, and 95 percent indicated that they sometimes hold an evidentiary hearing in such cases.[180] Scarce judicial resources can be saved if procedures are established to reduce the need for oral arguments and evidentiary hearings on fee applications.

**Hearings**

When fee applications are factually disputed, courts generally provide an evidentiary hearing.[181] In common-fund cases, hearings may be essential to fulfill the court's duty to protect the plaintiffs' interest in the fund, which may be infringed because of the potential conflict between the attorneys' and the clients' claims to the fund.[182] However, one may question how much information the court gains at these hearings that could not be garnered through briefs or documents alone.[183] Given the increased detail required of fee applications in the last ten years, the necessity for a hearing in many cases may have declined.[184] As the court accumulates information about community rates, for example, there is less need for expert testimony on the subject.

In several situations, evidentiary hearings will remain necessary if requested by either party. These situations include

1. disagreements concerning a material question of fact,[185]
2. situations where the attorneys' fees are being granted or withheld as a sanction. In these cases, attorneys should have the right to defend their behavior or to argue that the sanction is overly severe,[186] and
3. determinations of whether a plaintiff is "prevailing." While this is a crucial issue, the court's familiarity with its own

180. Miller, *supra* note 12, at 225–26.

181. *Perkins,* 399 U.S. at 222. The legislative history of the CRAFAA leaves unclear whether a hearing was intended to be required, since the illustrative cases cited by Congress were split on the issue. *See* Larson, *supra* note 2, at 269–71.

182. *See, e.g., In re Fine Paper,* No. 83-1172, slip op. at 38; *Copeland,* 641 F.2d at 880.

183. *See* Miller, *supra* note 12, at 227.

184. *See* Larson, *supra* note 2, at 271.

185. *Concerned Veterans,* 675 F.2d at 1330, and cases cited therein (defendants sought hearing on adequacy of documentation of hours and their right to discovery).

186. Miranda v. Southern Pac. Trans. Co., 710 F.2d 516 (9th Cir. 1983); Textor v. Board of Regents, 711 F.2d 1387 (7th Cir. 1983).

prior rulings in the case may obviate the need for extended argument.

If either party requests a hearing, the court's ruling on that request, as well as its announcement of its position regarding award of fees for the requested hearing, will provide an opportunity to encourage settlement discussions. Any prehearing conference will afford a similar opportunity.

**Discovery of Defendant's Payment**

Whether or not a hearing is to take place, the scope of discovery for the fee application may have to be established. District courts are split on whether defendant's rates and time expenditures in the case at hand can be discovered.[187] On the other hand, commentators uniformly conclude that these records are relevant to plaintiff's burden of showing the reasonableness of hours and rates in the same litigation.[188] No federal appellate court has ruled directly on the issue.[189] An argument against the discovery of time expenditures is that the plaintiff may be induced to raise frivolous issues merely to increase the defendant's time expenditures. Pretrial management and limiting payment to issues on which plaintiff has prevailed, as required under the *Hensley v. Eckerhart*[190] decision, can prevent this potential abuse.

Generally, the defense counsels' normal billing rates can be discovered; the rate charged in the case at hand can also be discovered if it is relevant to the prevailing community rate.[191] However,

187. *Compare* Stastny v. Southern Bell Tel. & Tel. Co., 77 F.R.D. 662 (W.D.N.C. 1978) (hours spent by defendant's attorneys relevant to plaintiff's request, and not privileged under attorney–client privilege), *with* Samuel v. University of Pittsburgh, 80 F.R.D. 293 (W.D. Pa. 1978) (defendant's time expenditures irrelevant since defendant generally spent more time on trial and may attach more precedential value to case than to individual plaintiffs).

188. Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. at 483 (court used as one criterion for fees the fees paid to opposing counsel); Larson, *supra* note 2, at 272–73; Note, *Determining the Reasonableness of Attorneys' Fees—The Discoverability of Billing Records*, 64 B.U.L. Rev. 241 (1984).

189. *But see University College*, 706 F.2d at 1208 (failure of the district court to allow discovery and introduction of evidence of defendants' hours and fees was not an abuse of discretion given that the court allowed some evidence of defendants' rates), *cert. denied*, — U.S. —, 104 S. Ct. 489 (1984); *see* Action on Smoking and Health v. CAB, 724 F.2d 211 (D.C. Cir. 1984) (rehearing granted to consider court's failure to grant government discovery on fee issue).

190. 461 U.S. 424 (1983).

191. Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979) (all rates, both in this case and in general, are discoverable—whether they are reflective of the community rates determines the weight of the evidence rather than its relevance); *cf.* Blowers v. Lawyers Coop. Publishing Co., 526 F. Supp. 1324 (W.D.N.Y. 1981) (defendants' rates discoverable when they reflect the prevailing community rates).

one court has held that the rates discoverable are limited to the "normal" billing rates rather than the rates charged in the specific litigation.[192] The rationale supporting this interpretation is that the litigation at hand may have special difficulties that make the rate unrepresentative. This rationale is undercut by the fact that the discovered rates apply to the case at hand, so any unusual factors are likely to be equally relevant to both plaintiff and defendant.

A court has considerable discretion in allowing or refusing to consider evidence of the billing hours and rates of the defense counsel. In some cases, the court may deem the evidence to be relevant but not weighty.[193] Disclosure of the defendant's time expenditures can provide inexperienced plaintiff's counsel a standard for comparison, albeit an imprecise one.

### Alternative Approaches

Courts can avoid some discovery disputes by ruling that hours and rates are discoverable and facilitating exchange of information. However, discovery which is excessive or unnecessary, no matter how trouble-free, remains wasteful. Reasonable fees, not absolute penny-for-penny reimbursement, are provided for in fee-recovery statutes. As long as both sides have had an opportunity to present all their arguments and to be heard, and the resulting findings of fact and fee award reasonably reflect all the relevant factors, the result should withstand challenge.

Within these constraints, the court can limit discovery disputes and hearing time by establishing standardized procedures for discovery and presentation of evidence and argument, with limited and well-defined exceptions.[194] For example, the court could, in consultation with appropriate bar committees and public-interest legal groups, establish a standard set of interrogatories and requests for production; such forms would cover routine exchange of information about rates and hours of counsel for each side. Appropriate sanctions could be built into the order.[195]

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192. *Blowers*, 526 F. Supp. at 1324; *see also* Note, *Determining the Reasonableness of Attorneys' Fees—The Discoverability of Billing Records*, 64 B.U.L. Rev. 241, 255–56 (1984).

193. *In re Fine Paper*, No. 83-1172, slip op. at 45 (court did not abuse discretion in disallowing introduction of evidence of fees paid by settling defendants in the underlying litigation, given the availability of other evidence on the topic); *University College*, 706 F.2d at 1208.

194. *See Concerned Veterans*, 675 F.2d at 1319 (court suggests information about hourly rates and time expenditures be made available).

195. *Cf.* T. Willging, Asbestos Case Management: Pretrial and Trial Procedures (Federal Judicial Center 1985).

In determining fees, the court's considerable discretion might permit the promulgation of a reasonable schedule of fees to which attorneys must adhere.[196] The court may make the list as comprehensive as it likes and may provide a specified procedure for exemptions from the schedule.

Another alternative is to have each fee dispute documented, briefed, and disposed of without oral argument, unless the court sees a need for argument. Conversely, the court may want to forgo briefs and rely solely on oral arguments.[197]

A particular waste of time arises from the use of expert witnesses and numerous affidavits as to community rates.[198] If the court does not establish its own rate schedules, the court can limit what factors will be considered in making the determination. For example, a court may state that affidavits of other attorneys supporting the fee are unnecessary, or that such affidavits should be accompanied by the rates charged in similar cases by the affiant's firm. Furthermore, the court may establish what types of firms must be surveyed in arriving at a community rate (corporate, middle-sized, specialized, or solo practitioner). If evidence is to be taken on the issue of community rates, the court could specify that it be done by narrative summary to focus the content more efficiently.[199]

### Summary

Now that courts have considerable experience with fee disputes, devices to streamline the gathering of evidence for decision seem appropriate. Specification of the form of the fee petition in the pretrial order, routine orders for exchange of discovery information, use of schedules to determine community rates, structuring the form of the evidence, limiting briefs and arguments—all these case management tools tend to limit the opportunities for bitterly contested, foot-dragging, wasteful fee disputes.

