Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial

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JUDICIAL REGULATION OF ATTORNEYS' FEES: BEGINNING THE PROCESS AT PRETRIAL

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I. INTRODUCTION

Background

With the proliferation of federal statutes under which prevailing parties can recover reasonable attorneys' fees,[1] federal courts are increasingly involved in review of petitions from attorneys for awards of such fees. The almost universal adoption of the "lodestar" approach[2] forces a trial court to make detailed findings of fact and conclusions of law relating to the reasonableness of the hours expended by counsel and the appropriate hourly rate in the geographic area.[3]

Judicial review of fee petitions takes place in the context of suspicion of abuses by attorneys. Professor Arthur Miller found in a survey of lawyers and judges that a substantial number of each group believed that there were widespread abuses in class actions in which courts may award fees to the attorneys.[4] For example, 63 percent of the judges surveyed thought that attorneys "often" worked more hours than necessary in such cases, and an additional 29 percent thought that unnecessary work "sometimes" occurred. Even 73 percent of plaintiffs' counsel responded that this abuse "sometimes" occurs, and 17 percent responded that it happens "often." Accordingly, Professor Miller advocated that judicial efforts to control such abuses start at the pretrial stage.[5]

In *In re Fine Paper Antitrust Litigation,*[6] the trial court carefully reviewed the attorney fee petitions in a major antitrust case and

1. *See* E.R. Larson, Federal Court Awards of Attorney Fees 323 app. C (1981), for a listing of 124 statutory provisions for judicial awards of attorneys' fees.

2. A. Miller, Attorneys' Fees in Class Actions 60-64 (Federal Judicial Center 1980). Under the "lodestar" method, the fee is determined by multiplication of hours reasonably expended by a reasonable hourly rate in the geographic market for an attorney of comparable experience and skill, with perhaps a multiplier as a bonus. *Id.*

3. *See, e.g.,* National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979).

4. A. Miller, *supra* note 2, at 264-89.

5. *Id.* at 338-45.

6. 98 F.R.D. 48 (E.D. Pa. 1983), *appeal docketed,* No. 83-1172 (3d Cir. Mar. 16, 1983).

found widespread abuses relating to the inefficiency of the organizational structure of plaintiffs' counsel, excessive expenditure of time, extensive billing for reviewing materials, attendance at pretrial conferences without any special benefit to the class, widespread duplication of effort, insufficiently documented and poorly organized fee petitions, and unnecessary and extravagant travel and related expenses. After observing that the "inquiry has given substance to the worst fears of the critics of the class action device,"[7] the court reduced the $21 million fee request to about $5.6 million.

Shortly after the decision in *Fine Paper,* Judge John F. Grady of the Northern District of Illinois issued an order in *In re Continental Illinois Securities Litigation*[8] (a copy of which is contained in appendix A *infra)* that was designed to prevent the type of fee abuses described in *Fine Paper.* Using a model of individual responsibility for providing legal services to a class, Judge Grady articulated a set of guidelines that he would employ in reviewing fee petitions if the plaintiffs were to succeed in the litigation.

These guidelines, which serve as the major focus of this study, cover such issues as compensation for conferring, duplication of effort, rates of compensation, types of services that would be compensable, limits on expenses, form of time records, and organization of counsel. Briefly, the order provided that

> compensation for conferring would be limited, and no more than one attorney would be paid for appearances at depositions, motions arguments, and pretrial conferences;
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> senior partner rates would be paid only for work warranting the attention of a senior partner, excluding research or document review that could be done by a beginning associate;
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> no compensation would be allowed for general research on law well-known to practitioners in that area of law;
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> no compensation would be allowed for reviewing documents simply as a matter of interest, without relation to a lawyer's role in the case;
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> payment for communication with attorneys for class members would be strictly limited;
>
> expenses would be limited to those found to be absolutely necessary;

7. *Id.* at 85.
8. 572 F. Supp. 931 (N.D. Ill. 1983).

time records would have to be submitted by activity rather than by attorney or in chronological order; and

the organization of plaintiffs' counsel would be monitored by the court and limited to a roster of attorneys no larger than necessary to provide effective representation.

Concurrent with the concerns within the legal profession and the judiciary about abuses in attorney fee petitions, some corporations have emphasized efforts to control the costs of attorneys' fees for outside counsel.[9]

In designing this study, we hypothesized that the techniques used by corporate counsel, law firms, legal services offices, and public interest groups to reduce the costs of litigation would parallel the guidelines promulgated by Judge Grady. While the private groups' concerns and techniques are more global in that they address the alternatives to litigation as well as reduction of its costs,[10] we expected that the similarity of goals would produce similar private and judicial efforts to control the costs of litigation.

Design of the Study

For this study, we sought a design that would elicit reactions to Judge Grady's order in *Continental Illinois* by a cross section of lawyers. One criterion for selection of lawyers for interviews was to ensure adequate representation from six distinct categories of practice:

1. house counsel (corporate or union)
2. house counsel (insurance company)
3. retained counsel (representing corporations, insurance companies, and unions)
4. plaintiffs' counsel (including lawyers from small, medium, and large firms, mostly representing plaintiffs in business tort cases such as antitrust and shareholder derivative suits)

9. *See, e.g.*, Flaherty, *Comparison Shopping Hits the Law*, Nat'l L.J., Oct. 31, 1983, at 1, col. 3; Lempert, *New Realism Suffuses Inside-Outside Dialogue*, Legal Times, Feb. 27, 1984, at 36, col. 1; *Aetna Reduces Outside Counsel Fees 35% by Focusing on "Pre-Process,"* 2 Alternatives to the High Cost of Litigation 4 (Jan. 1984); *CPR Corporate, Law Firm Litigation Management Survey: Active Managers Seem to Have Better Results*, 1 Alternatives to the High Cost of Litigation 1 (Dec. 1983).

10. *See generally* Center for Public Resources, Corporate Dispute Management (1982).

5. legal services programs funded by the Legal Services Corporation

6. public interest organizations and law firms engaged primarily in plaintiffs' civil rights representation.

Thirty-nine lawyers in eight eastern, midwestern, and western cities were selected on the basis of a variety of factors related to experience in litigation, reputation within the bar, knowledge of attorney fee petition practice, manifestation of concern with controlling costs of litigation, or some combination of the above. Emphasis was given to qualitative factors. While efforts were made to achieve geographical diversity, we do not claim that this sample of lawyers is either randomly selected or representative of the universe of American lawyers. We do, however, think that these lawyers represent a broad range of responses to the order in *Continental Illinois.*

About one-third of the lawyers interviewed were familiar with Judge Grady's order prior to receiving a copy from us. We sent a copy of the order to all respondents, and most reviewed it prior to the interview. A copy of the interview protocol for house counsel is contained in appendix B *infra.*

Using Judge Grady's order in *Continental Illinois* as a catalyst for discussion, we created a design that would stimulate the lawyers interviewed to address the following issues:

> Will following Judge Grady's guidelines be likely to result in significant cost savings?
>
> Are any of the guidelines likely to interfere with the ability of a lawyer to provide adequate representation to an individual client or to a class?
>
> Are the *Continental Illinois* guidelines reasonable?
>
> Do house counsel or law firm senior partners impose similar restrictions on retained counsel or members of the firm? If so, under what circumstances are exceptions made? If not, what steps do they take to address the same goals?
>
> Is Judge Grady's order suitable for application to other types of litigation?

Would extension of Judge Grady's order to other cases result in discouraging plaintiffs and their counsel from initiating litigation?

Are there alternative approaches, not identified in Judge Grady's order, that might be effective in reducing the costs of litigation?

II. SUMMARY OF CONCLUSIONS

Our survey of attorney reactions to the order in *In re Continental Illinois Securities Litigation* leads to the following observations.

1. Will following Judge Grady's guidelines be likely to result in significant cost savings? Implementation of Judge Grady's guidelines is likely to result in substantial cost savings in that type of litigation and might also result in substantial savings if applied to other commercial cases. The average estimated savings was about 50 percent of the attorneys' fees and expenses that would be incurred in the absence of the guidelines. Respondents saw great potential for savings particularly in the sections of the order dealing with individual responsibility (limiting conferring and the number of attorneys at depositions, conferences, and motions arguments), document review, and the form of time records. Monitoring the organizational structure of plaintiffs' attorneys and limiting the number of class representatives who might be compensated from the common fund also showed great prospects of savings to the class.

Respondents generally thought that specific portions of the order were transferable to other types of commercial litigation. One exception was the guideline referring to use of local counsel for court appearances; many felt that this guideline was unique to the setting of the case in a large metropolitan area with competent specialists already involved in the litigation. In other jurisdictions, this guideline might be inappropriate because of the lack of expertise of local counsel and the cost of educating them.

2. Are any of the guidelines likely to interfere with the ability of a lawyer to provide adequate representation to an individual client or to a class? If interpreted strictly and enforced rigorously, the guidelines might interfere with the ability of a lawyer to provide adequate representation to a client. As such, the order does not touch the question of what the lawyer might do in behalf of a client. The only issue is whether the lawyer will be paid for this legal work. Respondents assume that the absence of prospects of payment will affect, at least in the long run, the amount of time that a lawyer can devote to a case.

Respondents were especially concerned that the guidelines might be interpreted to prevent a senior partner from reviewing basic research in the specialty area and from reviewing documents to be used at a deposition or trial. Some were also concerned that an attorney for a class member might not be compensated to review documents essential to informing his or her client about the case or even to review documents before signature, as required by Federal Rule of Civil Procedure 11.

3. Are the *Continental Illinois* guidelines reasonable? The question of whether the guidelines are reasonable may be too broad for a precise summary. Most respondents found most of the guidelines to be reasonable if administered with some flexibility, allowing for exceptions as necessary to provide adequate representation to the class. None of the respondents found the entire order to be unreasonable, but virtually all found some aspect of the order to be potentially unreasonable if not interpreted liberally or administered flexibly.

