# Awarding Attorneys' Fees and Managing Fee Litigation

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# Introduction

In the federal courts, attorneys' fees litigation arises in several contexts. Almost 200 civil statutes authorize fee awards to prevailing plaintiffs and, in some cases, prevailing defendants. Bankruptcy courts must approve requests for fees for professional services, including attorneys' fees, in every Chapter 11 case and in other cases as well. In addition, common law permits courts to award fees where a suit results in a common fund or substantial benefit to a class of plaintiffs or non-parties. Judges also may award fees against parties or attorneys as a sanction for misconduct, under the court's inherent authority, or pursuant to several provisions in the Federal Rules of Civil Procedure. Finally, the 1964 Criminal Justice Act authorizes compensation to court-appointed attorneys in criminal cases. In the aggregate, attorneys' fees matters constitute a significant part of a federal judge's workload.

Fee awards were not always so prevalent in federal litigation. Under the traditional "American Rule," each party assumed its own legal costs.[1] In the nineteenth century, the Supreme Court carved out the common fund exception.[2] Throughout the twentieth century, Congress and the courts created broader exceptions. Congress enacted statutes providing for the prevailing party to recover attorneys' fees from its opponent in particular kinds of actions.[3] Invoking its inherent equity power, the Supreme Court held that attorneys' fees may be assessed against

1. For the history of this rule, and occasional minor departures from it, see Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247–57 (1975).

2. *See* Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1881).

3. For a list of the earlier statutes, see *Alyeska Pipeline Co.*, 421 U.S. at 260–61 n.33.

parties who disobey a court order or act in bad faith.[4] Most significantly, in the early 1970s a number of courts ordered defendants to pay the attorneys' fees of victorious plaintiffs whose lawsuits advanced important public policies, such as environmental protection.[5] But in the 1975 case of *Alyeska Pipeline Service Co. v. Wilderness Society*,[6] the Supreme Court rejected the "private attorney general" doctrine, holding that courts may not shift a prevailing party's fees to a losing party absent specific statutory authorization. (In dicta, the Court approved continued use of fee awards in common fund and substantial benefit cases and as a sanction for misconduct.[7])

At the time of *Alyeska*, there were several dozen fee-shifting statutes. In its wake, such statutes proliferated. Congress enacted the Civil Rights Attorney's Fees Award Act of 1976[8] and followed it with scores of less prominent fee-shifting statutes. Applying these statutes is often difficult. In many cases, it is unclear whether a party is entitled to a fee award, and even where an award is clearly in order, calculating the amount of the award can be complex and time-consuming. By 1983, when the Supreme Court decided the seminal case of *Hensley v. Eckerhart*,[9] disputes over attorneys' fees were consuming substantial judicial resources. In *Hensley*, the Court warned lower courts not to permit fee requests to spawn "a second major litigation."[10] But neither this warning nor the attempted clarification of the law in *Hensley* and in subsequent Supreme Court decisions has significantly reduced the burden or complexity of fee awards.

In recent years numerous commentators have made suggestions for facilitating attorneys' fees litigation, offering, among

4. *See* Vaughan v. Atkinson, 369 U.S. 527 (1962) (bad faith); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426–28 (1923) (order disobeyed).

5. *See, e.g.,* Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Natural Resources Defense Council v. EPA, 484 F.2d 1331 (1st Cir. 1973); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied,* 410 U.S. 955 (1973); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

6. 421 U.S. 240 (1975).

7. *Id.* at 259.

8. 42 U.S.C. § 1988 (1988).

9. 461 U.S. 424 (1983).

10. *Id.* at 437.

other things, proposals for changing the methods of calculating awards. But neither the Supreme Court nor Congress has shown an inclination toward major reform in this area. Although the efforts of commentators to promote a more effective regime are important, in this monograph we take a different tack. We accept as given the statutory framework and Court decisions, and aim to help the courts in two ways. First, we offer a synthesis and analysis of the case law, to assist courts in ruling on fee petitions and resolving disputes. Second, we present case management techniques that judges have found effective in handling attorneys' fees matters.