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196. *See, e.g., Laffey,* 572 F. Supp. at 375; *In re Agent Orange,* M.D.L. No. 381, slip op. at 87–89 (national rate schedule utilized). *But see In re Fine Paper,* No. 83-1172, slip op. at 52–53 (must figure rate individually for each attorney).

197. *See generally* J. E. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984).

198. *See Laffey,* 572 F. Supp. at 385 (judge refused to compensate for expert testimony of one economist because his testimony did not elucidate any relevant factors).

199. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial,* 72 Geo. L.J. 73 (1983).

## Standardized Rate-Setting

Local rates and local fee determinations are appropriate given the different costs of living throughout the country. However, within the district courts of one state, or among the judges within a district, a disparity in the fees allowed can lead to judge-shopping and confusion. Several approaches, such as a standardized fee schedule and prestructured discovery, can help provide a specific framework for rates, without straitjacketing the court's discretion.

The fear that standardizing fee rates will chill the enthusiasm of attorneys for accepting these cases may be questioned on several grounds. First, the standard rates would be set at a market rate in order to carry out the intent of Congress. By definition, these rates should be competitive with rates offered by potential clients. Second, statutory fees can create a limited amount of incentive, and there will always remain those lawyers who prefer their retainer and hourly clients to a contingent fee case, whether the fee ultimately comes from the defendant or the client. Lastly, since the matter is judicially determined, rather than legislatively established, changing the rates to maintain the reasonableness of awards will be relatively easy. Thus, courts can use these standards to demonstrate consistency, but not intransigence, in rate determination.

# VI. ADJUSTMENTS TO THE LODESTAR

Adjustments to the established lodestar figure, often known as multipliers, generally fall into three categories—quality, contingency, and the result obtained. While these factors are among the most subjective in the fee award computation, discernible standards do regulate their application. At this point, subjectivity and overlap become apparent.

## Quality

In certain cases, fee awards can be increased or decreased for quality of representation.[200] Mere success on the merits will not create the proper situation for a quality adjustment; the success must be exceptional, given the case and the effort exerted. Several courts have been reluctant to award bonuses when the time spent on the case was so overwhelming that success seemed to flow from sheer hours of work.[201] Sanctionable behavior generally seems to cause decreases since excess will have been eliminated in the lodestar computation.[202] Decreases may also result from a *Hensley* determination that the hours claimed do not properly reflect the hours expended.

## Contingency

Contingency factors also allow for increases or decreases in awards. Contingency can be divided into likelihood of success and likelihood of payment from any source.[203] In a case invoking the

200. *Hensley,* 461 U.S. at 424.

201. *Blum,* __ U.S. __, 104 S. Ct. at 1541 (the novelty and complexity of the issues presumably were fully reflected in the number of billable hours).

202. Williams v. Trans World Airlines, Inc., 660 F.2d 1267 (8th Cir. 1981) (plaintiff's attorney interviewed no defendant's witnesses, failed to attend deposition, and failed to submit brief; court granted 100 of 450 requested hours at $50/hour rather than $90); *In re Fine Paper,* 98 F.R.D. at 86.

203. Aumiller v. University of Del., 455 F. Supp. 676, 682-84 (D. Del. 1978) (plaintiff "ill-prepared to finance the costs of litigation"), *aff'd,* 594 F.2d 854 (3d Cir. 1979).

fee statute, the likelihood of success relates to the risk of failure on the merits. The likelihood of payment refers to factors affecting payment regardless of success on the merits. The risk of nonpayment may be high if the defendant has limited financial resources to pay a fee award; it will be low if the plaintiff pays a retainer plus costs. While several courts appear to give priority to the likelihood of success, the likelihood of payment significantly affects rate. In *Blum v. Stenson,*[204] the court declined to decide whether the risk of not prevailing on the merits was a factor justifying an upward adjustment in the rate.[205] However, a number of courts have awarded fees at lower rates once one winning claim arose, based on a decrease in contingency, although prevailing on one issue does not necessarily dictate success on others.[206] A single-issue success does entail payment for the work on that issue, assuming the party prevails. For the risk of failure contingency, which continues even in a successful case, it may be appropriate to stop granting the bonus once a significant issue has been won since the plaintiff's attorneys will no longer face a risk of total nonpayment.

Contingency also involves the fact that the attorney often must invest years of time and substantial out-of-pocket costs in a case without remuneration. To make this investment possible, let alone profitable, fee statutes call for an incentive. The risks of nonpayment and delay in payment bonuses temper a disincentive arising from the long wait for court-determined attorneys' fees.[207] When delay is the only contingency under consideration, the award is comparable to interest. When the risk of failure or nonpayment is the contingency, however, the multiplier can be fairly applied to all fees prior to dissipation of that risk.

## Result Obtained

This multiplier arises from the holding in *Hensley,* which attempted to ensure that fee awards reflect the amount of success obtained.[208] In cases where the successes and failures are insepara-

204. ___ U.S. ___, 104 S. Ct. 1541 (1984).

205. *But see* Brennan, J., concurring (Congress intended that risk of not prevailing is proper basis for upward adjustment).

206. *Ramos,* 713 F.2d 546 (10th Cir. 1983) (contingency may be applied differently at different points in trial).

207. *See* Larson, *supra* note 2, at 226. However, attractiveness and favorable publicity generated by taking a case are not a proper reason to decrease an award. Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981).

208. *Hensley,* 461 U.S. at 424.

ble, so that the lodestar may overcompensate, the court may employ a fractional multiplier to reduce the award proportionately. In effect, the "results obtained" multiplier may be seen as the mirror image of the quality multiplier—when quality increases, the "result obtained" decreases compensation.

## Alternatives in Applying Contingency Factors

An anomaly with applying contingency factors to fee awards is that the reward may be negatively correlated to the difficulty of the case.[209] For example, in a case where the defendants settle early in the litigation because the infringement of rights is so blatant, the case becomes noncontingent very early, and no multiplier applies. However, a very close case may drag on for years, with entitlement to an award remaining undecided until the end. In that case, the contingency multiplier will be appropriate, despite the fact that the case may be close.

Defendants have argued that contingency adjustments are inappropriate when applied to lawyers employed by public interest groups, whose salary will be paid whether the case succeeds or not. This contention was rejected by the Supreme Court in *Blum v. Stenson.* However, the court made it clear that contingency adjustments were to be used sparingly for all types of plaintiffs. Contingency is neither a reward for success nor a punishment for taking a case to trial. Rather, it is an attempt to ensure that the total award reflects the actual effort exerted and the risks involved.[210]

Hours spent preparing and litigating fee application issues are seldom increased by any multiplier. Often, multipliers are inappropriate because of the lack of complexity and the lack of contingency.[211] Some attorneys argue that multipliers on fee hours provide additional incentive to take cases, since practically, the hours spent litigating fee applications could otherwise be spent on cases commanding the higher rate throughout the litigation.

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209. *Laffey,* 746 F.2d at 26; Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983). *Cf. In re Agent Orange,* M.D.L. No. 381 slip op. at 45 (if counsel settles case in one-tenth the time that would have been expended, multiplier of ten apparently appropriate, given public policy favoring settlements).

210. *Louisville Black Police Officers,* 700 F.2d at 268 (contingency factor is not a bonus—it's merely a way to achieve reasonable compensation).

211. *E.g.,* Wright v. Heizer Corp., 503 F. Supp. 802 (N.D. Ill. 1980); *Aumiller,* 455 F. Supp. at 676; *cf. Jorstad,* 489 F. Supp. at 1180 (multiplier applied by district court for fee litigation; overruled on appeal).

## Suggestions for Application of Contingency Factors

One quick solution to the contingency question is merely to assume that risks of lack of success, nonpayment, and delay are unavoidable features of the legal profession, and that the risk factor is encompassed by the high legal fees received. Thus, almost no situation will present an occasion for a contingency multiplier. This position is somewhat more extreme than that articulated in *Blum,* but ensures certainty and focuses increased attention on the lodestar factors. The approach also reflects the reality of legal practice on an hourly rate basis, absent congressional provisions for fees.

Alternatively, the multiplier could be applied in cases where there has been a demonstrated disadvantage to the attorneys. For example, attorneys who have charged no fees to an impecunious client for a number of years, or who reinvested any money received into expenses of the litigation, could be compensated by a multiplier. This differs from applying an interest rate for the lost value of the money in that it compensates the risk of nonpayment as well as the risk of delayed payment.