4. Do house counsel or law firm senior partners impose similar restrictions on retained counsel or members of the firm? If so, under what circumstances are exceptions made? If not, what steps do they take to address the same goals? House counsel, law firms, and legal services offices apply what they consider to be commonsense versions of many of the guidelines identified by Judge Grady. They are rarely stated formally as guidelines or written rules, but they do inform the frequent interactions between house counsel and retained counsel, senior partner and associates, and director and staff attorneys. Some of the guidelines, however, are not considered appropriate to small law firms or legal services offices that do not have sufficient numbers of attorneys or paralegals to permit pyramid staffing.

5. Is Judge Grady's order suitable for application to other types of litigation? The order in *In re Continental Illinois Securities Litigation* appears to be suitable to other forms of commercial litigation. Extension to civil rights cases and other classes of cases in which a shortage of competent counsel is the norm appears to be unnecessary and duplicative of existing review of fee petitions by the courts. None of the respondents identified any abuse in civil rights or public interest cases, and all those who addressed the issue thought that review of fee petitions by the courts was adequate in those cases.

6. Would extension of Judge Grady's order to other cases result in discouraging plaintiffs and their counsel from initiating litigation? Few respondents thought that this would happen. Most thought that cases would be decided on an individual basis without

regard to the issue of the amount of fees. Lawyers in one firm did report that they had become discouraged from involvement in contingent fee representation of plaintiffs in commercial litigation because of the uncertainty of payment. Several public interest lawyers indicated their dependence on recovery of fees to support future litigation.

7. Are there alternative approaches, not identified in Judge Grady's order, that might be effective in reducing the costs of litigation? Respondents identified numerous alternative steps that might be taken to accomplish the objectives of containment of the costs of attorneys' fees in class litigation. The most comprehensive of these suggestions is to have a periodic review of billing during the course of the litigation, either by a judge or by extrajudicial support personnel, such as a magistrate or special master. Other alternatives are discussed in the specific responses in chapter 4 *infra.*

In brief, the lawyers interviewed for this study identified innovative features of the order in *Continental Illinois,* applauded the concept of a pretrial order, criticized specific aspects of the order, and called for a more flexible approach to achieve the unassailable goal of reducing the costs of attorneys' fees in class actions without sacrificing quality of representation or access to counsel and the judicial system.

III. GENERAL RESPONSES

The overwhelming majority of lawyers interviewed expressed appreciation for the concept of the order and applauded the judicial recognition of the need for such an order. Typical comments were that it is important for a judge to "get out front" in a situation showing a potential for abuse of the fee process and that the order derives from a "legitimate concern" to control demonstrable abuses. Most of the respondents thought that the order would result in substantial savings in *Continental Illinois* and other cases to which it might be applied. A minority thought that the order would deter lawyers from becoming involved in class action litigation in marginal cases.

All house counsel supported the concept that an order should establish ground rules early in the litigation; as a group they displayed the most enthusiasm for the order. At the same time, house counsel expressed some reservations about specific items in the order, as did all of the attorneys.

More than half of the respondents favorable to the order tempered their applause with a concern that the order was unduly rigid, impractical, or restrictive of quality legal representation. One such respondent said that the order was "great" in dealing with the "horribles," but that she disagrees with many of the specific rules. Another deemed the order "aggressive, but not wholly inappropriate." Others questioned whether it is practical or whether it should be applied across the board to all attorney fee awards. Another capsulized the ambivalence of many respondents by stating that "like all revolutions, it goes too far."

About 20 percent of the lawyers were primarily critical of the order. These criticisms cut across lawyer roles and were made by all types of respondents except house counsel. Plaintiffs' counsel as a group exhibited a slight tendency to be more critical of the order than other attorneys were; most plaintiffs' attorneys, however, favored the order.

Civil rights plaintiffs' lawyers, public interest lawyers, and legal services lawyers generally supported the concept of such an order while emphasizing that the types of abuses, especially the "overlawyering" of cases, rarely if ever manifest themselves in civil

rights cases. A shortage of counsel and a need to husband scarce resources are the norm in those cases. Indeed, these attorneys thought that rules equivalent to those expressed by Judge Grady were already applied in postjudgment reviews of fee petitions in civil rights cases.[11] These plaintiffs' attorneys and some plaintiffs' lawyers in commercial litigation favored the order because judicial reaction to abusive cases such as *Fine Paper* tends to spill over into restrictions on compensation for all plaintiffs' counsel despite the dissimilarities in the cases.

General criticisms of the order were that the guidelines appear to be inflexible, that specific items are "impractical," and that the order creates an imbalance in litigation in favor of defendants. The latter have their fees paid without risk or arbitrary limits, and the order leaves them free to exploit the limitations implicit in the assertion that plaintiffs will not be paid for certain activities.

About three-fourths of the respondents thought that the order would accomplish a substantial reduction in the costs of litigation in cases in which it was applied. After reviewing the entire order during the interview, the attorneys were asked to give their best estimates of the amount of such savings. The responses ranged from 10 percent to 90 percent of the costs that would be incurred in a typical case in the absence of the guidelines. The latter estimate assumed a literal application of the individual responsibility guideline so that only one lawyer would represent the class.

Most of the specific estimates were in the 50 to 60 percent range, but several predicted that savings would be limited to 10 or 20 percent and that there would be little or no savings outside of the commercial class action context. The latter predictions were based on assertions that the economics of small law firms and public interest and legal services programs control the investment of time and resources in cases in which no fee can be recovered until after a successful result has been achieved.

As with all estimates, one should be cautious about drawing hard quantitative conclusions from the above figures. They give us a range of projected savings from experienced litigators and house counsel who monitor litigation. Based on their opinions, we can confidently conclude that substantial savings are likely to be realized as a result of this order.

The mechanism for achieving any anticipated savings is debatable. Several respondents assumed that plaintiffs' attorneys would restrict their time and efforts in a case because of the prospect of

11. *See, e.g.,* National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979).

nonpayment. Under this speculation, plaintiffs' counsel would look for more lucrative cases and seek to settle the case quickly. Events seem to have disproved this hypothesis. Reviewing the docket sheet in *In re Continental Illinois Securities Litigation* shows that the litigation continues with vigorous competition for the position of lead counsel.[12]

Other respondents speculate that the savings will come from the plaintiffs' pockets and flow into the defendants' coffers. The assumption is that plaintiffs' attorneys will continue to engage in the same amount of effort and will simply be paid less for fulfilling their professional responsibilities to their clients and the class. Events to date do not bear out this prediction. Appearances by plaintiffs' attorneys at court conferences have been reduced from between thirty and forty before the order to between one and three after the order. Appearances by the defendants' attorneys have not changed.

Less than half of the respondents thought that the order would have the effect of reducing the amount of litigation. Many lawyers ventured the opinion that the order would reduce the amount of profits generated by plaintiffs' counsel, but that the area of antitrust class action work would remain lucrative. On the other hand, one experienced class action commercial litigator stated that he had already decided to limit his activity to representation of paying clients, plaintiffs and defendants, on an hourly basis. He reached this conclusion after receiving a fee award for $70 an hour for major antitrust class action work, compared with his normal rate of $175 per hour.

Those who did think that the order, if extended to all cases, would result in a reduction in the amount of litigation also thought that the effect would be only on the marginal cases and on the number of counsel who might appear in class action cases.

In summary, most respondents applaud the effort of Judge Grady to control the costs of litigation at the outset of a major case. They see substantial savings from such efforts and few negative side effects such as deterrence of legitimate claims. On the other hand,

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12. The amount of litigation is substantial. As of June 4, 1984, slightly more than twenty-two months after the filing of the action, there were thirty-two pages of entries on the docket sheet.

Competition for the lead counsel position is also evident. The court certified a class in the case. The only named plaintiff who qualified as a class representative was represented by an attorney who had not been part of the lead counsel team. This attorney then filed a motion to add two new counsel and to bar lead counsel from continuing to represent the class, alleging a conflict of interest. This motion and the opposition to it demonstrate a lively interest on the part of several counsel in the lead counsel position.

all of the respondents had some strong opinions in disagreement with specific aspects of Judge Grady's order. We now turn to those concerns.

IV. SPECIFIC RESPONSES

Individual Responsibility

Judge Grady ruled that

> [g]enerally, attorneys should work independently, without the incessant "conferring" that so often forms a major part of the fee petition in all but the tiniest cases. Counsel who are not able to work independently should not seek to represent the class. Examples of the kind of work for which only *one* attorney should be compensated are:
>
> *(a) Court appearances.* When it is necessary for the plaintiffs to be represented in court on a motion or argument, or for a conference, no more than one lawyer should appear for them.
>
> *(b) Depositions.* No more than one lawyer should appear for the plaintiffs at a deposition of a witness.[13]

This section of the order generated widespread disagreement and no unconditional support. On the one hand, supporters of portions of this section stated that it was essential to regulate these areas to control costs. On the other hand, opponents rejected it as "too rigid" and "unreasonable."

As to the "one attorney" aspect of this guideline, most of the respondents focused on its application to depositions and reported that they regularly use at least one attorney and a paralegal to conduct depositions. Only respondents from small law firms (fewer than ten attorneys) or from legal services programs reported use of a single attorney to conduct a deposition. Even among these firms and programs, exceptions would be made for depositions of major witnesses, depositions involving a large number of documents, and depositions requiring multiple specialists. As one respondent stated, "the deposition of a major witness may be the trial."

House counsel do not impose so strict a requirement. Some house counsel use a budget to estimate discovery costs for a year, leaving decisions about the number of attorneys at a specific proceeding to the discretion of trial counsel within the confines of the budget es-

13. 572 F. Supp. at 933.

timate. The most restrictive practice of house counsel is to limit compensation to one attorney plus a paralegal. Even that guideline is subject to adjustment in a complex case.