The monograph addresses both statutory fee-shifting awards and common fund and substantial benefit awards. (It does not deal with compensation under the Criminal Justice Act or fees as a sanction for misconduct, which are not unimportant, but which raise separate issues that warrant discrete treatment.[11]) Part 1 analyzes attorneys' fees awards under fee-shifting statutes. Part 2 discusses fee awards based on the common fund doctrine and its offspring, the substantial benefit doctrine. Part 3 considers an attorneys' fees issue of special significance to bankruptcy courts—the propriety of *sua sponte* review of fee petitions.[12] Part 4 presents case management strategies.

11. Although the monograph does not address these areas specifically, parts of the analysis concerning the amount of a fee award will apply to fees awarded as sanctions and under the Criminal Justice Act.

12. Although Parts 1 and 2 do not deal directly with fees under bankruptcy statutes, most of the analysis concerning the amount of awards is applicable to bankruptcy court fee awards. Fee issues peculiar to bankruptcy courts are, by and large, beyond the scope of this monograph. However, the issue of *sua sponte* review, because of its importance, is treated in Part 3.

# 1
# Fee-Shifting Statutes

Attorneys' fees disputes under fee-shifting statutes occur in innumerable circumstances and raise many questions. It is impossible to provide a simple formula that will make the resolution of all disputes routine. Nevertheless, Supreme Court and lower appellate court decisions establish some guiding principles for trial courts.[13] Drawing on the voluminous case law, in Part 1 we address the questions that a court must ask at each stage of its analysis of a fee request.

## Determining Whether a Fee Award Is In Order

The threshold question in an attorneys' fees case is whether any award is in order. Such a determination entails several discrete inquiries.

### *Was a Timely Fee Request Made?*

The Supreme Court has held that a motion for fees is untimely only if it causes "unfair surprise or prejudice" or violates a local

13. Although the Supreme Court decisions arise in the context of a particular statute, they generally rely on principles applicable to most fee-shifting statutes. *See Hensley*, 461 U.S. at 433 n.7 ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"). With a few exceptions, the nuances unique to particular statutes (e.g., the Equal Access to Justice Act's prohibition of fees if the government's position was "substantially justified") are beyond the scope of this monograph.

rule.[14] The Court rejected the contention that a motion for fees is a motion to amend or alter a judgment to which the ten-day requirement of Federal Rule of Civil Procedure 59(e) applies.[15] All the courts of appeals that have considered the question have rejected fee opponents' contentions that the timing should be governed by local court rules concerning bills of cost.[16] Several appellate courts have urged district courts to adopt local rules specifically governing the timing of fee requests,[17] and many district courts have done so.[18] Absent such a rule, courts of appeals have rarely held a particular motion untimely.[19] However, an amendment to Federal Rule of Civil Procedure 54(d)(2)(B) requires motions for attorneys' fees to be filed no later than fifteen days from the entry of judgment.

14. White v. New Hampshire, 455 U.S. 445, 454 (1982).

15. In a subsequent case, the Court held that a judgment on the merits is final even if the amount of fees has not been determined. Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Therefore, the thirty-day period for filing an appeal begins once the judgment is entered, even if an order on the fee request has not been entered.

16. *See* Fulps v. Springfield, 715 F.2d 1088 (6th Cir. 1983); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Gautreaux v. Chicago Housing Auth., 690 F.2d 601 (7th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); Brown v. City of Palmetto, 681 F.2d 1325 (11th Cir. 1982); Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982).

17. *See, e.g.*, Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982); Obin v. District No. 9, Int'l Ass'n of Machinists & Aerospace Workers, 651 F.2d 574 (8th Cir. 1981); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

18. *See, e.g.*, Rule 270-1 (N.D. Cal.) (within sixty days of entry of judgment); Rule 16.10 (C.D. Cal.) (thirty days); Rule 25 (C.D. Ill.) (ninety days).