Last, courts may continue to apply the contingency factor under the current standards. Courts will be free to apply the multiplier in cases where they feel the quality of representation has been exceptional, or where the likelihood of success was small. This option can become more enticing if courts outline a few guidelines to facilitate the use of contingency multipliers.

## Summary

The lodestar determination and subsequent adjustments will remain the focus of the lion's share of the judge's time in attorney fee disputes. The determination of reasonably expended hours can be simplified by pretrial management and monitoring of hours (see chapters 1 and 2). The predictability of rate determinations and application of the contingency factors can be increased through a number of standardized methods, including use of standard community rates, prescription of standard forms and procedures for the fee application, and setting routine guidelines for decisions about contingency factors.

# VII. COSTS

Besides compensation for the time expended, costs may be awarded to the prevailing party, either under Federal Rule of Civil Procedure 54(d) or by the wording of the fee statute that allows recovery of costs.[212] This chapter focuses on two sources for determining costs and the differences between them; apportioning costs among parties and the proper degree of documentation needed for costs; and examples of how courts have dealt with cost awards in several categories.

Numerous statutory provisions regulate the awarding of costs and expenses.[213] Congress also provided discretion for taxation of a limited award of specified costs, such as filing and service fees or compensation of court-appointed experts, in all federal cases.[214] Federal Rule of Civil Procedure 54(d) allows costs to the prevailing party, unless the court directs differently.[215] Although courts wield considerable discretion over the allowance of costs, the discretion is not unrestrained.[216] When specific statutes allow for the recovery of costs or expenses, some confusion has arisen concerning whether the broader or more restrictive language controls in determining allowable costs.[217] In all cases, precise clarifications are necessary because of the often interchangeable use of the terms "costs," "fees," and "expenses."

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212. Costs may also be granted as a sanction, even against the prevailing party or for frivolous appeals. Bartell, *Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553, 556 (1984).

213. *E.g.*, 42 U.S.C. § 1988, "the court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"; 15 U.S.C. § 15, "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

214. 42 U.S.C. § 1988.

215. Some local rules establish the standard for who is a prevailing party for the assessment of costs. *See* Bartell, *supra* note 212 (each side must bear its own costs if they reach no agreement); M.D.N.C. R. 27(e)(1).

216. Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1964).

217. *Dowdell*, 698 F.2d at 1189 (11th Cir. 1983) (if statute allows prevailing party to recover costs or expenses, the underlying limitations of 54(d) and section 1920 do not apply).

## Sources of Statutory Costs

The leading case on awarding costs defines two primary sources for those costs.[218] The first source is 42 U.S.C. § 1988 (CRAFAA). The standard for awarding costs arose from then-Rep. Robert Drinan's statement in the CRAFAA's legislative history that attorneys' fees include the values of the legal services provided by counsel, including all necessary expenses incurred in furnishing effective and competent representation.[219] Accordingly, most courts have interpreted this standard liberally, not limiting recovery to traditional statutory costs. Perhaps the Eleventh Circuit stated the standard most comprehensively by allowing "with the exception of routine office overhead," all reasonable expenses incurred in case preparation, during the course of litigation or as an aspect of settlement of the case.[220] Thus, certain expenditures, such as photocopying, paralegal expenses, travel, and telephone costs, which would not normally be allowed as costs, are compensable under section 1988.

The Seventh Circuit, however, rejected the liberal interpretation of costs under section 1988 as based on minimal legislative history and refused to allow travel, lodging, parking, and long-distance phone calls for an out-of-state attorney.[221]

Statutory costs under section 1920 for a civil rights claim will be judged by the same standards as any other claim; that is, only those costs specifically mentioned will be allowed unless "special circumstances" arise.[222] Cases where special circumstances have been found generally include situations where the court relied heavily on expert testimony that was integral to the claim.[223] However, several courts either have interpreted these "special circumstances" very broadly, thereby obfuscating the distinction be-

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218. Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1979). Of course, judicial discretion under rule 54(d) is always a potential source for cost awards.

219. 122 Cong. Rec. 35, 123 (daily ed. Oct. 1, 1976) (statement of Rep. Drinan).

220. *Dowdell*, 698 F.2d at 1192.

221. Entertainment Concepts, III, Inc. v. Maciejewski, 514 F. Supp. 1378 (N.D. Ill. 1981), *on remand*, 631 F.2d 497 (7th Cir. 1980).

222. *Northcross*, 611 F.2d at 624; Baum v. United States, 432 F.2d 85 (5th Cir. 1970). The distinction articulated in *Northcross* between the section 1988 costs and the section 1920 costs is that section 1920 costs are generally received by a third party rather than by the attorney (e.g., docket fees or filing fees). Attorneys, however, customarily pass on these charges to clients, just as they do with section 1988 costs.

223. *Thornberry*, 676 F.2d at 1240; Chapman v. Pacific Tel. & Tel. Co., 456 F. Supp. 77, 83–84 (N.D. Cal. 1978).

tween 42 U.S.C. § 1988 and 28 U.S.C. § 1920, or have resorted to the catchall discretion mentioned in rule 54(d).[224]

## Apportioning the Burdens of Costs Between Parties

The status of a party as indigent or as a governmental entity does not immunize them from taxation of costs. However, these factors may be considered in determining the appropriate apportionment of costs among parties.

*Northcross v. Board of Education*[225] presents one appropriate response to the difficulty of apportioning burdens of litigation. By generously allowing the section 1988 costs, and more conservatively granting section 1920 costs, neither the plaintiff nor the defendant may be disproportionately burdened. For example, the prevailing plaintiff will frequently have to pay expert witness fees or the costs of its own depositions, while the defendant will have to pay costs for generating and disseminating information, such as photocopying, phone calls, and travel. In cases of egregious behavior, there may be reason to burden one party disproportionately. Congress designed attorney fee statutes to lessen the financial burden of bringing a suit, but requiring the plaintiff to pay certain costs of litigation may help discourage patently frivolous suits.[226]

Courts have also considered the relative ability of parties to bear the costs. In denying awards to a prevailing defendant, the Seventh Circuit has exercised discretion in considering the plaintiff's indigence as a factor.[227] In cases of prevailing plaintiffs, there is likely to be more reason to grant costs than in the case of prevailing defendants, given the goals of the civil rights acts to make it easier to file suits.

Courts and attorneys must be careful to recognize that different statutes provide different standards for recovery of costs. Courts may provide guidance for attorneys by categorizing statutes into

224. Heverly v. Lewis, 99 F.R.D. 135 (D. Nev. 1983); Wuori v. Concannon, 551 F. Supp. 185 (D. Me. 1982); *Thornberry,* 676 F.2d at 1240 (special circumstances look to the needs of the case).

225. 611 F.2d 624 (6th Cir. 1979).

226. *See* Dickerson v. Pritchard, 551 F. Supp. 306 (W.D. Ark. 1982) (plaintiff must bear some costs of suit), *aff'd,* 706 F.2d 256 (8th Cir. 1983); *see generally* T. Willging, Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report (Federal Judicial Center 1984). It is, of course, questionable whether this rationale should apply to prevailing plaintiffs.

227. Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); Delta Air Lines, Inc. v. Colbert, 692 F.2d 489 (7th Cir. 1982) (inability to pay is proper factor to consider in granting or denying taxable costs, despite a presumption for paying costs).

groups with similar recovery standards—for example, the CRAFAA and title VII have similar wording for fee and costs recovery.[228] Alternatively, a court may promulgate a list of costs that will *not* be regularly allowed under the various statutes. To prevent abuse, the court may require attorneys to request authorization of major expenditures,[229] or, in the course of performing other pretrial duties, note potential problems with proposed expenditures.

In many situations, statutorily recognized costs or expenses could have been avoided or were unnecessarily increased by the prevailing party's behavior. Courts have attempted to use their discretion when apportioning the costs between the parties in each case.[230] One way courts can prevent the accumulation of excess costs is to require attorneys to request prior approval for certain types of expenditures that are most subject to abuse or to set a maximum level of expenditures that will be compensated without prior judicial approval.

Application of a multiplier is singularly unsuited to the determination of costs or expenses.[231] The purpose behind recovery of costs is merely to compensate, not to provide a reasonable incentive to take the case; on the other hand, assessment of costs should avoid imposing disincentives for litigation under a statute providing for fees and costs.