To our surprise, many house counsel expressed a need for judicial controls of the litigation practices of defendants' counsel. In other words, they sought judicial assistance in regulating the behavior of their own retained counsel. One house counsel stated that this portion of the order "discriminates against the plaintiffs' bar because no such controls are imposed on the defendants' bar." He then said that this was "an admission against interest" and even an invitation to "creeping socialism." Nevertheless, this lawyer urged such judicial regulation of defendants as "necessary for an even-handed approach." Several other house counsel articulated similar sentiments.

The complaint that this rule might lead to imbalances in representation and, therefore, in fairness to plaintiffs is supported by further developments in *Continental Illinois.* One of plaintiffs' counsel raised this issue in these terms:

> Perhaps the best evidence of the need for more than one lawyer at complex multi-document depositions is a look at the defense side of the table, where there are seldom less than two lawyers and often are many more. Not all this defense activity can be ascribed to padding or overlawyering. Market forces are at work and defense counsel have to answer to a client's in-house general counsel if bills get out of line. The truth is that in some instances a deposition simply can't be handled efficiently and effectively by one lawyer, and in those cases it would be unfair to penalize class plaintiffs with such a requirement.[14]

Judge Grady responded by reaffirming his decision:

> I have specifically said that the reasonable number is *one.* If in a particular situation counsel believe it is necessary to have more than one attorney to appear at a particular deposition, I would advise them to check with me in advance. They may not be able to persuade me after the fact that the extra help was really necessary.

He also stated:

> You seem to complain about a certain unfairness in plaintiffs' being limited in the number of lawyers they can have on a project whereas defendants have no such limitation. I express no view as to whether the numerous defendants in this case, many with pos-

14. Letter from Lowell E. Sachnoff, Esq., to Hon. John F. Grady (Nov. 7, 1983) (in file of *In re* Continental Illinois Securities Litigation, No. 82 C 4712 (N.D. Ill.)).

> sibly conflicting interests, have too many lawyers. Assuming *arguendo* that they do, I have two reactions to your complaint. First, there is nothing unfair in limiting plaintiffs' counsel to the number that is necessary. Running up excessive fees just because the other side might be doing it is not a defensible practice. Secondly, I have nothing to do with setting the defendants' attorneys' fees. Whether those fees are reasonable or not is a matter between the defendants and their attorneys.[15]

What form would such regulation of defendants take? Presumably, the lawyers interviewed contemplated restraints similar to those imposed on plaintiffs. One plaintiffs' attorney expressly called for judicial screening of routine memorandums that only contain legal truisms and that should not require a response. Regulation could be through sanctions under the Federal Rules of Civil Procedure—either rule 11 or rule 42(a).[16]

As to the limits on conferring, respondents uniformly stated a high degree of respect for the value of conferring in the practice of law. Typical comments were that conferring "is at the heart of law practice," is "important to set direction for a case and to explore alternatives," and allows an economical "exchange of experience among counsel."

On the other hand, one experienced retained counsel (who also performs house counsel functions) finds that conferring is both very valuable at the outset and summary judgment stages of a case and also "one of the most fudged items on billings." The task is to separate the valuable, efficient conferring from that which has no benefit to the class. The order in *Continental Illinois* apparently allows compensation for some unspecified amount of significant and necessary conferring that falls short of the "incessant conferring" condemned in the order.

Several lawyers saw a conflict between the "one attorney" rule and the "no conferring" rule. For the single attorney to put together a deposition or argument, there will be a need to confer with other members of the committee of counsel or, at least, other members of the law firm. There is also a strong likelihood of conflict with the rule limiting senior partner compensation to work demanding senior partner skills. Any future order on this subject should address these conflicts and attempt to define permissible conferring—at a minimum, that which is essential to streamlining

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15. Letter from Hon. John F. Grady to Lowell E. Sachnoff, Esq. (Nov. 20, 1983) (in file of *In re* Continental Illinois Securities Litigation, No. 82 C 4712 (N.D. Ill.)).

16. Rule 42(a) provides for orders "to avoid unnecessary costs or delay." This provision was derived from 28 U.S.C. § 734 (1940), which was entitled "Orders to save costs." It apparently applies only to actions involving a common question of law or fact. Most complex commercial litigation, however, meets those criteria.

the lawyers' work—and perhaps to articulate criteria for identification of excessive conferring.

In addition to general suggestions of increased flexibility in the statement and administration of the guidelines, several respondents suggested that an alternative approach to the "one attorney" rule would be to require justification for additional attorneys to appear at a deposition or hearing.[17] Such justification would have to be linked to their role in the case. In the words of one lawyer, the rule should be "Don't pay spectators." Such a rule would require limits on the ability of counsel to create new roles to justify payment.[18]

Virtually all of the lawyers concurred in the prediction that enforcement of this facet of the order would result in substantial cost savings. As the above discussion indicates, a substantial number of those lawyers believe that the savings would be at the expense of adequate representation of the class.

Rates of Compensation

Judge Grady ruled that "[s]enior partner rates will be paid only for work that warrants the attention of a senior partner. If a senior partner spends his time reviewing documents or doing research a beginning associate could do, he will be paid at the rate of a beginning associate."[19]

The great majority of lawyers interviewed found this guideline to be quite reasonable and to approximate the expectations of house counsel and the practices of retained counsel. A significant minority, however, found the guideline to be ambiguous and unreasonable if interpreted narrowly to preclude any research or document review by senior partners. Some lawyers also objected to the anticompetitive implications of the order's preference for large law firm structures.

Even the majority who found this portion of the order to be reasonable did not expect substantial cost savings from it and did not identify widespread abuse in this area.[20]

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17. In his correspondence with Mr. Sachnoff, *supra* note 15, Judge Grady did indicate an intent to be flexible in administration of at least this portion of the order. He stated "[i]f in a particular situation counsel believe it is necessary for more than one attorney to appear at a particular deposition, I would advise them to check with me in advance."

18. *Id.*

19. 572 F. Supp. at 933.

20. On the other hand, Professor Miller's survey showed that "attorneys quite frequently do work that should be done by paralegals." A. Miller, *supra* note 2, at 283. In his survey, "[o]ver one third of the judges (33 of 80) and attorneys (30 of 88) thought attorneys often or always did paralegal work." *Id.*

Some observed that market forces tend to take care of the problem and that senior partner time is valuable and scarce. One house counsel stated that he tried to buy as much "good senior partner time" as he could get because the senior partner serves as a manager who gives direction and efficiency to the efforts of associates and paralegals. Others observed that the judicious use of senior partner time, even in research or sampling of documents, should increase efficiency.

Nothing in this portion of the order seems inconsistent with those observations. Judge Grady did not state that he would never compensate at senior partner rates; the positive inference in his order is that he will award fees at senior partner rates for work that warrants the attention of a senior partner.

Many respondents found this portion of the order to be ambiguous in that it implies that senior partners will never be compensated at senior partner rates for engaging in legal research or document review. These lawyers point out that the senior partner who is lead trial counsel needs to have a solid grasp of the legal issues in a case and to be familiar with all the documents that will be used at a trial or deposition. Both of these functions require thorough comprehension of the "primary materials." If interpreted to exclude all research and document review, the rule would restrain payment for services necessary to provide effective representation to a client.

Other respondents identified the abuses as related to senior partners' attendance at the first production of documents or doing the initial research on the case. They read the order as being limited to those situations and not to all research and document review. Because of the potential for ambiguity, any future order on this subject should attempt to clarify the abuses at which the rule is aimed and the type of senior partner work that will be compensated and even encouraged.

House counsel do not apply this type of order in this form. They do tend to be concerned about the proper mix among senior partner, junior partner, associate, and paralegal time. They generally address this concern by identifying the lawyers within the retained law firm who will work on the case and monitoring the reasonableness of the division of labor within the firm. Abuses are called to the attention of the senior partner during the review of periodic bills.

In some situations, house counsel and retained counsel report that they will contract for a senior partner to do basic legal research on a novel issue because they expect that the senior partner will more likely see the opportunity for innovative arguments.

Senior partners who have been so retained do think that they are able to see more issues and avenues for argument than a less experienced lawyer is.

Criticism that this portion of the order has anticompetitive effects centers on its implicit model of the large law firm with pyramid staffing. Some lawyers observed that this model would not apply to their small firms or to public interest or legal services offices. The latter are sometimes so understaffed and underfunded that senior lawyers often do their own research and document review. Limitation of reimbursement to paralegal rates might render those offices unable to compete, tend to create an oligopoly of large specialized large firms, and reduce the options available to consumers of legal services.

One response to that criticism is that the anticompetitive effect of the order is itself a product of competition and market forces. If the market for legal research is at paralegal rates, the court's mandate to award attorneys' fees at reasonable market rates is satisfied by payment of the attorneys at the paralegal rates.[21] Any anticompetitive effect would then be a natural byproduct of an order limiting fees to a reasonable market rate.[22]

Alternatives proposed by lawyers for regulation of this area included the use of clearer and more flexible guidelines to permit the use of senior partner time for legitimate document review and review of legal research. Some respondents also thought that this guideline should include some direct encouragement of the use of paralegals; use of the term "beginning associate" might be read to encourage use of associates rather than paralegals.

On the other hand, one house counsel stated that paralegals are no bargain in many cases and that profit margins are high for paralegals. Several house counsel indicate that they regulate the use of paralegals closely because of the temptation to create unnecessary projects for them. Some house counsel create their own staff of paralegals and do the work in-house at a substantial savings.

In summary, if this guideline is interpreted to permit senior partner review of documents and legal research necessary to

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21. *See, e.g.,* Copeland v. Marshall, 641 F.2d 880, 892 (D.C. Cir. 1980) ("there may be more than one reasonable hourly rate for each of the attorneys, and for each of the kinds of work involved in the litigation").