19. For examples of delays found acceptable, see Masalosalo v. Stonewall Ins. Co., 718 F.2d 955 (9th Cir. 1983) (101 days); Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984) (eighteen days); Rosewitz v. Latting, 689 F.2d 175 (10th Cir. 1982) (seventy-one days); Brown v. City of Palmetto, 681 F.2d 1325 (11th Cir. 1982) (four months); Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982) (twenty-five days). For a rare exception, see Baird v. Belloti, 724 F.2d 1032 (1st Cir.), *cert. denied*, 467 U.S. 1227 (1984) (upholding denial of fee awards for plaintiffs where delay in filing was thirty months).

## *Is There a Prevailing Party?*

### prevailing plaintiffs

The Supreme Court has said that to be eligible for a fee award, a plaintiff must prevail on "any significant claim affording some of the relief sought."[20] The relief cannot be merely declaratory or procedural; it must reach the underlying merits of the claim and "affect[] the behavior of the defendant towards the plaintiff."[21] Thus, for example, the Court found that the plaintiff was not a prevailing party where his success consisted of an appellate court decision reversing a directed verdict for the defendant and ordering a new trial (and making a favorable ruling for the plaintiff requiring additional discovery): "The respondents have of course not prevailed on the merits of any of their [underlying] claims."[22] In a recent case illustrative of this doctrine, the Eighth Circuit rejected a fee request where the plaintiff's victory consisted solely of the district court finding that it had jurisdiction to hear the case.[23]

At the same time, the Supreme Court held that an award of nominal damages confers prevailing party status on the plaintiff.[24] Such an award "modifies the defendant's behavior for the

20. Texas Ass'n v. Garland, 489 U.S. 782, 791 (1989). The Court rejected the law in some circuits that plaintiff must prevail on the "central issue" and achieve "the primary relief sought."

21. Hewitt v. Helms, 482 U.S. 755, 761 (1987). In *Hewitt*, an appellate court held that due process was denied an inmate sentenced by a prison committee to disciplinary confinement. On remand, however, the district court found defendant immune from damage liability. The appellate court had also given essentially declaratory relief, stating that defendant's disciplinary proceedings were improper and would have to be changed. But because plaintiff had been released on parole, and thus did not benefit from this declaration, the Supreme Court held that he was not a prevailing party. Rhodes v. Stewart, 488 U.S. 1 (1988), is similar, although, unlike in *Hewitt*, the lower court granted formal declaratory relief. By the time it was granted, however, one plaintiff had died and the other was no longer in custody. The Court held that there was no prevailing plaintiff: "A declaratory judgment, in this respect, is no different from any other judgment. It will constitute relief . . . if, and only if, it affects the behavior of the defendant towards the plaintiff." *Id.* at 4.

22. Hanrahan v. Hampton, 446 U.S. 754, 768 (1980).

23. Huey v. Sullivan, 971 F.2d 1362, 1367 (8th Cir. 1992).

24. Farrar v. Hobby, 113 S. Ct. 566 (1992).

plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."[25]

Consensus in the lower courts has emerged with respect to the "prevailing party" question in certain recurring situations. The courts agree that when a party's favorable judgment is vacated or reversed on appeal, the party ceases to be a prevailing party and a prior fee award must fall.[26] The same is generally true when the plaintiff is granted injunctive relief based on a likelihood of prevailing on the merits but ultimately loses on the merits.[27] However, all circuits that have considered the question have held that the plaintiff is a prevailing party when it obtains a preliminary injunction based on its probability of success and the case becomes moot before a final judgment.[28] But where injunctive relief is granted only to preserve the status quo so that any eventual relief would not come too late, and the court makes no assessment of the merits of the case, the plaintiff is not a prevailing party if the case becomes moot.[29]

The Supreme Court has held that favorable settlements qualify plaintiffs for fee awards.[30] Lower courts have developed this

25. *Id.* at 574.

26. *See, e.g.*, Dexter v. Kirschner, 984 F.2d 979, 987 (9th Cir. 1992); Ladnier v. Murray, 769 F.2d 195, 200 (4th Cir. 1985); Harris v. Pirch, 677 F.2d 681, 689 (8th Cir. 1982).