## Standard of Documentation

The optimal standard would allow moderately precise, but not cumbersome, documentation of expenditures. The D.C. Circuit warns against becoming "enmeshed in a meticulous analysis of every detailed facet of the professional representation" in determining costs.[232] The standard articulated in *Laffey* is that for most

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228. For two different standards, *compare* 42 U.S.C. § 1988, "the court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," *with* 15 U.S.C. § 15, "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

229. *Northcross,* 611 F.2d at 624.

230. Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983) (costs on appeal apportioned two-thirds to Anheuser-Busch and one-third to plaintiff); *Copper Liquor,* 684 F.2d at 1087 (remand necessitated in part by plaintiff's counsel's failure to properly document and itemize claims; thus costs of appeal taxed 75 percent to appellant/defendant, 25 percent to appellee/plaintiff); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir. 1980) (court has discretion to direct each party to bear its own costs), *cert. denied,* 449 U.S. 1042 (1980).

231. *Copper Liquor,* 684 F.2d at 1087 (disallow extravagant or unnecessary expense on item-by-item basis); *Heverly,* 99 F.R.D. at 135.

232. *Copeland,* 641 F.2d at 896.

out-of-pocket expenses, it is enough to identify expenses by category, with a general description of the types of charges. For larger expenditures, or unusual disbursements, the parties may want better documentation. Parties may find it prudent to seek court approval for certain expenditures if they fear they may not be compensated later. This request can be made informally, although generally not ex parte.[233]

The vehicle for standardizing the rules governing allowable costs and expenses may be local rules, standing orders, or case-specific scheduling decisions.[234] The more comprehensive the standard is for the district, and the circuit, the less conflict and confusion will arise, and the less time courts will be bothered by these questions. The following list of types of costs, while not exhaustive, answers common questions about compensability and notes recent cases on each topic.

1. **Witness fees.** Witness fees are statutorily provided for in 28 U.S.C. § 1920(3); however, courts differ regarding whether expert witnesses can be compensated at more than the statutory witness fee. Even cases allowing costs for expert witnesses may do so under different theories.[235]

   Even when an ordinary witness is subpoenaed, numerous questions relevant to taxation of costs must be answered. These include: whether a witness can be paid for the days he or she attended trial without testifying, and whether a subpoenaed witness who does not testify should be paid. Here again, local rules are helpful in resolving these issues and determining what activities are compensable. For further discussion of the use of local rules in awarding costs, see chapter 7.

2. **Transcripts, depositions, and photocopying.** Transcript costs are allowable under section 1920(2), if reasonably needed.[236]

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233. In some circumstances, confidentiality or strategic concerns may dictate submission of a written in camera request without notice to opposing counsel.

234. For examples of local rules dealing with costs, *see* Bartell, *supra* note 212, at 570.

235. *Compare* Easley v. Anheuser-Busch, Inc., 572 F. Supp. 402 (E.D. Mo. 1983) (expert witness fees within discretion of court—generally recoverable if necessary to the case), *and Thornberry,* 676 F.2d at 1245, *with* Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (expert witness fees generally not recoverable above statutory rate, but here are allowed because of Congress's intent for full fee recovery under section 1988).

236. *Ramos,* 713 F.2d at 546 (transcript must be necessary, not merely convenient).

Fees for depositions are sometimes permitted under section 1920(4).[237] However, the courts differ on the compensation for copies of depositions.[238] Courts also differ on whether costs of a deposition not used at trial are compensable, both in case law and under local rules.[239]

Courts can save much time and tribulation by strictly or meticulously defining what constitutes necessity in these situations. Alternatively, courts may want to articulate which reasons will not be acceptable. Word processing costs have been subsumed under overhead and are not allowed as costs.[240]

3. **Travel.** Travel costs are frequently perceived as a potential source of abuse. Courts may disallow travel costs if out-of-town counsel is unnecessarily hired[241] or if the travel is excessive.[242] Others merely note that "unnecessarily luxurious" travel need not be compensated.[243] Others approach the problem by varying adjustment to the rate for hours traveled.[244] This is not the preferred method—the cost of the travel and the time spent traveling are actually two separate types of expenditures. Grouping them together confuses the attorneys who must make fee applications and complicates challenges and reviews of the decision-making process.

4. **Telephone calls.** Long-distance telephone calls are generally billed to a paying client, and thus should be billable to a statutory fee client.[245] The logic of compensating long-dis-

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237. SunShip, Inc. v. Lehman, 655 F.2d 1311 (D.C. Cir. 1981) (costs of depositions awarded if "necessarily obtained for use in the case").

238. *Compare* Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 572 F. Supp. 92 (D. Mo. 1983) (costs of copies of depositions not taxable as cost because depositions on file and available to parties), *with Ramos,* 713 F.2d at 546 (when deposition necessary to litigation, cost of copies allowed under 1920(4)), *and* Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 713 F.2d 128 (5th Cir. 1983) (cost of original deposition taxable without factual finding, but copies only if necessary); *see also Heverly,* 99 F.R.D. at 135 (party witness cannot recover expenses incident to own deposition). *See generally* Bartell, *supra* note 212, at 567–70.

239. *See* Bartell, *supra* note 212, at 568.

240. *Laffey,* 572 F. Supp. at 384.

241. *Entertainment Concepts,* 514 F. Supp. at 1378.

242. *Benitez,* 571 F. Supp. at 246.

243. *Henry,* 738 F.2d at 188.

244. For examples of local rules dealing with costs, *see* Bartell, *supra* note 212, at 570.

245. Palmigiano v. Garrahy, 707 F.2d 636 (1st Cir. 1983); *Northcross,* 611 F.2d at 624; *but see Entertainment Concepts,* 514 F. Supp. at 1378 (because out-of-town counsel were unnecessarily hired, there was no compensation for long-distance phone calls), *and* Zdunek v. Washington Metropolitan Area Transit Auth., 100 F.R.D. 689 (D.D.C. 1983) (long-distance phone calls are a general expense incurred by all plaintiffs, not taxable costs).

tance but not local calls arises from the fixed nature of local calls and the advisable resistance to separating every expense, including items generally considered to be overhead, into each component part.

5. **Computer research.** Computer research has recently arisen as a difficult expenditure to classify. Although most courts have allowed some compensation for "reasonable amounts" of computer research, they have based their decision on various postulates.[246] A number of courts have disallowed costs for computer research because it is not an enumerated cost in section 1920.[247]

   Computer research differs from overhead in that it is not always necessary and is not fairly divisible among all clients. When a situation requires, it may be very efficient, but frequent use may be wasteful. Because computer time is frequently billed individually to paying clients, it has characteristics of a separate, compensable expense rather than overhead.

## Summary

Although costs vary in each case, a number of categories of costs are available in almost every case. Courts can simplify cost requests by providing guidelines, instructions, and forms for costs requests. Consistent with its monitoring functions, the court may warn the parties immediately when proposed or actual expenditures appear excessive or unreasonable. Due to the number of sources of authority to grant costs, courts could improve comprehension of the process by clarifying the authority under which they act in awarding costs in each case.

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246. *Laffey*, 572 F. Supp. at 385 (compensate if the research necessary—here excessive; requested as "disbursement" or miscellaneous expense); O'Donnell v. Georgia Osteopathic Hosp., Inc., 99 F.R.D. 578 (N.D. Ga. 1983) (if not duplicated in attorneys' fees, reasonable cost of computer research recoverable; not dispositive that expenses sought as costs); Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980) (Westlaw allowed as costs, but case brought under broader statute of 15 U.S.C. § 15); *contra,* Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 100 F.R.D. 264 (D. Or. 1983) (computer research not allowable because it is overhead and not included under section 1920).

247. Wolfe v. Wolfe, 570 F. Supp. 826, 828-29 (D.S.C. 1983); United States v. Bedford Assocs., 548 F. Supp. 748, 753 (D. Ariz. 1982); *Wehr*, 477 F. Supp. at 1022.

# VIII. SETTLEMENT NEGOTIATIONS OF FEES AND THEIR MERITS

The policy supporting settlement of cases assumes that the earlier a case settles, the less time will be expended. Thus, the fee determinations will be less arduous, both because of the decreased number of hours and the relative contemporaneousness of the determination to the actual time expenditures. Despite this convenience, however, settlement raises several complex ethical and practical issues.

A recurring problem in the settlement of cases in which attorneys' fees may be awarded arises from the simultaneous negotiation and settlement of attorney fee issues and the merits of the litigation. As stated in the *Manual for Complex Litigation*, "there is an inherent conflict of interest" for the plaintiff's counsel in these situations.[248] Judicial attention to this problem at the pretrial stages of litigation can prevent difficult problems of appeals, unraveling of class action settlements, and other unnecessary drains on the courts' resources. Announcement of a preventive rule, as has been done in a number of cases, can minimize these forseeable conflicts. We will present several alternatives for consideration.