22. This argument also pales in light of the capital investment necessary for plaintiffs' counsel to sustain a major commercial class action. Counsel for the plaintiffs in *In re* Corrugated Container Antitrust Litigation, 447 F. Supp. 468 (E.D. Pa. 1978), reported that $2.5 million was advanced by plaintiffs' lawyers in that case prior to any reimbursement. Such investments can hardly be made by a typical small law firm. *But see* Rand, *A Small Firm Nets Big Bucks,* Nat'l L.J., May 28, 1984, at 1, col. 2, reporting that Davis, Miner of Chicago invested $125,000 in one class action and $250,000 in another.

manage the case and perform the role of lead trial counsel, there is little dispute that it is reasonable and that it may curb some abuses. Criticism of its anticompetitive effects seems to raise fundamental questions of whether the delivery of legal services in major commercial litigation has built-in tendencies toward specialization among large, well-capitalized law firms.

Legal Research

On the topic of legal research, Judge Grady ruled that

> [c]ounsel who are sufficiently experienced to represent the class are presumed to have an adequate background in the law applicable to the case. While it is recognized that particular questions requiring research will arise from time to time, no fees will be allowed for general research on law which is well known to practitioners in the areas of law involved.[23]

The lawyers interviewed generally agreed with the direction of this guideline, but a substantial number found it ambiguous, potentially difficult to apply, and presenting a danger of interference with the provision of adequate representation to a class.

Many lawyers recognized the abuse at which Judge Grady directed this portion of the order, namely the "recycling" of research in multiple cases with minor, if any, adaptations. A variation of the abuse is "massaging the memo" to train an associate to produce a perfect internal work product to grace the interior of a manila folder in a file cabinet. None of the respondents indicated any disagreement with the goal of elimination of this type of overbilling. Some condemned it in the harshest terms.

At the same time, many of these lawyers identified the value of legal research and the difficulty of separating important legal research from repetitious pap. One observed the simple difficulty of distinguishing between research and drafting. When one bills for writing a brief, there is an area of discretion in whether to label the work "research" or "drafting." The order in *Continental Illinois* limits research, but does not expressly address the issue of drafting.

One lawyer asserted that the guiding principle behind his law firm's success is that "research is the key to successful litigation." Another stated that his formula for success is to "review the familiar to produce the new." As noted in the previous section, house

23. 572 F. Supp. at 933.

counsel will sometimes expressly contract for "perfect" research by a senior partner in a new or troublesome area of law. These and other respondents seemed to be reacting to the implication in the order that they would not be paid for this challenging legal work if the judge were to deem the area of law to be "basic."

House counsel almost uniformly recognize the abuse; however, they cope with it in different ways. Some request copies of the firm's memorandums on the issues as background for the litigation, thereby deterring bills for use of minor variations of those same memorandums. Others "capture" the background research work and do it in-house. Still others try to discourage the "recycling" practice by calling attention to it in review of periodic bills or in the initial letter of retainer. For example, one corporation in its form retainer letter states that the corporation "retained you because of expertise . . . [and we] do not expect basic research in the area to be part of the plan for future billing."

Several lawyers identified anticompetitive effects of this aspect of the order as well as the one dealing with rates of compensation. In combination, these two guidelines promote the use of highly specialized, generally large law firms with pyramid staffing to the detriment of the small firm seeking to enter a new specialty area. One respondent, himself an antitrust specialist with a major law firm, expressed doubts that the policy would save money because the rates of the specialists were generally higher, due at least in part to their oligopolistic control of the market. Clients' freedom to choose counsel would be promoted by judicial policies that allow payment for some basic research by an entering practitioner who charges a lower overall rate.

In line with the above observation, another lawyer suggested that an alternative to excluding basic legal research from a fee award is to compensate such research at a lower rate. The section of Judge Grady's order dealing with rates of compensation makes it clear, as we have seen, that most legal research will be compensated at a rate lower than that of a senior partner.

Another alternative suggested by several lawyers was for the court to issue guidelines related to filing unnecessary briefs and memorandums that discuss basic propositions of law without application to the case at hand. Such an order would presumably have its own in terrorem effect and would also be enforceable by imposition of sanctions.

Finally, several lawyers suggested the straightforward option of reviewing the work product that flows from legal research and making a judicial determination of the value of the product to the class. This is the method used by Judge McGlynn in *Fine Paper*

and used generally in reviews of fee petitions by the judge who decided the case. Familiarity with the quality of legal work in the case would appear to flow naturally from judicial decisions on pretrial and trial issues in the case.

In summary, virtually all of the lawyers agreed that the court should not award fees for "recycled" or unnecessary legal research. Separation of the basic from the sublime remains the problem. Many respondents feel that there is no substitute for judicial evaluation of the quality of legal research as evidenced by the final product.

Document Review

Judge Grady ruled that

> [g]enerally speaking, I will allow no fees to a lawyer for simply reading the work product of another lawyer. There will be instances, of course, where a junior associate might prepare a pleading or a brief for a senior lawyer to approve before filing. There will also be times when a lawyer will need to read something prepared by someone else in order to perform a particular task in the case. But under no circumstances will it be compensable for a multiplicity of lawyers to review the same document simply as a matter of interest, whether it be a pleading, a brief or a document produced in discovery. Again, the keynote is individual responsibility.[24]

None of the lawyers expressed any doubt that a lawyer should not be paid for reviewing documents "simply as a matter of interest." Several expressed their opinion that the guideline begged the crucial question of whether the review was in the interest of the lawyer, the individual client, or the class as a whole. In the words of one lawyer, "I'm so busy. I can't imagine reading anything 'simply as a matter of interest.' "

Many of the interviewees, however, inferred from the tone of the order that the court would apply it to situations in which the lawyers felt an obligation to represent an individual client. Once one assumes that the phrase "simply as a matter of interest" does not modify the entire section, conflicts emerge. The lawyer engaged in the active representation of an individual client perceives that this portion of the order will impinge on payment for that representation.

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24. 572 F. Supp. at 933-34.

One problem is that a lawyer for an individual class member may be counsel of record in the case. The documents under review may be pleadings in the case. Under Federal Rule of Civil Procedure 11, "[t]he signature of an attorney or party constitutes a certificate" that the attorney or party read the pleading, motion, or other paper and made the judgment that it is "well grounded" and "not interposed for any improper purpose." Obviously, submission of the pleading under the attorney's signature without reading amounts to a clear violation of rule 11 and would subject the attorney to mandatory sanctions.

Another problem is that a lawyer for an individual class member may need to advise his or her client concerning the decision about whether to request exclusion from a class settlement or judgment as permitted by Federal Rule of Civil Procedure 23(c)(3). The lawyer's duty to advise the client may be considered to be independent of the question of whether the class should pay counsel to provide such advice. Under the general rule that attorneys' fees may be awarded for legal work that benefits the class,[25] a case can be made for payment when the advice directly relates to the success of the class action mechanism.[26]

Class members, defendants, the courts, and the public all have an interest in informed decisions from class members concerning participation in a class judgment. Without reviewing relevant documents, the lawyer for the class member may be unable to assist the client in making a fully informed decision. On the other hand, in many cases, the decision of whether or not to join the class is likely to affect only the interest of the individual class member. In cases in which the stakes of an individual claim are small, economics will dictate the result.

Another problem identified by respondents is that counsel for a class member may be inhibited from performing the role of monitoring the activities of lead counsel for the class. As the *Fine Paper* case illustrates, an inside evaluation of the efforts of counsel for the class can aid the court in identifying and resolving fee disputes. Reviewing documents would be the first step in that process.

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25. *See generally, In re* Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), *appeal docketed,* No. 83-1172 (3d Cir. Mar. 16, 1983). The general rule is that attorneys should not be compensated for their efforts to represent an individual class member in a class action suit unless the representation of the individual benefits the class in a "common fund" class action. *Id.; see also* Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1975); *In re* Equity Funding Corp. of America Securities, 438 F. Supp. 1303 (C.D. Cal. 1977).

26. In some settlements, such as the Agent Orange litigation, there is a trigger mechanism that would allow the defendants to abort the settlement if a given number or percentage of the class decides to opt out. *Inside Agent Orange,* Nat'l L.J., May 21, 1984, at 1, col. 1.

Judge Grady anticipates this argument, stating in the section of his order that deals with communication with attorneys for class members that "[i]f the attorneys for the class are competent, there is no need for a legion of other lawyers to be looking over their shoulders; if they are not competent, the legion will do no good anyway."[27]

Some respondents supported the rule in its strictest form (i.e., prohibiting payment for document review on behalf of an individual class member), reasoning that the class action procedure includes judicially approved representation of individual class members by counsel for the class. Additional representation is a superfluous luxury, perhaps beneficial to the individual but not to the class. The individual should pay for this personal benefit. One respondent noted that in civil rights cases in which he had been involved, attorneys for individual class members did not submit fee petitions. Another respondent observed that civil rights cases have proceeded well without payment of counsel for individuals to serve as monitors.

Professor Miller states flatly that "[t]o the extent duplicated effort represents an attempt by an attorney to stay abreast of the case so as to represent his individual client's interest, the time should be charged to those clients, not the class."[28] The question remains, however, as to how to apply this general rule to situations involving mixed motives and benefits to the individual and the class.

Without attempting to resolve these competing arguments, we can fairly say that there are substantial arguments for payment or nonpayment of counsel for individual class members, that a court may need to resolve these issues on a case-by-case basis, and that a prior order, even one with a presumption of nonpayment, serves as a valuable guide to counsel.

House counsel do not emphasize this type of guideline in reviewing bills or otherwise communicating with retained counsel. A few enforce similar guidelines. One stressed the problem of elaborate review mechanisms within the law firm; his corporation refuses to pay for multiple internal reviews of the same document. Another house counsel, however, insists on review of all pleadings prior to filing, adding another layer of review to the process.

Most of the respondents did not identify review of documents as a major abuse, the regulation of which would result in substantial savings to the court, class, or defendants.

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27. 572 F. Supp. at 934.
28. A. Miller, *supra* note 2, at 274.