27. Palmer v. Chicago, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987); Ward v. County of San Diego, 791 F.2d 1329, 1334 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); Doe v. Busbee, 684 F.2d 1375, 1380 (11th Cir. 1982); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980). *But cf.* Frazier v. Board of Trustees of Northwest Miss. Regional Medical Ctr., 765 F.2d 1278 (5th Cir. 1985) (at least where eventual loss resulted from change in the law after initial injunction was granted, plaintiff was entitled to fees), *cert. denied*, 476 U.S. 1142 (1986).

28. Dahlem v. Board of Educ., 901 F.2d 1508, 1512 (10th Cir. 1990); Webster v. Sowders, 846 F.2d 1032, 1036 (6th Cir. 1988); Taylor v. Fort Lauderdale, 810 F.2d 1551, 1557–58 (11th Cir. 1987); Grano v. Barry, 783 F.2d 1104, 1109 (D.C. Cir. 1986); Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1290–91 (8th Cir. 1982); Williams v. Alioto, 625 F.2d 845, 847–48 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118, 119–20 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); Coalition for Basic Human Needs v. King, 691 F.2d 597, 600 (1st Cir. 1982).

29. Libby v. Illinois High Sch. Ass'n, 921 F.2d 96 (7th Cir. 1990).

30. Maher v. Gagne, 448 U.S. 122 (1980).

doctrine, holding that the plaintiff is a prevailing party when its lawsuit serves as a "catalyst" for favorable action by the defendant. All the circuits agree that to be a catalyst, the suit must play a role in the defendant's decision to take remedial action.[31] Most circuits have established another requirement as well: The suit must state at least a colorable claim so that the defendant's action is not simply a gratuitous response to a groundless suit.[32] The Fifth Circuit places the burden on the defendant to prove that its conduct was gratuitous by "demonstrat[ing] the worthlessness of the plaintiff's claims and explain[ing] why [it] nonetheless voluntarily gave the plaintiffs the requested relief."[33]

The Supreme Court has held that, under the civil rights fee-shifting statute, a plaintiff who prevails on a nonconstitutional statutory claim brought pursuant to section 1983 is eligible for attorneys' fees.[34] The Court has also held that success before administrative agencies qualifies plaintiffs for a fee award, provided (1) the plaintiff filed a claim in federal court, (2) the ad-

31. The precise formulations differ. *See, e.g.,* Hendrickson v. Branstad, 934 F.2d 158, 161 (8th Cir. 1991) (suit must be "necessary and important factor"); Koster v. Perales, 903 F.2d 131, 135 (2d Cir. 1990) (suit must be "catalytic, necessary, or substantial factor"); Dunn v. Florida Bar, 889 F.2d 1010, 1014–18 (11th Cir. 1989), *cert. denied,* 498 U.S. 811 (1990); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) (suit must be "causally linked" to the relief). The Third Circuit favors a "most expansive definition of causation," Dunn v. United States, 842 F.2d 1420, 1433 (3d Cir. 1988), which requires that the suit be a "substantial factor" of the remedial action, not necessarily a "but for cause." Metropolitan Pittsburgh Crusade for Voters v. Pittsburgh, 964 F.2d 244, 251 (3d Cir. 1992).

32. *See* DeGidio v. Pung, 920 F.2d 525, 529 n.7 (8th Cir. 1990); Dunn v. Florida Bar, 889 F.2d 1010, 1015 (11th Cir. 1989), *cert. denied,* 498 U.S. 811 (1990); Sablan v. Department of Fin., 856 F.2d 1317, 1327 (9th Cir. 1988); Webster v. Sowders, 846 F.2d 1032, 1037 (6th Cir. 1988); Janowski v. International Bhd. of Teamsters, 812 F.2d 295, 298 (7th Cir. 1987); Grano v. Barry, 783 F.2d 1104, 1110 (D.C. Cir. 1986); J. J. Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1475 (10th Cir. 1985); Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982); Staten v. Housing Auth. of Pittsburgh, 638 F.2d 599, 605 (3d Cir. 1980). The Second and Fourth Circuits have not mentioned the "colorable claim" requirement.