## "Sweetheart" Contracts

The problem—sometimes referred to as the *Prandini* problem[249]—takes a variety of forms. The one involved in *Prandini v. National Tea Co.* might be called the "sweetheart contract," that is, a settlement of attorneys' fees that is generous to the plaintiff's counsel and a settlement of the merits that is favorable to defendants. Such settlements raise suspicions that the defendant acted on the "impulse to treat opposing counsel . . . generously" to induce a settlement favorable to the defendant at the expense of the class.[250]

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248. Manual for Complex Litigation § 146 (5th ed. 1982).

249. *Prandini*, 557 F. 2d at 1015. This case involved an agreement between the parties to impose a cap or ceiling on the attorneys' fees, with the precise amount to be determined by the court.

250. *Id.* at 1020–21.

Noting the universal condemnation of such a contract and the prevalence of the temptation to buy out the plaintiff's counsel, the *Prandini* court fashioned a "reasonable solution," namely "for the courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees."[251] To enforce this solution, the court ruled that "[o]nly after court approval of the damage settlement could discussion and negotiation of appropriate compensation for the attorneys begin."[252] The goal is to avoid "having, in practical effect, one fund divided between the attorney and client."[253]

Several courts have followed this approach.[254] Recently, however, a number of courts have approved settlements in which the merits and attorney fee issues had been merged, assuming without discussion of *Prandini* that the practice is legitimate.[255]

## Demand for Waiver of Fees

An equally problematic version of the mixed settlement of attorneys' fees and the merits occurs when the defendant insists on a waiver of fees by the plaintiff as a condition of settlement.[256] An ethical lawyer will suppress selfish interests in a fee and convey the settlement offer to the client.[257] If the settlement is favorable

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251. *Id.* at 1021; *see also In re Fine Paper,* No. 83-1172, slip op. at 36 (court acknowledges that *Prandini* approach avoids conflicts of interest and is easy to administer, despite circuit precedent allowing concurrent settlement of damages and fees in common-fund cases, which, in turn, are subject to "heightened judicial scrutiny" because of the conflict-of-interest problem).

252. *Prandini,* 557 F.2d at 1021.

253. *Id.*

254. *See, e.g.,* Mendoza v. United States, 623 F. 2d 1338 (9th Cir. 1980); *cf. White,* 455 U.S. at 453-54, n.15 (dicta re: "difficult ethical issues" involved in simultaneous negotiations of fees and the merits; court "reluctant to hold that no resolution is ever available to ethical counsel").

255. *See, e.g.,* Jennings v. Metropolitan Gov't, 715 F.2d 1111 (6th Cir. 1983) (court determines that parties intended to provide for attorneys' fees in an unspecified amount); Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982), *cert. denied,* 459 U.S. 828 (parties agreed to attorneys' fees in an amount to be set by the court).

256. Jeff D. v. Evans, 743 F.2d 648, 650 (9th Cir. Sept. 30, 1984), *cert. granted,* __ U.S. __ (May 13, 1985); *see also* Moore v. National Ass'n of Sec. Dealers, No. 83-2213 (D.C. Cir. Sept. 24, 1984) (appellants argue that allowance of waiver undermines purposes of the CRAFAA).

257. *Jeff D.,* 743 F.2d. at 650; *Nat'l Ass'n of Sec. Dealers,* No. 83-2213; *see also* American Bar Association, Model Rules of Professional Conduct Rule 1.4 comment (1983); *see also* Wolfram, *The Second Set of Players: Lawyers, Fee Shifting and the Limits of Professional Discipline,* 47 Law & Contemp. Probs. 293, 300-02, 305-07, 314-19 (1984).

to the client, such as in granting all injunctive relief sought by a class, the offer may amount to "a demand for a benefit which the lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest."[258]

Reasoning that such offers will undermine the rule that a successful section 1983 claimant "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,"[259] the Ninth Circuit recently ruled that "a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court."[260]

Aside from the *Prandini* solution, which would implicitly bar any waiver of attorneys' fees, courts have not tended to adopt absolute prohibitions on fee waivers.[261] Some courts have made a limited exception for waiver of fees in "nuisance settlements."[262]

When questioned about the *Prandini* solution, a majority of judges and plaintiffs' and defendants' lawyers agreed with limiting discussion of attorneys' fees until after the merits had been settled.[263]

## Rule 23(e) Review

Courts also have a duty under rule 23(e) to review settlements in a class action to ensure fairness to all parties, particularly unrepresented class members.[264] The established standard is that the set-

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258. Committee on Professional and Judicial Ethics, Ass'n of the Bar of the City of New York, Op. 80-94, The Record 507, 508 (Sept. 18, 1981). The committee ruled that "it is unethical for defense counsel to propose settlements conditioned on the waiver of fees authorized by statutes designed to encourage the enforcement of civil rights and civil liberties." *Id. See also* Disciplinary Board of the Supreme Court of Tennessee, Advisory Ethics Op. 81-A-50 (Jan. 12, 1981) ("any arrangement wherein the adverse party participates in the setting of the fee" is unethical); *but see* Subcommittee, Committee on Attorneys Fees of the D.C. Bar, Final Report, 13 Bar Report 4, 5-6 (Aug./Sept. 1984) ("matter cannot be decided on an across the board basis").

259. *Jeff D.*, 743 F.2d. at 652.

260. *Id.*

261. *See, e.g., id.* ("unusual circumstances test"); Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983) (settlement of case "without costs" to either party amounts to an enforceable waiver of fees).

262. *See, e.g.*, Chicano Police Officers Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980).

263. Miller, *supra* note 12, at 224-25. A substantial minority (about 38 percent of each group), however, disagreed.

264. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1797, at 226 (1972); in settlement of nonclass actions, judges play a more limited role. They may review the negotiations at pretrial stages under Fed. R. Civ. P. 16(a)(5) or 16(c)(7).

tlement must be fair, reasonable, and adequate.[265] The role of the court is to guard stringently the interests of unprotected class members through careful evaluation of the settlement. However, judges are not to substitute their opinion concerning the equities of the settlement for that of the parties.[266] Nor should the court conduct its own trial on the merits.[267]

Review of the settlement includes, among other things, scrutiny of any attorney fee award. Because of the *Prandini* conflict, some courts will not consider attorneys' fees until after submission to the court or approval of the settlement on the merits. However, assuming a jurisdiction where the merits and the attorneys' fees may be considered simultaneously, several important safeguards should be applied to protect all the parties' interests.

## Deference to Attorney Fee Agreements

### Waiver

A written waiver does not prevent a court from reviewing the reasonableness of fees under rule 23 and the CRAFAA.[268] Some courts have assumed that parties may agree to waive attorneys' fees in a settlement.[269] If no clause explicitly waives fees, the test is whether the parties intended to settle the dispute in full.[270] If the intent to settle in full is found, the court may infer a waiver; however, most courts will not allow an inference of waiver from the absence of an attorney fee agreement in the settlement.[271] In a case where the plaintiff agreed to eliminate from the settlement agreement a clause preserving the plaintiff's right to attorneys' fees, the court still refused to find a waiver.[272]

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265. *Jeff D.*, 743 F.2d at 650; Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975).

266. Plummer v. Chemical Bank, 668 F.2d 654, 655 (2d Cir. 1982).

267. *Id.*

268. *Jeff D.*, 743 F.2d at 652.

269. *General Motors*, 722 F.2d at 1009; *Jennings*, 715 F.2d at 1111; Gram v. Bank of La., 691 F.2d 728 (5th Cir. 1982); *Chicano Police Officers*, 624 F.2d at 127.

270. *General Motors*, 722 F.2d at 1009; *Jennings*, 715 F.2d at 1111; *Chicano Police Officers*, 624 F.2d at 127 (waiver of entitlement to statutory fees must be clear).

271. *General Motors*, 722 F.2d at 1009; *Jennings*, 715 F.2d at 1111; *Benitez*, 571 F. Supp. at 246; El Club del Barrio, Inc. v. United Community Corps, 735 F.2d 98 (3d Cir. 1984).

272. *El Club del Barrio*, 735 F.2d at 101 (best rule of law places burden on party losing underlying litigation to get waiver in writing).