A number of respondents thought that this rule was too rigid and that alternative restrictions would achieve the same result with less restriction of legitimate functions of counsel for the class member. One such alternative was to relate the issue of compensation for review of documents to the role of the lawyer in the case. Counsel for the class would be allowed more review time than counsel for an individual member; lead trial counsel would have more review time than the junior associate. One respondent suggested that the amount of time for review of documents be some (unspecified) proportion of the time spent by counsel on other activities in the case.

Another recommended alternative was to limit the amount of time allowed for review—a "read fast" rule. Similarly, the court could compensate review at a lower rate than other functions, a result implied by the court's ruling on rates of compensation. Finally, the court could relate the amount of compensable review time to the goals of the litigation and the benefits of such review to the class, the court, and the public interest.

In sum, the respondents tended to agree that a lawyer has a duty to the individual client to review documents in a case. Fundamental disagreement among respondents concerned the issue of who should pay for such review. Many respondents suggested alternative, flexible rules to permit compensation when the review for an individual would also benefit the class, the courts, and the public interest.

Communication with Attorneys for Class Members

Part of Judge Grady's ruling on communication with attorneys for class members reads:

> There is no doubt that the activities of "liaison" counsel in communicating, lawyer to lawyer, with the lawyers for class members frequently generate enormous amounts of "billable time" in class actions. That will not occur here. Class members should be kept apprised of the progress of the litigation, but in no greater detail or frequency than the typical client is kept advised by his attorney. Periodic informational mailings to the class should suffice. Even that may not be necessary. In many class actions, counsel do no more than respond to specific inquiries by class members. The needs of this particular case will become apparent in time, and we will meet those needs as they arise.[29]

29. 572 F. Supp. at 934.

Unlike the order relating to review of documents, which is directed primarily to counsel for individual class members, this portion of the order is directed to class counsel.

This guideline generated little disagreement among the lawyers interviewed. Most found it to be "reasonable, but . . .," adding an interpretation, qualification, or caveat. Few saw it as a major area of abuse, but a substantial number of the lawyers professed a lack of familiarity with the inner working of class representation in major commercial litigation.

The measure of the amount of communication to be permitted with class members or their attorneys is the amount that a "typical client" has with his or her attorney. The guideline seemed quite vague to many respondents; perhaps it is purposely so at this early stage of the litigation. One thought it "not tough enough" because he communicates extensively with his corporate clients. Others thought it might allow too little communication because lack of communication is a major reason given for complaints against lawyers.

Another source of ambiguity relates to whether the guideline applies to communication with individual class members or just to communication with their attorneys. In many class actions, especially civil rights actions, the class members do not have separate counsel.

Many of the respondents identified a need to encourage class counsel to communicate with dissident or potentially dissident class members so that they could keep the class together, especially in "opt out" class actions under Federal Rule of Civil Procedure 23(c)(3). Several attorneys suggested, however, that the likelihood of dissidents opting out is minimal in many class actions because so little is at stake for each member and because attorneys' fees will not be paid by the common fund.

Concern about the cohesiveness of the class lessens when the interests of class members are similar. When the interests are diverse, however, the rule limiting communication may serve to fragment the class and increase costs for all parties and the court. One of the lawyers interviewed had substantial experience in the Oldsmobile Engine class action.[30] In his opinion, the rule would not work in such a case because many plaintiffs were political entities, such as states, that had diverse interests and the ability to opt out. Plaintiffs' counsel's communication with such class members seems primarily to benefit the class.

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30. *In re* General Motors Engine Interchange Litigation, 549 F.2d 1106 (3d Cir. 1979).

In addition to these broad concerns about class cohesiveness, some lawyers identified a need to maintain good relationships with individual class members so that they could be called on to assist with such mundane matters as responses to lengthy interrogatories or other discovery requests.

Several lawyers suggested alternatives for regulation of this subject. One is to encourage regular forms of mass communication, such as newsletters, to forestall routine requests for information. Judge Grady considered this option and dismissed it because it might produce unnecessary communication. Another suggestion was to pay a lower rate of compensation for communication with class members.

One respondent, who had experience in a major civil rights class action, felt strongly that class meetings are essential for class decision making on issues leading up to a final settlement or trial. Without regular information and participation in the decision making during litigation extending over several years, class members may develop unreasonable expectations about a case, leading to dissatisfaction and dissent when a settlement is proposed.

House counsel report that they rarely have occasion to consider or apply such a guideline. Sometimes they are class members, and they instruct counsel not to participate actively in the litigation.

In summary, several respondents raised serious questions about the cost-effectiveness of inhibiting communication with class members or their attorneys. Few saw significant cost savings flowing from this portion of the order.

Expenses

Judge Grady ruled that

> [r]eimbursement will be allowed for the reasonable expense of *necessary* travel, hotel accommodations and meals. Work should be assigned so as to minimize the need for travel, e.g., if a deposition is to be taken in Chicago, it should not be taken by a lawyer from New York. Since this case is pending in the Northern District of Illinois, I cannot readily imagine a circumstance that would justify a lawyer from out of the district making a court appearance here. Conferences between counsel who office at distant points should be by telephone; it would require extraordinary justification for counsel to fly, say from Chicago to Philadelphia, for a conference. Air fares will be reimbursed at tourist rates, and there will be no meal reimbursement unless counsel is travelling away from home.[31]

31. 572 F. Supp. at 934.

In general, there was little disagreement with the aspects of this rule directed specifically at expenses, such as use of coach travel. Most respondents, however, cautioned against application of the rule regarding use of Chicago counsel to other cases in other jurisdictions. Many respondents suggested other approaches to regulation of expenses.

Approval of the guideline regarding coach travel was virtually unanimous. Two lawyers argued for use of the "business class" category for transcontinental flights. Another pair of lawyers argued for the importance of first-class accommodations to provide space and privacy for working, but they were willing to pay for the differential.

Generally, house counsel apply this rule to their own staffs and to retained counsel. Exceptions are sometimes made for retained counsel who make a case for working in relative privacy with confidential materials of the corporation. One corporation also permits an exception for "senior attorneys" (over forty years of age). One corporate house counsel, however, reports that a law firm refused to accept a case because they had "principles" against less than first-class travel.

Many respondents, especially corporate house counsel, suggested additional areas for regulation of expenses. Some argued for placing a ceiling on hotel room rates; several retained counsel, on the other hand, argued for the need for first-class hotel accommodations with adequate desk space.

House counsel also suggested regulation of photocopying and telephone charges, billing for secretarial overtime, and prior approval for paralegal projects of a specific magnitude. Several emphasized the importance of limiting the minimum segment for billing to one-tenth of an hour intervals or less.

Regulation of travel time was also a favorite concern of many house counsel. Some specified limits designed to avoid double billing—for example, billing one client for travel time and another for work performed while traveling. Others simply encouraged the lawyer to work during travel.

As to Judge Grady's proscription against use of out-of-town counsel for depositions and hearings, there was near universal opposition to generalization of this rule beyond the context of the *Continental Illinois* case. Most respondents recognized that the rule might be appropriate to that case because of the number of Chicago counsel involved; however, many vehemently opposed its extension to other locales in which local counsel may be no more than a "mail drop" or a formality to comply with local rules. In those situ-

ations, the costs of educating local counsel to conduct any but the most routine deposition would exceed the costs of travel.

In sum, counsel of all types and roles generally applauded the court's efforts to restrain expenses and disfavored the required use of local counsel.

Keeping Time Records

Judge Grady ruled that

> [t]he time records in this case should be kept, or at least ultimately submitted to me, chronologically by *activity* rather than by attorney. For instance, if a memorandum of law is prepared over a period of several days, there should be a time entry such as "preparation of memorandum re _____," describing that memorandum and, for each date work was done, naming each person who worked on it and the number of hours spent by each person. As a further example, if a conference is held, the time entry should be headed "conference re _____" and indicate all of the persons who participated and the time spent by each. The description of the work done should be sufficient to demonstrate that it benefitted the class or contributed to the recovery of the common fund. Notations such as "research re class action" will not suffice. The particular question researched should be described. Much of the narrative in most fee petitions consists of entries like "conference with GBS re motion to compel." As indicated above, such "conferences" should be held only when necessary, which should not be very often. But in no event would that kind of entry be sufficient to show the conference was necessary and productive. There should be a statement, albeit very brief, of specifically what was discussed and what conclusion was reached. Should such a statement necessarily include privileged information (which seems unlikely, since it will be submitted at the end of the case), it may be submitted *in camera*.[32]

As to the grouping of time records by activity rather than by attorney, the vast majority of the lawyers approved this facet of the order and many applauded it enthusiastically. Typical reactions were "best part of order," "good management tool," "very reasonable, even ingenious," "interesting and innovative," and "great idea." These lawyers thought that such time records would enable the court to spot major abuses and uncover significant cost savings.

Most respondents, including many of the enthusiastic supporters, thought that adoption of such a requirement would cost a significant amount of money for the law firms to implement. Most

32. 572 F. Supp. at 934-35.

thought that it would require a computerized system and that the record-keeping systems of most law firms could be adapted to the format by coding specific activities and entering all attorneys' time on a central computer.

One respondent thought that it would not be feasible in a major case because it would depend on the ability of numerous law firms to develop a uniform system for reporting their hours. Several other respondents thought that it might be impractical; one small firm that does not use computerized billing feared that it would add another barrier to representation of plaintiffs by small firms, thereby reducing access to the courts.

One of the lead counsel for plaintiffs in *Continental Illinois* has demonstrated the feasibility of the order by submitting fee petitions organized by activity to Judge Grady in another case.[33]

One public interest litigator with considerable experience with fee petitions states that he already prepares petitions according to the format mandated by Judge Grady. In his opinion, some of the federal circuit courts of appeals already require similar formats.[34] He has also found that this format is more conducive to a persuasive presentation of justification for the fees and hours.