33. Hennigan v. Ouachita Parrish Sch. Bd., 749 F.2d 1148, 1153 (5th Cir. 1985).

34. Maine v. Thiboutot, 448 U.S. 1 (1980) (per curiam).

ministrative proceeding was mandatory for anyone who wanted to pursue a judicial remedy, and (3) the issue in the administrative proceeding was related to the claim that the plaintiff advanced in the judicial proceeding.[35]

The courts of appeals have consistently held that where plaintiffs lose a claim governed by a fee statute but prevail on another claim, they are not entitled to fees.[36] However, they are entitled to fees if they prevail on another claim and the fee-based claim is not reached (as long as it is not frivolous).[37]

A plaintiff may be a prevailing party entitled to fees *pendente lite* rather than at the conclusion of the litigation. Courts have long had discretion to award interim fees where liability has been

35. In New York Gaslight Club v. Carey, 447 U.S. 54 (1980), before filing a Title VII claim, plaintiff initiated administrative proceedings. She prevailed and moved for fees in federal court. Noting that the Title VII fee-shifting statute, 42 U.S.C. § 2000e-5, authorizes fees for prevailing plaintiffs "in any action or proceeding," and that the administrative proceeding was mandatory, the Court approved an award. In Webb v. Board of Educ., 471 U.S. 234 (1985), after entering into a consent decree, plaintiff sought fees for work in state administrative proceedings before filing the claim. The Court held an award inappropriate, distinguishing *Carey* on the ground that here the administrative proceeding was not mandatory. Moreover, in the administrative proceeding plaintiff sought to enforce rights created by state law, not the rights under section 1983 that were pursued in the lawsuit. The Court stated that work in an optional administrative proceeding might be compensable if "reasonably expended on the litigation." *Id*. at 241. But this entails showing that such work was "both useful and of a type ordinarily necessary to advance the civil rights litigation." *Id*. at 243. In North Carolina Dep't of Transp. v. Crest St. Community Council, 479 U.S. 6 (1986), plaintiff prevailed in mandatory administrative proceedings but filed no judicial action (except to recover fees). The Court held an award inappropriate in such circumstances.

36. Mateyko v. Felix, 924 F.2d 824, 828 (9th Cir. 1990), *cert. denied,* 112 S. Ct. 65 (1991); Keely v. City of Leesville, 897 F.2d 172, 176–77 (5th Cir. 1990); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 476 (3d Cir. 1989), *cert. denied,* 494 U.S. 1068 (1990); Finch v. City of Vernon, 877 F.2d 1497, 1507–08 (11th Cir. 1989); McDonald v. Doe, 748 F.2d 1055, 1057 (5th Cir. 1984); Gagne v. Town of Enfield, 734 F.2d 902, 904 (2d Cir. 1984); Reel v. Arkansas Dep't of Correction, 672 F.2d 693, 698 (8th Cir. 1982); Haywood v. Ball, 634 F.2d 740, 743 (4th Cir. 1980).

37. Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 969 (1992); Plott v. Griffiths, 938 F.2d 164 (10th Cir. 1991); Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981).

established but no remedial order has been entered.[38] In 1989, the Supreme Court suggested that district courts have discretion to award interim fees whenever the plaintiff achieves success sufficient to make it a prevailing party—regardless of the stage of the litigation[39]—for example, where the plaintiff receives a partial summary judgment establishing liability on one issue while other issues remain to be tried. However, interim fees are generally granted only if they are necessary for the plaintiff to continue pursuing the lawsuit, or if the case has been unusually protracted.[40]

If the plaintiff who has received interim fees has its victory on the underlying issue or issues reversed on appeal, it may be directed to repay the money.[41] Several trial courts have conditioned interim fees on the posting of a security.[42]

### prevailing defendants

In *Christiansburg Garment v. EEOC,*[43] the Supreme Court held that the Title VII fee-shifting statute[44] authorizes an award to prevailing defendants as well as to prevailing plaintiffs. The holding appears to apply to all fee-shifting statutes that speak of a

38. Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974).