In situations where courts approve settlements including waiver of statutory fees, the duty to protect unrepresented parties, the court's equitable power to regulate attorneys' fees, and the interest in furthering the goals of any applicable fees statute all mandate that judges scrutinize the agreements for overreaching or unethical behavior.[273]

### Fee Agreement Included in Settlement

Whether parties or the court have the ultimate authority to determine attorneys' fees in class actions remains unsettled. The situation arises when a court sees reason to modify an attorney fee agreement that is integrated into a proposed settlement of the merits. Courts have applied at least three different approaches to the problem.

**Disclosure.** The court may insist that the settlement agreement state when attorneys' fees are included in the settlement, but allow the court to determine the amount.[274] Rule 23(e) dictates that class members should be given notice of any proposed settlement. Some courts have interpreted this to mean that notice of all settlement terms, including any potential liability for attorneys' fees, should be made available to class members.[275] This information may be incorporated into the settlement or may merely be a ballpark figure class members may use to estimate the real benefit of the settlement.[276] Allowing the information exchange also limits the amount of uncertainty inherent in this open-ended agreement.

**Fairness review.** The court may grant a presumption of validity to the stated fees amount in the settlement agreement, subject to review to ensure the fairness of the amount.[277] If the court decides

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273. *In re Fine Paper,* No. 83-1172m, slip op. at 36 (3d Cir. 1984). Similarly, if an agreement apportioning fees appears to be unethical, the judge can so indicate and allow a new agreement to be negotiated. *In re Agent Orange,* M.D.L. No. 311, slip op. at 113-14.

274. Dekro v. Stern Bros., 571 F. Supp. 97 (W.D. Mo. 1983) (parties voluntarily included such an agreement); *Parker,* 667 F.2d at 1204; Norman v. McKee, 290 F. Supp 29 (N.D. Cal. 1968), *aff'd,* 431 F.2d 769 (9th Cir. 1970), *cert. denied,* 449 U.S. 912 (1970).

275. Dunn v. H. K. Porter Co., 78 F.R.D. 41, 43, *vacated,* 602 F.2d 1105 (3d Cir. 1979) (common-fund case); Piambino v. Bailey, 610 F.2d 1306, 1328 (5th Cir. 1980), *cert. denied,* 449 U.S. 1011 (1980).

276. *See* Discovery for Determining Rate, chapter 5.

277. *Jeff D.,* 743 F.2d at 650 (stipulation waiving fees of "limited applicability" to class action under the CRAFAA); *Kaye,* 99 F.R.D. at 161 (settlement agreement provides for $17,000 in attorneys' fees; court found that sum reasonable, although attorneys spent more time); Cantor v. Detroit Edison Co., 86 F.R.D. 752 (E.D. Mich. 1980) (duty to protect unrepresented class members requires review of terms of settlement agreement).

that, although no overreaching occurred, the agreed-upon fee compensates unfairly, the degree of deference a court must accord it is unclear. In several cases, courts have reduced attorney fee grants within settlement agreements without requiring or allowing renegotiation of other issues.[278] In a case of first impression, the Ninth Circuit ruled that a judge may reject a waiver of attorneys' fees in a settlement and "make its own determination of fees that are reasonable."[279]

The uncertainty created by allowing the court to retain this power need not significantly restrict the settlement process if judges apply a systematic approach when determining fees.[280] Cases support the proposition that unrepresented class members should be granted access to fee information so that their decision to approve a settlement will be based on informed consent.[281] Another technique for protecting the defendant's interests is to allow a reversion to the defendant of any unclaimed amounts of the settlement fund allowing the defendant to retain an incentive to challenge fee requests.[282]

**Deference.** The court may accord great deference to attorney fee agreements arising from settlement negotiations, intervening only when evidence of overreaching or unethical behavior arises. Problems may arise when one party-plaintiff has no incentive to argue for attorneys' fees and overcomes another plaintiff's interests. This approach grants great leeway to the litigants; the court's role is limited to identification and rejection of abuses in the form of conflicts of interest, excessive fees, or waivers that threaten to undermine the purposes of attorney fee statutes.

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278. Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983); Foster v. Boise-Cascade, Inc., 577 F.2d 335 (5th Cir. 1978).

279. *Jeff D.*, 743 F.2d at 652; *see also National Ass'n of Sec. Dealers*, No. 83-2213. In that case, the district court assumed that it had no authority to reject the waiver and approve the rest of the settlement. The district court approved the settlement and denied the plaintiff's motion for attorneys' fees. *See also* NAACP v. City of Chattanooga, No. 79-2111 (D. Tenn. Dec. 2, 1981), *appeal dismissed*, Nos. 82-5016/5013 (6th Cir. Apr. 29, 1982) (entire consent agreement should stand together); *Chicano Police Officers*, 624 F.2d at 127 (Seth, J., dissenting) (entire agreement must stand together because court should not modify contract).

280. *In re* Federal Skywalk Cases, 97 F.R.D. 380 (W.D. Mo. 1983).

281. *Cantor*, 86 F.R.D. at 752 (conflict of interest may be met by disclosure of attorneys' fees in proposed settlement agreement).

282. Shlensky v. Dorsey, 574 F.2d 131 (3d Cir. 1978) (stockholder's derivative suit, so putative defendant had interest in keeping attorneys' fees low); McDonald v. Chicago Milwaukee Corp., 565 F.2d 416 (7th Cir. 1977).

## Awards of Fees and Rule 68

The relationship between Federal Rule of Civil Procedure 68 (offer of judgment) and attorney fee statutes remains unclear. One question, argued before the Supreme Court this term, is whether attorneys' fees should be awarded to a prevailing plaintiff who had earlier rejected a more favorable offer of judgment.

The Seventh Circuit held that the offeree could still recover statutory fees, despite the offer of judgment, because of the plain language of the rule and because to do otherwise would contravene the congressional intent behind statutory fee recoveries.[283]

## Apportioning Fees Among Defendants, Class, and Named Plaintiffs

In a settlement, several factors may militate against the defendant being held responsible for all attorneys' fees. When all parties had negotiated a settlement agreement, including a fee amount, or negotiated a knowing and voluntary waiver that created no conflict between the class and the named plaintiffs, some courts did approve the fee agreement.[284] However, future courts should take a hard look at the settlement for overreaching or unfairness.

After the court has determined the lodestar and appropriate adjustments, the last step is to apportion any remaining attorney fee liability between the unrepresented claimants and the named plaintiffs. Absent extraordinary circumstances, unrepresented claimants should pay for attorneys' services in proportion to the benefits accrued from them.[285] Occasionally, different funds may be created for different subclasses so that some fees will be paid from the general settlement fund and some from the subclass fund.[286]

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283. Chesney v. Marek, 720 F.2d 474 (7th Cir. 1983), *cert. granted,* 104 S. Ct. 2149, 80 L. Ed. 2d 536 (1984). The proposed amendment to rule 68 would solve this dilemma, as the committee notes state that the award of attorneys' fees and the award of fees under rule 68 are two separable activities. Judicial Conference of the United States Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1984).

The amendment further establishes that acceptance of an offer of settlement amounts to settlement of the entire claim, including attorneys' fees. *Id.* at 30. However, the amended rule does not apply to class actions or derivative suits. *Id.* at 29.

284. *General Motors,* 722 F.2d at 1009; *Jennings,* 715 F.2d at 1111; *Gram,* 691 F.2d at 728; *Chicano Police Officers,* 624 F.2d at 127; *Kaye,* 99 F.R.D. at 161.

285. Manual for Complex Litigation § 1.47 (5th ed. 1982).

286. *In re* Equity Funding Corp. of Am. Sec. Litig., 438 F. Supp. 1303, 1342 (C.D. Cal. 1977). *See In re Agent Orange,* M.D.L. No. 381, slip op. at 57 (individuals who opt

Individually named plaintiffs will not be compensated for work primarily benefiting their individual claims, despite any spillover benefit.[287] However, the benefit to the class should be construed generously, to account for the responsibilities the named plaintiff undertakes to benefit the whole class. To do otherwise would undermine the policy supporting attorney fee statutes.