As to the requirement that the activity and its benefit to the class be specified, several respondents noted that the recent Supreme Court decision in *Hensley v. Eckert*[35] compels a similar result because counsel need to show that the specific activity (e.g., research on a class certification) was one on which the petitioner prevailed.

A substantial number of the respondents objected to the portion of the order that requires a detailed statement of the subject matter of a conference and the outcome. Objections were based on the invasion of the inner sanctum of attorney-client relationships and strategy discussions. Some also noted that it would include settlement conferences, which often do not have an identifiable outcome until negotiations are complete. Even then, the parties often want to restrict disclosure of the terms of the settlement. Respondents were not satisfied with the protection against invasion of the privilege through in camera submission of the fee petitions. They reasoned that privileged information should not be disclosed, even to the court.

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33. Securities and Exchange Commission v. Swift, Henke & Co., No. 77 C 855 (N.D. Ill. 1984). This case, however, does only involve fee petitions from two law firms.

34. *See* cases cited at note 3 *supra*.

35. 103 S. Ct. 1933 (1983).

Several alternative approaches to review of fee petitions were recommended. One respondent suggested that a quarterly report showing the costs to date and a comparison of the cost-benefit ratio would be useful to control costs that far exceed any benefit to the class or the plaintiffs. Another recommended early judicial control of "wheel-spinning" behavior by counsel, such as excessive discovery or motions practice. Several plaintiffs' attorneys suggested that the court look to fees paid to defendants' counsel as a guide to the reasonableness of the fee request. Finally, another respondent suggested that a judge or magistrate review the petitions on a monthly basis.

In summary, the vast majority of respondents were enthusiastic about the record-keeping aspects of the order and thought that it would produce substantial cost savings.

Designation of Committee Structure and Lead Counsel for the Class

Prior to Judge Grady's assignment to the *Continental Illinois* case, plaintiffs' counsel had submitted, and the court had adopted, a table of organization with three law firms designated as "lead counsel" and two firms designated as "liaison counsel." The lead firm had open-ended authority to perform and delegate work "as they deem[ed] necessary."[36] Judge Grady vacated that order.[37] After setting forth the ground rules discussed above, he concluded his order as follows:

> In the event a class is certified, I would prefer to designate counsel who are nominated by plaintiffs' attorneys. I therefore suggest that plaintiffs' counsel confer together with a view toward submitting a proposed roster that will be no larger than necessary to provide effective representation under the foregoing guidelines.[38]

Judge Grady's ruling at this juncture was necessarily vague and stimulated little comment or disagreement. One respondent did question, somewhat facetiously, whether the conference to select lead counsel would itself violate the guideline against payment for conferring. About a dozen respondents underscored the importance of imposing a limit on the number of counsel for plaintiffs.

36. 572 F. Supp. at 932.
37. *Id.* at 933.
38. *Id.* at 935.

House counsel especially were familiar with the issues involved in the selection of lead counsel and establishment of an organizational structure. They tended to see this section of the order as central to the limitation of costs.

One house counsel described this section as a "key element" of the order because it implements and reinforces rules relating to conferring and review of documents by limiting opportunities for such activities. Several house counsel suggested a limit of one law firm as the lead counsel of a pyramidal structure.

On the other hand, one experienced plaintiffs' attorney recommended that the court permit at least one law firm per defendant to work for the plaintiffs. His theory was that the work should be organized with a focus on each defendant, with one firm assigned to undertake the discovery of the facts relevant to that defendant. Those lawyers working on discovery, in turn, would coordinate their activities through a discovery committee. In the *Continental Illinois* case, there were three major business entities as defendants plus nineteen officers and directors of Continental Illinois Corporation.

Another experienced plaintiffs' attorney expressed his opinion that the single law firm model would not allow adequate staffing for plaintiffs in a complex case. Judge Grady's view of the *Continental Illinois* case was that it was not legally complex even though extensive factual development would be required.[39] In this attorney's view, extension of Judge Grady's views on organization to a more complex case would create a serious risk that plaintiffs' attorneys would be unable to represent the class adequately.

One lawyer also observed that the single law firm model implied in Judge Grady's order would eliminate small- to medium-size law firms from consideration, without regard to their skill and ability to deliver services at a competitive price. This view, however, ignores the ability of such a firm to contract with specialists.

Several respondents with experience in complex commercial class actions questioned whether a typical judge would have sufficient information about the skills of counsel to make judgments about specific lawyers' ability to represent the class. Federal Rule of Civil Procedure 23, of course, requires that the court make such judgments in class actions.

Along similar lines, these same respondents were concerned about whether a judge could adequately cope with the political deals that permeate selection of class representatives by plaintiffs. Typically, candidates for lead counsel offer promises of delegation

39. *Id.* at 932-33.

of work to counsel in exchange for their votes.[40] To counteract this practice, respondents suggested that the court would need to uncover information about such deals and void them prior to an election. One suggested alternative was to order disclosure of all promises or other inducements made by candidates for lead counsel.

Another alternative suggested by one respondent was to institutionalize the *Fine Paper* procedure by appointment of counsel to represent the class in reviewing the fee petitions. Other respondents had indicated the importance of early and periodic review of fee petitions during the progress of the case. Combining these two recommendations would lead to court-monitored review of fee petitions during the pendency of the action either through appointed counsel (which may be difficult before the case has been resolved) or through judicial support personnel such as magistrates or clerks.

In sum, none of the lawyers disputed the procedure of having plaintiffs' counsel meet and recommend an organizational structure to the judge. Nor can the judge's authority to impose an organizational structure on counsel pursuant to rule 23 be seriously disputed. The shape of the organization can be expected to generate disputes and to involve the judge directly in assessing the competence of counsel and the political background of the case.[41]

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40. *See In re* Fine Paper Antitrust Litigation, 98 F.R.D. 48, 70-75 (E.D. Pa.), *appeal docketed*, No. 83-1172 (3d Cir. Mar. 16, 1983).

41. Indeed, in the *In re* Continental Illinois Securities Litigation, the selection of counsel became problematic after the order regarding counsel fees was issued. The court designated the case as a class action, but the only named plaintiff was represented by a lawyer who was not with one of the three lead counsel firms. This lawyer then filed motions for leave to file an amended complaint, remove himself from the consolidated complaint, and add two new special counsel to assist him. The three former lead counsel vigorously opposed these motions, and they await the court's decision at the time of this writing. Thus, approximately one year after the order regarding attorneys' fees was issued, the issue of selection of lead counsel remains unresolved.

V. CONCLUSION

During the last decade, calls for active judicial involvement in the management of civil cases have emanated from a variety of sources. Judges,[42] policymakers,[43] litigants,[44] lawyers,[45] and researchers[46] have issued broad appeals for the judiciary to manage more actively the practices of lawyers and litigants in discovery, pretrial practice, and trial practices. Generally, lawyers have supported these urgings for judges to intervene more frequently in discovery disputes and prevent or remedy adversarial excesses.[47]

Just as lawyers have endorsed these sweeping calls for increased case controls, in this study of the narrow area of judicial pretrial regulation of attorneys' fees, they have approved a specific judicial effort to control excesses in litigation. Just as lawyers have called for sanctions for abuse of discovery processes, so have they voiced strong approval of control of excessive attorneys' fees. Although the details of a given approach to pretrial regulation of attorneys' fees will need to be adapted to a specific case and court, this study shows that courts have the support of lawyers in efforts to control abuses.

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42. *See, e.g.*, Kaufman, *Judicial Reform in the Next Century*, 29 Stan. L. Rev. 1, 10-12 (1976).

43. American Bar Association, Report of Pound Conference Follow-up Task Force, 74 F.R.D. 159 (1976).

44. I.S. Shapiro, Managing the Judicial System: A Businessman's View (Dupont 1978).

45. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, Am. B. Found. Research J. 219, 250 (1980).

46. 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).

47. *See, e.g.*, Brazil, *supra* note 45; American Bar Association, *supra* note 43.

APPENDIX A
Order, In re Continental Illinois Securities Litigation, 572 F. Supp. 931 (N.D. Ill. 1983)

In the United States District Court for the Northern District of Illinois Eastern Division

In re Continental Illinois Securities Litigation, **NO. 82 C 4712**

ORDER

This consolidated case is brought by various shareholders of Continental Illinois Corporation on behalf of themselves and other shareholders and derivatively on behalf of the corporation. The defendants are Continental Illinois Corporation, nineteen of its officers and directors, Continental Illinois Bank and Trust Company of Chicago, and Ernst & Whinney, an auditing firm. The complaint concerns a large number of allegedly improvident loans made by Continental Illinois National Bank & Trust Company of Chicago, a subsidiary of Continental Illinois Corporation. The loans are in default. The class action, brought under the federal securities laws, alleges that the plaintiffs, as purchasers of shares in Continental Illinois Corporation, were damaged by the defendants' concealment of the losses caused by the bad loans. The derivative action alleges that the defendants violated their duties to the corporation in approving the loans and in failing to adopt and enforce prudent loan practices.

The motion for class certification is pending. The propriety of the derivative action is also the subject of a pending motion.

What concerns me at this point is the question of the organization and management of plaintiffs' counsel. The reason for that concern is that if plaintiffs prevail, I will be asked to determine their reasonable attorneys' fees. At the present time, there are more lawyers on the plaintiffs' side of the case than I or anyone else could possibly keep track of. This came about because four separate complaints were filed by different law firms, each alleging essentially the same cause of action, and the judge to whom this case was initially assigned entered an order consolidating the cases and appointing three of the law firms as "lead counsel" in the consolidated case. Two of the lead firms were also designated "liaison counsel." The order authorized lead counsel to perform specified

kinds of work "either personally or through counsel whom they designate," and in addition, to "perform such other duties as they deem necessary."

The order designated a committee consisting of all plaintiffs' counsel, including counsel in subsequently filed cases, as a labor force to be called upon by lead counsel to perform whatever duties lead counsel might assign.