39. Texas Ass'n v. Garland, 489 U.S. 782, 790–91 (1989).

40. *See Bradley,* 416 U.S. 696, 722–23 (1974); McKenzie v. Kennickell, 669 F. Supp. 529, 532–33 (D.D.C. 1987); West Side Women's Serv. v. Cleveland, 594 F. Supp. 299, 303 (N.D. Ohio 1984).

41. There is precedent for the return of fees in common fund and bankruptcy cases. *See* Mokhiber *ex rel* Ford Motor Co. v. Cohn, 783 F.2d 26 (2d Cir. 1986) (per curiam); Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986); *In re* Hepburn, 84 B.R. 855 (S.D. Fla. 1988); *In re* Chin, 31 B.R. 314 (Bankr. S.D.N.Y. 1984). Although we find no reported cases of parties ordered to return fees awarded pursuant to fee-shifting statutes, courts apparently have such authority. *See* People Who Care v. Rockford Bd. of Educ., 921 F.2d 132, 134 (7th Cir. 1991) ("court may . . . direct the plaintiffs to repay the money if they ultimately fail to establish an entitlement to relief").

42. *See* Feher v. Department of Labor & Indus. Relations, 561 F. Supp. 757, 768 (D. Haw. 1983); Howard v. Phelps, 443 F. Supp. 374, 377 (E.D. La. 1978); Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977), *rev'd on other grounds,* 596 F.2d 152 (6th Cir. 1979).

43. 434 U.S. 412 (1978).

44. 42 U.S.C. § 2000e-5(k).

prevailing "party" without specification.[45] However, the Court held that an award for the defendant requires more than a showing that the defendant is a prevailing party. The trial court must also find that the plaintiff's suit was "frivolous, unreasonable, or without foundation."[46] It need not find subjective bad faith on the plaintiff's part.[47]

### prevailing intervenors

The courts of appeals that have addressed the question have held that fees may be awarded in favor of an intervenor.[48] The intervenor must "contribute[] importantly"[49] or play a "significant role"[50] in producing the outcome. The Second Circuit rejected the contention that intervenors can recover fees only when they assert a violation of their own rights.[51] The fee award should reflect the intervenor's contribution; efforts that duplicate work of the original plaintiffs should not be compensated.[52]

### prevailing pro se litigants

Under the civil rights fee-shifting statute, a pro se litigant, whether a lawyer or a layperson, is not eligible for an award of attorneys' fees.[53]

45. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983) (generalizing *Christiansburg*'s holding).

46. *Christiansburg*, 434 U.S. at 421.

47. *Id*.

48. Wilder v. Bernstein, 965 F.2d 1196, 1202–04 (2d Cir.) (en banc), *cert. denied*, 113 S. Ct. 410 (1992); Grove v. Mead Sch. Dist., 753 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); Miller v. Staats, 706 F.2d 336, 340–42 (D.C. Cir. 1983).

49. United States v. Board of Educ. of Waterbury, 605 F.2d 573, 574 (2d Cir. 1979).

50. Donnell v. United States, 682 F.2d 240, 246 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

51. Wilder v. Bernstein, 965 F.2d 1196, 1202 (2d Cir.) (en banc), *cert. denied*, 113 S. Ct. 410 (1992).

52. 965 F.2d at 1204–05.

53. Kay v. Ehrler, 111 S. Ct. 1435 (1991). The Court's broad reasoning would seem to apply to any statute where the text or legislative history does not specifically indicate that fees for pro se litigants are intended.

### *Standing to Bring a Claim for Fees*

The Supreme Court has stated that an award of fees is to the party, not to counsel.[54] In most circumstances, this is a mere technicality. For example, the Seventh Circuit has said that a motion for fees may be made in the name of the attorney, and an award so directed: "where the lawyer is acting in his capacity as the client's representative . . . it would exalt form over substance to deny the motion for fees 'so that the ministerial function of substituting the plaintiff' for the attorney could be accomplished."[55]