Class members may avoid liability for their share of attorneys' fees from the settlement fund by hiring individual counsel and participating in the litigation.[288] The work of the attorney must contribute to the class benefit. Thus, in the *Agent Orange* litigation, Judge Weinstein stated that the work of numerous attorneys for individual clients produced results which were "inchoate and indirect," and only reimbursed expenses for those attorneys.[289]

The court in one case refused to reimburse attorneys for individual class members, saying, "in cases where individual class members voluntarily retain independent counsel, reimbursement of their legal expenses from the settlement fund is not warranted, even if some benefit accrues to the class as a result."[290]

Another factor occasionally considered is whether the party or class has achieved a monetary or a nonmonetary benefit. Parties who have received a nonmonetary, prospective benefit may be less able to pay counsel, and this may be considered in apportioning the cost.[291] Further apportionment must be based on case-by-case evaluations of the benefit to the class.

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out of class and later recover in separate action must repay fund for use of discovery materials).

287. Valente v. Pepsico, Inc., 90 F.R.D. 170 (D. Del. 1981).

288. Vincent v. Hughes Air West, Inc., 557 F.2d 759, 777 (9th Cir. 1977).

289. *In re Agent Orange,* M.D.L. No. 381, slip op. at 52-53.

290. *Valente,* 90 F.R.D. at 173 (reimbursement allowed for two class members that class counsel refused to represent).

291. See chapter 4.

# IX. PROCEDURAL ALTERNATIVES FOR SETTLEMENTS

## Alternative Solutions

To avoid the aborted settlements and appeals by dissatisfied lawyers that characterized cases like *Prandini* and *Jeff D. v. Evans,*[292] we suggest that courts fashion a standing order or local rule that will alert counsel to the legal and ethical problems in the simultaneous negotiation of attorneys' fees and the merits, and establish a standard to guide settlement discussions. A number of alternative standards should be considered before formulating a rule.

### Pure Prandini

In class action cases such as *Prandini,* the strictest version of the solution is to postpone settlement discussion of attorney fee issues until after the court has approved the proposed settlement of the merits of the claim pursuant to rule 23(e) of the Federal Rules of Civil Procedure. The advantages of such distinct separation of the issues are obvious. A disadvantage of this procedure is that separate proceedings must be held to consider the two aspects of the settlement.[293]

### Modified Prandini

Another approach is to follow the spirit of *Prandini* but modify the letter of the ruling. Such a modification would involve permitting discussion of the attorney fee issues immediately after the merits have been settled by the parties, with the agreement reduced to writing and filed with the court, but prior to judicial approval of the class-action settlement. The advantage is that approval of class-action settlements can be integrated into one proceeding at which all parties and the court know the full extent of the attorneys' fees.

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292. 743 F.2d 648 (9th Cir. 1984).

293. In a class motion involving a common fund, presumably the court could establish the fee after the parties negotiated to create the fund.

### Capping the Fees

Several courts have approved settlements that included a ceiling on attorneys' fees, with the exact amount to be determined by the court.[294] While this solution is appropriate to the stockholder's derivative actions in which it was approved, in other contexts the simultaneous negotiation of the merits and a cap on the attorneys' fees fall prey to some of the same conflict-of-interest problems condemned in *Prandini* and its followers.

### Information Exchange

The court could, by rule, by standardized discovery order, or by pretrial order, permit the parties to exchange information about the number of hours spent on the case and the hourly rate being sought. This information would enable the defendant to know the outer limits of its liability without inviting trade-offs between damages and attorneys' fees. A disadvantage is that such a rule encourages the defendant to reserve funds to meet the attorney fee demands, thereby depleting the funds available to settle the damages portion. This defect is not fatal, however, because the rule directs the attorneys to focus their attention on the value of the case independently of attorney fee issues. The relative success of plaintiff's counsel in achieving the original goals of the litigation will in turn influence the negotiation of the attorney fee issues. Presumably, those discussions would focus on application of the *Hensley* standards and other issues relevant to attorney fee litigation. In any event, any competent attorney would be familiar with attorney fee statutes and would advise a client to reserve funds for an award of attorneys' fees after settlement of the merits.

### Ad Hoc Review

A final alternative is for the court to note the problem and invite either party to petition the court for a ruling on the permissibility of simultaneous discussion of the merits and attorneys' fees. As in one recent case,[295] the court could review the context of the case

294. See Maher v. Zapata Corp., 714 F.2d 436, 453 (5th Cir. 1983) ($400,000 cap and $250,000 floor approved in stockholder's derivative action, partly on grounds that corporate beneficiary of action had incentive to challenge fees); *see also Shlensky*, 574 F.2d at 131 ($600,000 cap in stockholder's derivative action). In *Prandini*, however, the court declined to distinguish a cap on the award from a "sweetheart" settlement.

295. Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983) (demand for waiver of attorneys' fees interferes with policy of encouraging settlement and raises ethical concerns).

and decide whether simultaneous discussion of attorneys' fees and the merits is appropriate. In that case, the court ordered the parties "to negotiate the merits of this case separate from the question of the plaintiffs' entitlement to attorney fees pursuant to 42 U.S.C. § 1988."[296] A major disadvantage of this approach is that it may lead to unnecessary court action in cases involving little distinction from each other. It would be more efficient to adopt a flat rule and allow the parties to seek an exception in extraordinary circumstances.

Of course, the court always has the option of maintaining the status quo. Such a decision would likely be based on an explicit assumption that attorneys will make reasonable offers for combined settlement of the merits and fees and that unreasonable offers are exceptional.[297] Adherence to the status quo is likely to continue a situation of ad hoc review, either before or after settlement, with disadvantages of unpredictability and inefficiency.

For the reasons discussed above, we suggest that a court combine the modified *Prandini* and the information exchange, allowing the parties to discuss attorneys' fees after settlement of the merits and providing for an exchange of information about fees and hours prior to settlement of the merits. Such a rule would encourage the settlement of both sets of issues and, at the same time, preserve a bright line demarcating the ethical and legal limits.

## Hearing Procedures on the Fairness of the Settlement

A full hearing on the fairness of a class action settlement, including attorneys' fees, should be held.[298] This procedure includes notice to the class, introduction of evidence, cross-examination, and an opportunity for objectors to be heard.

In a class action, the need for a hearing increases because of the multiplication of possible conflicts among parties. While a settlement may appear favorable overall, it may ignore certain goals of individual plaintiffs or unrepresented class members. For example, in a sex discrimination case, the back pay may be of a fair amount, but if the true goal of the named plaintiffs was prospective relief, it is possible that one subgroup has bargained away another's rights.

296. *Id.*
297. *See, e.g.*, Committee on Attorneys Fees of the D.C. Bar, *supra* note 258, at 6.
298. *Parker*, 667 F.2d at 1204.

In common-fund cases, the attorneys' fees are integrally related to the overall settlement and should be considered in toto.

## Procedures to Facilitate Settlement

In most respects, judicial efforts to facilitate settlement of attorney fee issues differ little from judicial efforts toward settlement of the merits of a case.[299] In attorney fee award cases, however, the court is likely to be familiar with the merits of the litigation either as a result of reviewing a rule 23 settlement, by virtue of presiding at a trial on the merits, or by accumulation of information during the pretrial process. Another difference from involvement in the merits of a settlement of nonfee litigation is that a court can be certain that, if settlement efforts fail, the court will be called on to decide the factual and legal issues relating to attorneys' fees.

The groundwork for judicial action to stimulate settlement activity may be laid long before the termination of the case at hand. The use of pretrial guidelines,[300] establishment of fee schedules for the district,[301] standardization of discovery content and procedures,[302] and firm application of predictable, written procedures and guidelines, all enhance settlement efforts by underscoring the certainty and predictability of the judicial process and allowing the parties to approximate the fee award without extensive judicial participation.

The keystone of a judicial effort to encourage settlement of an attorney fee issue may be scheduling a conference shortly after a party files a fees application. Such a conference can serve the dual, related purposes of establishing a firm case management schedule for the attorney fee issues and encouraging the parties to agree on factual and legal issues, including the ultimate disposition of the claim for fees. The conference agenda would include

1. discussion of the application to identify areas of agreement and dispute regarding computation of the lodestar and a multiplier, if any,
2. exploration of the feasibility of stipulations from the parties on the undisputed issues,

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299. *See generally* H. Will, R. Merhige, Jr., & A. Rubin, The Role of the Judge in the Settlement Process (Federal Judicial Center 1977); F. Lacey, The Judge's Role in the Settlement of Civil Suits (Federal Judicial Center 1977).
300. See chapter 1.
301. See chapter 5.
302. See chapter 5.