Twelve attorneys from the three lead firms have filed individual appearances in the case, and I assume it is contemplated that other attorneys from those firms will also participate. There are six additional law firms representing various plaintiffs, and thirteen individual members of those firms have filed appearances.

The order establishing this table of organization was submitted by plaintiffs' counsel. It was entered just a little over two months after the first of the consolidated cases was filed and before anything else of substance had been done in the case. The order appears to be premised on the notion that this is a "complex" case requiring the combined efforts of a large number of lawyers. From what I have learned of the case since its reassignment to me, I do not believe it is "complex" enough to require this treatment. While the factual material is probably extensive, it is not unusually difficult. The primary question is whether the defendant officers and directors should have known there was inadequate security for the numerous loans that have defaulted. Generally, the legal issues do not appear to be particularly complex.

The number of lawyers who have been authorized to render services on behalf of the plaintiffs in this case, and the broad authority given lead counsel, make it almost inevitable that I will encounter the kinds of problems confronted by Judge Joseph L. McGlynn, Jr. of the Eastern District of Pennsylvania in the case of *In re Fine Paper Antitrust Litigation,* MDL 323, Slip Op. (March 3, 1983, ____ F. Supp. ____ (E.D. Pa. 1983)). The plaintiffs' attorneys in that class action petitioned for approximately $21 million in fees and expenses out of a total of $50,650,000.00 in settlement proceeds. Finding that there was extensive duplication of effort, performance of unnecessary services and incurring of unnecessary expenses, as well as virtually uniform exaggeration of the value of the services which were rendered, Judge McGlynn allowed fees and expenses of $5,464,123.00—about 25 percent of the amount claimed. The organization of plaintiffs' counsel in that case was strikingly similar to the organization set up by the prior order in this case. It is apparent from Judge McGlynn's opinion that the distribution of work among various counsel in the hierarchical structure presided over by "lead counsel" was, in large part, responsible for the chaos

which existed among plaintiffs' counsel in that case. Judge McGlynn's 468-page opinion is well worth the time it takes to read, but at least his analysis of the organizational structure (Slip Op. at 8-25) is essential reading for anyone who wants to know why there is a cost explosion in federal litigation.

By a separate order entered this date, I have vacated that portion of the earlier pretrial order which established the organization of plaintiffs' counsel. I will attempt in the instant order to advise plaintiffs' counsel of the rules which will govern the allowance of fees in this case, should plaintiffs become entitled to fees. These rules will, I believe, suggest to counsel what the revised table of organization should be.

Any fees and expenses for which court approval is sought in this case will be evaluated in accordance with the following guidelines:

1. **Individual responsibility.** Generally, attorneys should work independently, without the incessant "conferring" that so often forms a major part of the fee petition in all but the tiniest cases. Counsel who are not able to work independently should not seek to represent the class. Examples of the kind of work for which only *one* attorney will be compensated are:

(a) *Court appearances.* When it is necessary for the plaintiffs to be represented in court on a motion or argument, or for a conference, no more than one lawyer should appear for them.

(b) *Depositions.* No more than one lawyer should appear for the plaintiffs at a deposition of a witness.

2. **Rates of compensation.** Senior partner rates will be paid only for work that warrants the attention of a senior partner. If a senior partner spends his time reviewing documents or doing research a beginning associate could do, he will be paid at the rate of a beginning associate.

3. **Legal research.** Counsel who are sufficiently experienced to represent the class are presumed to have an adequate background in the law applicable to the case. While it is recognized that particular questions requiring research will arise from time to time, no fees will be allowed for general research on law which is well known to practitioners in the areas of law involved.

4. **Document "review."** Generally speaking, I will allow no fees to a lawyer for simply reading the work product of another lawyer. There will be instances, of course, where a junior associate might prepare a pleading or a brief for a senior lawyer to approve before filing. There will also be times when a lawyer will need to read something prepared by someone else in order to perform a particu-

lar task in the case. But under no circumstances will it be compensable for a multiplicity of lawyers to review the same document simply as a matter of interest, whether it be a pleading, a brief or a document produced in discovery. Again, the keynote is individual responsibility. (". . . [E]very attorney cannot possibly be compensated for reading every piece of paper over the course of three years of litigation, as Levin apparently did." *In re Fine Paper Antitrust Litigation, supra,* Slip Op. at 55).

5. Communication with attorneys for class members. One of the principal advantages of a class action is that duplication of legal expense is avoided, or at least greatly reduced. It makes no sense to designate a small number of attorneys to represent the class and then compensate them for time spent communicating with the attorneys for individual class members. If the attorneys for the class are competent, there is no need for a legion of other lawyers to be looking over their shoulders; if they are not competent, the legion will do no good anyway.[1] There is no doubt that the activities of "liaison" counsel in communicating, lawyer to lawyer, with the lawyers for class members frequently generate enormous amounts of "billable time" in class actions. That will not occur here. Class members should be kept apprised of the progress of the litigation, but in no greater detail or frequency than the typical client is kept advised by his attorney. Periodic informational mailings to the class should suffice. Even that may not be necessary. In many class actions, counsel do no more than respond to specific inquiries by class members. The needs of this particular case will become apparent in time, and we will meet those needs as they arise.

6. Expenses. Reimbursement will be allowed for the reasonable expense of *necessary* travel, hotel accommodations and meals. Work should be assigned so as to minimize the need for travel, e.g., if a deposition is to be taken in Chicago, it should not be taken by a lawyer from New York. Since this case is pending in the Northern District of Illinois, I cannot readily imagine a circumstance that would justify a lawyer from out of the district making a court appearance here. Conferences between counsel who office at distant points should be by telephone; it would require extraordinary justification for counsel to fly, say from Chicago to Philadelphia, for a conference. Air fares will be reimbursed at tourist rates, and there

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1. The *Fine Paper* case illustrates the point:
   In excess of 4,200 hours were charged to the development of a damage theory to be incorporated into the plaintiffs' pretrial memorandum and for use at trial. Despite this enormous cost to the class, as of the date of trial, plaintiffs' counsel had not developed a viable damage theory.
Slip. Op. at 23.

will be no meal reimbursement unless counsel is travelling away from home.

7. Keeping of time records. All of the foregoing rules would be unenforceable unless there is some means of record keeping that will demonstrate compliance. Typically, fee petitions are organized by attorney, showing the chronological breakdown of what each attorney did from day to day on the case. This format makes it very difficult, if not impossible, to determine whether there has been duplication of effort, especially when the time records of numerous attorneys are involved.

The time records in this case should be kept, or at least ultimately submitted to me, chronologically by *activity* rather than by attorney. For instance, if a memorandum of law is prepared over a period of several days, there should be a time entry such as "preparation of memorandum re _____," describing that memorandum and, for each date work was done, naming each person who worked on it and the number of hours spent by each person. As a further example, if a conference is held, the time entry should be headed "conference re _____" and indicate all of the persons who participated and the time spent by each.

The description of the work done should be sufficient to demonstrate that it benefitted the class or contributed to the recovery of the common fund. Notations such as "research re class action" will not suffice. The particular question researched should be described. Much of the narrative in most fee petitions consists of entries like "conference with GBS re motion to compel." As indicated above, such "conferences" should be held only when necessary, which should not be very often. But in no event would that kind of entry be sufficient to show the conference was necessary and productive. There should be a statement, albeit very brief, of specifically what was discussed and what conclusion was reached. Should such a statement necessarily include privileged information (which seems unlikely, since it will be submitted at the end of the case), it may be submitted *in camera.*

The utility of keeping time by activity or project, rather than by attorney, is suggested by the *Fine Paper* case. As one example, it was determined in that case, as a result of a painstaking analysis of hundreds of time entries submitted by numerous lawyers, that 4,500 hours were being claimed for preparation of the plaintiffs' pretrial memorandum.[2] The reason this kind of specific informa-

2. In Judge McGlynn's words:
Work on the pretrial memorandum was one of the major boondoggles of this case. Fifty-one plaintiffs' lawyers, including twenty-one partners from nineteen different law firms, and deputy attorneys general devoted a total

tion surfaced in the *Fine Paper* case is that an unusual, if not unprecedented, event occurred: One of plaintiff's lead counsel and fifteen corporations who were members of the class filed objections to the fee petitions. Slip Op. at 30. An outside law firm hired by the class members to contest the fees reviewed all of the petitions and submitted a 525-page report, with 1,200 pages of exhibits and appendixes, analyzing the petitions in detail. *Id.* at pp. 33-34. Seventy-three and one-half hours of evidentiary hearings were held in open court on the fee petitions. *Id.* at 37.

There is no reason for me to expect that any fee petition in this case will be subjected to the kind of adversary process that occurred in *Fine Paper*. The likelihood is that, as usual, I will be on my own.

Once Judge McGlynn learned that 4,500 hours were being claimed for work on the pretrial memorandum, it was a simple matter for him to conclude that the claim was absurd. On the other hand, had the time spent on the pretrial memorandum turned out to be a reasonable number of hours, it would have been equally easy to conclude that the claim should be allowed. The point is that, unless the judge knows the total time spent on a project, there is no way of deciding whether that element of the claim is reasonable or not. Keeping time by activity or project seems a good way for a lawyer to document the worth of his services, and it strikes me as the *only* way for a group of lawyers to show the worth of their *combined* services. The alternative—and, regrettably, the tradition—is to leave it to the judge to attempt an evaluation of a morass of unrelated time entries which can and often do obscure the existence of duplication and excessive charges.

The intent of these guidelines is not to force plaintiffs to litigate with counsel who have no expectation of reasonable compensation. The intent, rather, is to avoid duplication and unnecessary expense. Should I have occasion to award fees, they will be reasonable, with due allowance for the quality of the work performed and the results accomplished.