3. consideration of the type of procedure best suited to resolve the remaining issues, including submission on the briefs, limited oral argument, evidentiary hearing, referral to a magistrate or special master, or some other procedure,
4. evaluation of whether some form of alternative dispute resolution (e.g., arbitration, referral to a local bar panel, mediation) is appropriate to the case,
5. communication to the parties about the range of court awards in similar cases,
6. informal exchange of information regarding each party's costs, fees, and expenses, or establishment of discovery procedures and a schedule, and
7. establishment of deadlines for briefing, discovery, and hearings, if necessary.

The format for this conference can itself be standardized by the use of general orders, preprinted forms for submission of information on all of the above topics, and form orders setting forth prehearing procedures. Reference to provisions in rules 11, 16, and 26 for sanctions can serve to remind counsel of the importance of good faith compliance with these prehearing procedures. Use of standard forms can minimize the time necessary for the conference while communicating to counsel the need to engage in good-faith efforts to settle the attorney fee issues. Establishment of firm deadlines for submission of briefs and supporting documentation should reinforce settlement efforts.

## Summary

Attorneys' fees in settlements raise numerous ethical and practical difficulties. Given the public policy supporting settlement and the frequency of settlements, more consideration must be given to the attorney fee problems relevant to the settlement. The separation of consideration of the merits and the attorneys' fees, allowing judicial determination of the merits and attorneys' fees, and setting forth a definite standard for waiver of fees are preliminary steps toward achieving the goal of manageable and fair settlements.

Once the merits of the case have been settled, active case management techniques, such as the use of a structured pretrial conference and the establishment of firm deadlines, should promote settlement of the vast majority of attorney fee disputes.

# APPENDIX
## Checklist for Drafting Attorney Fee Orders or Local Rules Governing Attorneys' Fees

# Checklist for Drafting Attorney Fee Orders or Local Rules Governing Attorneys' Fees

## I. PRETRIAL ISSUES

### A. *Procedures for Regulating Attorneys' Fees*

1. Pretrial order (Should a rule 16 conference be held to consider attorney fee issues? In all cases? With what agenda?)
2. Authority to delegate pretrial monitoring (To magistrate, master, deputy clerk, law clerk, committee of counsel, guardian ad litem?)
3. Format for reporting hours (Periodic pretrial reports in some cases?)

### B. *Types of Compensable Behavior*

1. Drafting legal documents (Will reuse of documents from prior cases be compensable? At what rate?)
2. Research (How much basic background knowledge will be assumed?)
3. Depositions and pretrial court appearances (How many lawyers will be compensated for attending?)
4. Conferring among cocounsel (What limits?)
5. Reading others' work (What limits?)
6. Travel time (How will it be compensated? At what rate?)
7. Trial (How many counsel will be compensated for courtroom work?)
8. Class actions

   a. How will lead counsel be selected and compensated? How can the court discover information about prior agreements among counsel to trade work assignments for votes?

   b. How will committees be chosen? How many? How large?

   c. How many counsel must be familiar with all or most aspects of the case?

   d. Should committee work be delegated to an individual attorney or firm?

   e. Should a broad, flexible approach be used to allow for variations in complexity of cases and issues?

f. Should a discovery schedule or scheduling order be used to allocate assignments?

C. *Limits on Amounts Recoverable*

1. What level of compensation (i.e., partner, associate, paralegal) will be awarded for each activity? Is the rate based on the difficulty of the work or on who does it?
2. Will deviations from discovery timetables or scheduling orders be noncompensable time? Can parties apply for preauthorization for such deviations? Must they? How is the fee availability affected by reallocations of work among counsel?
3. What effect will contingent fee arrangements have on the amount recoverable? Will the court limit the recovery to the agreement, or see it as a minimum? Will the court treat statutory fee cases differently from common-fund cases on this issue?
4. How and when will the court award attorneys' fees as sanctions? Will they be determined separately from the overall award of fees to the prevailing party? Will sanctions in cases of severe abuse affect eligibility for an award to a prevailing party?
5. What type of behavior will evidence duplication, excessiveness, and inexperience? How will the court deal with these abuses? (E.g., will the time be totally disallowed or will it be decreased proportionately?)
6. Will special provisions be made to allow governmental defendants to negotiate prolonged payment schedules or other alternatives?
7. What is the allowable scope of discovery of opponents' rates and hours in the fee application process?

D. *Who May Recover*

1. How is "prevailing party" defined? For plaintiffs? Defendants?
2. How does the standard apply to intervenors? Is the same standard applicable to plaintiff-intervenors and defendant-intervenors?

## II. TIMING OF FEE APPLICATION

1. Time requirement (How will time requirement be de-

fined—by local rule, by procedural stance (i.e., part of the judgment or separate order), or by nature of the case (common fund vs. statutory fee case)? How will an appeal of the merits affect the fee application process?)

2. Interim fee awards

a. What is the standard for award? Must the plaintiff prevail on some ultimate issue or is proof of inability to continue without an award, coupled with interim success, sufficient?

b. What is the standard for appeal of an interim award? No appeal until "final judgment"? When must a notice of appeal of an interim fee award be filed?

c. What protection is available for the party ordered to pay interim fees (e.g., payment into court, bond by recipient of award, or compensation with interest if the award is later reversed)?

## III. FORM OF APPLICATION: REQUIREMENTS

A. *Attorney Information*

1. Name, firm or association, education, legal experience, awards or commendations.

B. *Activity Information*

1. Divide hours between winning and losing issues, and between merits and fee application.
2. Note when billing judgment was exercised to decrease hours.
3. Are summaries, cumulative listings, or periodic lists required? Should they be supplemented by daily records?
4. Should documentation of fees charged to other clients in similar fee situations be submitted?
5. Should a listing of prior fees awards within a specified period of time be required?

C. *Class Action Information*

1. List of other fee cases where spent one hundred hours or more?
2. Submit work arrangements negotiated with other attorneys in case at bar?

3. Submit schedules of fees requested for similar cases within a certain time period?

D. *Community Rates*

1. Will evidence of rates charged by other lawyers be required by affidavit or otherwise?
2. Will the court choose to establish a fee schedule as presumptive evidence of local rates?
3. Under what circumstances will a hearing be required to establish community rates?

## IV. RATE STRUCTURE

1. Under what circumstances will local or national rates be awarded?
2. When is a practice defined as a specialty so that a higher rate will be awarded?
3. When will historical rates be applied? What is the standard for computing historical rates?
4. Will the attorney's actual rates or the prevailing market rates be applied? If actual, how will rates for public interest law firms be calculated?
5. Will different rates apply to lead counsel? For trial work? What are the standards for calculating these rates?
6. Will prevailing market rates be awarded for students and paralegals or will awards be limited to the firm's actual costs or billing rate for these services?
7. Of what relevance is the rate charged by opposing counsel for this litigation in determining a market rate of compensation?
8. Under what circumstances will multipliers be applied?
   a. for contingency,
   b. for quality,
   c. for results obtained?
9. Will multipliers be allowed for fee application hours, costs, and expenses?

## V. HEARINGS

1. What type of factual dispute concerning merits of fees issues warrants a hearing?

2. Is a hearing necessary to decide prevailing party issues? In common-fund cases without opposition to fee application? For approval of a class action settlement involving conflict between interests of any party and counsel?
3. Is an opportunity for a hearing essential when attorneys' fees are granted as a sanction?
4. What is the procedure to request a hearing?

## VI. COSTS

1. What are allowable costs under 42 U.S.C. § 1988 and 28 U.S.C. § 1920? What are the court's guidelines regarding expert witness fees, transcripts, depositions, photocopying, travel, telephone costs, and computer research?
2. What standard of documentation of costs will the court require? Is more or less stringent documentation required than for time expenditures?
3. Does the court plan to require that attorneys request permission before making major cost expenditures?

## VII. SETTLEMENT

1. What factors will be emphasized in approving a fair settlement? (E.g., procedural safeguards employed to protect class participation, the results obtained, or the overall apportionment of burdens and benefits among parties?)
2. Will the court permit simultaneous negotiation of fees and the merits? If simultaneous negotiation is allowed in some cases, will the court scrutinize the resulting settlement more strictly than a bifurcated negotiation? If simultaneous negotiation is not allowed, will the court bifurcate rule 23(e) hearings on the merits and the fees?
3. Will the court enforce fee waivers in negotiated settlements? Will the court employ strict scrutiny for fee waivers? Under what circumstances will waivers be enforced?
4. What types of settlement activity will be sanctionable by loss of attorneys' fees? By other sanctions?

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