In the event a class is certified, I would prefer to designate counsel who are nominated by plaintiffs' attorneys. I therefore suggest that plaintiffs' counsel confer together with a view toward submit-

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> of over 4,500 hours to the preparation of this Memorandum—especially extravagant figures considering it was to be filed after the Majority States had already filed a similar document dealing with most of the same issues. Not only were these hours excessive, but many of the partner hours were poorly allocated because the same work could have been accomplished by associates and paralegals. Based on the fee petitions, the cost to the class for this one Memorandum is over $1 million.

Slip. Op. at 22.

ting a proposed roster that will be no larger than necessary to provide effective representation under the foregoing guidelines.

DATED: 21 JUN 1983

ENTER: John F. Grady

United States District Judge

APPENDIX B
Interview Protocol for House Counsel

House Counsel Interview

Name of Interviewee: (inquire about confidentiality concerns)

Title or Position:

Company or Union Name:

Location:

Type of attorney fee cases in which company or union is involved:

a. Nature of cases:

b. Representing primarily _____ plaintiffs or _____ defendants

I. Judge Grady's Order in Continental Illinois Securities Litigation: General Questions

Are you familiar with Judge John Grady's order in the *Continental Illinois Securities Litigation*? _____ Yes _____ No

When and under what circumstances did you first learn about Judge Grady's order?

Have you read a copy of Judge Grady's order?

What was your initial reaction to the order? Has that reaction changed? How?

Are there aspects of the order with which you strongly agree or disagree? If so, what are they and what is the basis of your agreement or disagreement?

In general, do you think that Judge Grady's order will result in a substantial reduction in the costs of litigation in that type of case? If so, in what way? If not, why not?

If Judge Grady's order were extended to all cases in which attorney fees might be awarded, would the guidelines result in a substantial reduction in the costs of litigation? (a) If not, go to the next ques-

tions. (b) If so, could you estimate the savings in terms of the percentage of the average amount of lawyers' time that would be saved in a typical case?

ALTERNATIVE QUESTIONS FOR RESPONDENT WHO SEES NO SAVINGS RESULTING FROM THE ORDER

Please explain the basis for your conclusion that Judge Grady's order will not result in a substantial reduction in the costs of litigation.

Do you think that any of the components of Judge Grady's order will reduce the costs of litigation? If so, which parts?

Will the order increase the costs of litigation? If so, in what way?

Is there any problem to clients with regard to the costs of attorney fees or with the costs of litigation? If so, describe any problems you see. If not, end this portion of the interview and proceed to parts III and IV.

If so, what alternative measures would you recommend for responding to the problems of attorney fees and the costs of litigation?

What role, if any, should the courts play in responding to problems relating to attorney fees and the costs of litigation?

Even assuming that orders like that issued by Judge Grady will not result in substantial savings to litigants, are there any abuses in the areas of practice that Judge Grady identified (e.g., the practices described in Judge Grady's reference to the *Fine Paper Antitrust Litigation*, such as an inefficient committee system)? If so, what, if any, measures should a court take to control such abuses? (Proceed to parts III and IV.)

End Alternative Section

If Judge Grady's order were applied to all cases in which attorney fees might be awarded, would the guidelines result in any substantial savings to the corporation or union which you represent?

If Judge Grady's order were applied to all cases in which attorney fees might be awarded, would his guidelines result in a reduction of the amount of litigation in which the corporation or union which you represent is involved? If so, would that reduction be a product of action taken by your client or action taken (or not taken) by potential adversaries of your client? Why do you expect that such action would be taken or not taken? (In other words, would the order discourage you, as a plaintiff's attorney, from filing such an action? As a defense attorney, do you think that it would discourage plaintiffs or their counsel from filing some of the actions in which your company or union is involved?)

II. Specific Questions Regarding Judge Grady's Order

Judge Grady established a number of guidelines for counsel in his order. I will summarize each one and ask you a series of questions about how these guidelines would affect representation of your corporation, how they relate to guidelines which house counsel might impose on you as retained counsel, and what, if any, cost savings might be attained by Judge Grady's guidelines.

1. **Individual responsibility.** Judge Grady ruled that "attorneys should work independently, without the incessant 'conferring' that so often forms a major part of the fee petition in all but the tiniest cases." As examples, Judge Grady referred to court appearances for a motion, argument, or conference and to a deposition of a witness. In all of those situations he ruled that no more than one lawyer could expect to be paid.

   a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

   b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

   c. Do you as house counsel impose such a constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Are there other areas, not specified by Judge Grady, in which you would apply this guideline (e.g., trial, evidentiary hearing, settlement conference)?

f. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

g. Are there any other guidelines which you impose, or which you think would be reasonable to impose, on retained counsel in regard to individual responsibility? If so, what are they?

h. In general, is this guideline reasonable?

2. **Rates of compensation.** Judge Grady ruled that "[s]enior partner rates will be paid only for work that warrants the attention of a senior partner. If a senior partner spends his time reviewing documents or doing research that a beginning associate could do, he will be paid at the rate of a beginning associate."

a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Are there other areas, beyond the review of documents and research specified by Judge Grady, in which you would apply this guideline?

f. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

g. Are there any other guidelines which you would impose on retained counsel in regard to compensation for senior counsel? If so, what are they?

3. Legal research. Judge Grady ruled that "no fees will be allowed for general research on law which is well known to practitioners in the areas of law involved."

a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Are there any other areas of legal research, not specified by Judge Grady, in which you would apply this guideline?

f. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

g. Are there any other guidelines which you would impose on retained counsel in the subject area of legal research? If so, what are they?

4. Document "review." Judge Grady ruled that generally he would "allow no fees to a lawyer simply for reading the work product of another lawyer," with certain exceptions for review by a senior lawyer to approve a pleading before filing. He stated "under no circumstances will it be compensable for a multiplicity of lawyers to review the same document simply as a matter of interest, whether it be a pleading, a brief or a document produced in discovery."

a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Are there other areas, not specified by Judge Grady, in which you would apply this guideline?

f. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

g. Are there any other guidelines which you would impose on retained counsel in regard to review of documents? If so, what are they?

5. Communication with attorneys for class members. Judge Grady expressed concern about excessive communication between lawyers for the class and lawyers for individual class members. While he did not announce a rigid rule on this subject, he stated that "[c]lass members should be kept apprised of the progress of the litigation, but in no greater detail or frequency than the typical client is kept advised by his attorney."

a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Are there other areas of communication with class members, not specified by Judge Grady, in which you would apply this guideline?

f. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

g. Are there any other guidelines which you would impose on retained counsel in regard to communication with clients or class members? If so, what are they?

6. Expenses. Judge Grady stated that he would only reimburse for expenses of "*necessary* travel, hotel accommodations and meals." Ordinarily, counsel should confer by telephone and local counsel should conduct depositions and make court appearances. Reimbursement would be at tourist rates and no meal reimbursement would be allowed unless the lawyer was traveling away from home.

a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Are there other areas of expenses, not specified by Judge Grady, in which you would apply this guideline?

f. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

g. Are there any other guidelines which you would impose on retained counsel in regard to reimbursement for expenses? If so, what are they?

7. Keeping of time records. Judge Grady's guidelines included a requirement that records be submitted to him chronologically by area of activity rather than by attorney. For example, entries regarding "Preparation of Memorandum re _____" would list all

of the activities of the attorneys and paralegals who worked on that memorandum. Judge Grady also instructed the attorneys to identify the particular issues researched or discussed at a conference and the result of the discussion.

a. Are these guidelines likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If so, why? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

f. Are there any other guidelines which you would impose on retained counsel in this subject area? If so, what are they?

8. **Designation of class representatives.** Finally, Judge Grady requested that "plaintiffs' counsel confer together with a view toward submitting a proposed roster [of class counsel] that will be no larger than necessary to provide effective representation under the foregoing guidelines."

a. Is this guideline likely to interfere with the ability of an attorney to represent his or her client adequately? If so, in what way? If not, why not?

b. Are there any circumstances in which this guideline would inhibit adequate representation of a class of plaintiffs? If so, what are those circumstances?

c. Would you as a client, on behalf of _____ Corporation or Union, impose this constraint on retained counsel as a general rule? If not, why not?

d. If you would impose this constraint as a general rule, would you make exceptions? If so, in what circumstances?

e. Will this guideline result in significant cost savings in a typical shareholders' action? In other federal court actions? If so, can you estimate the percentage of the total attorney fees that might be eliminated?

f. Are there any other guidelines which you would impose on retained counsel regarding designation of class counsel? If so, what are they?

III. Other Cost Containment Measures

1. **Billing practices.** Does your Corporation or Union use alternative billing practices to attempt to contain the cost of litigation, such as

a. by the job (e.g., deposition, trial, entire case)

b. block of business (e.g., all products liability cases)

c. shared costs (dividing work with retained counsel)

d. reverse contingency (share of defendant's savings)

e. fixed retainer

f. other

2. **Use of paralegals.** Does your Corporation or Union use paralegals to help contain the cost of litigation? _____ If so, in which of the following roles do you use them?

a. fact investigation

b. legal research

c. drafting pleadings

d. drafting interrogatories

e. drafting discovery pleadings

f. preparation for deposition

g. organizing documentary evidence

h. other

IV. Demographics of Law Firm, Corporation, or Union

1. What is the size of your office?

   a. Attorneys

   b. Paralegals

   c. Support staff

2. What is the annual budget for your department? For 1984? For 1983? For 1982?

   a. for internal operations

   b. for hiring outside counsel

   c. other legal expenses

3. What is the prevailing hourly rate in your community for the following legal personnel? What is the range?

   a. for a junior partner

   b. for an associate (3-5 years)

   c. for an associate (0-3 years)

   d. for a paralegal

   e. for a law clerk (if different from d.)

4. What is the average hourly rate that you pay in your community for the following legal personnel? What is the range?

   a. for a junior partner

   b. for an associate (3-5 years)

   c. for an associate (0-3 years)

   d. for a paralegal

   e. for a law clerk (if different from d.)

5. What law school did you attend?

6. When were you admitted to the bar?

7. (Optional: ask about privacy) What is your annual income from legal work?

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