The matter is occasionally less straightforward if courts find that attorneys lack standing to request fees. In one case, counsel was discharged (because of the client's displeasure with his services) before the case was settled. The Second Circuit said that "[w]ere we to entertain [the attorney's] claim, clients' control of their litigation would be subject to a veto by former attorneys no longer under an obligation of loyalty."[56] In another case, the trial court granted a fee award and ordered a check payable jointly to two attorneys and a legal services organization. The plaintiffs requested that the check be made solely to the legal services organization, and the court so ordered. Over the plaintiffs' objection, one of the attorneys appealed the order. The First Circuit held that the attorney lacked standing because the appeal "was not only unauthorized by [the plaintiffs] but was not made for their benefit."[57] Although it agreed with those decisions, the Seventh Circuit permitted a fee request by an attorney who had successfully defended a judgment for his client on appeal, even though the client subsequently discharged him before the conclusion of the litigation—there was no question that the attorney had acted with the client's approval during the appeal and no ground for believing that the client objected to the fee petition.[58]

54. Evans v. Jeff D., 475 U.S. 717 (1986), discussed *infra* text accompanying notes 76–78 and note 78.

55. Richardson v. Penfold, 900 F.2d 116, 117 (7th Cir. 1990) (quoting Ceglia v. Schweicker, 566 F. Supp. 118, 120 (E.D.N.Y. 1983)).

56. Brown v. General Motors, 722 F.2d 1009, 1011 (2d Cir. 1983).

57. Benitez v. Collazo-Collazo, 888 F.2d 930, 933 (1st Cir. 1989).

58. Lowrance v. Hacker, 966 F.2d 1153, 1157 (7th Cir. 1992) (fee claim based on state lien statute, not on fee-shifting statute). The Seventh Circuit fol-

### *Is There a Liable Party?*

Any losing defendant, including the government or government officials, can be liable for fees.[59] However, plaintiffs who prevail only against government employees in their personal capacities may not recover fees from the government.[60]

The Supreme Court has held that attorneys' fees may be awarded against an intervenor, but only on a showing of bad faith.[61] Two courts of appeals have considered whether fees may be awarded against the defendant to compensate the plaintiff for successful work in opposition to an intervenor. The Seventh Circuit denied fees where the defendant had opposed the intervenor's position and the issue raised by the intervenors was ancillary to the main litigation.[62] However, the Eighth Circuit granted fees against the state for work by the plaintiff in defending a court-ordered remedy against members of the plaintiff class who intervened to challenge the remedy.[63] The Eighth Circuit distinguished the Seventh Circuit case, noting that here "the plaintiffs incurred their fees in defending the remedy, which was crucial to the object in filing suit to begin with."[64]

### *Are There Special Circumstances Militating Against an Award?*

Though fee-shifting statutes generally make fee awards for prevailing parties discretionary, the Court has stated that an award

lowed *Lowrance* in Smith v. Great Amer. Restaurants, 969 F.2d 430 (7th Cir. 1992), where plaintiff won a verdict and fee award and his attorney withdrew during the pendency of a post-trial adjudication over the amount of damages and fees. In withdrawing, the attorney asked the court for permission to continue to represent himself with respect to fees. The trial court granted permission, and the Seventh Circuit agreed with the decision: The attorney acted on the client's behalf in securing the verdict, and there was no evidence that the client objected to counsel's efforts to get the fee award enlarged.

59. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522, 543–44 (1984) (state judges liable for fees).

60. Kentucky v. Graham, 473 U.S. 159 (1985).

61. Flight Attendants v. Zipes, 491 U.S. 754 (1989).

62. Bigby v. Chicago, 927 F.2d 1426, 1429 (7th Cir. 1991).

63. Jenkins v. Missouri, 967 F.2d 1248, 1250–52 (8th Cir. 1992).

64. *Id.* at 1251 n.2.

should be given absent "special circumstances" that render one unjust.[65] In every Supreme Court case in which the defendants have argued special circumstances, the Court has rejected the claim.[66] Courts of appeals have followed this lead, rejecting most claimed special circumstances, including claims based on the defendant's willingness to enter into an early settlement;[67] the lawsuit conferring a private benefit on the plaintiff but no larger public benefit;[68] the plaintiffs' ability to pass their litigation costs on to consumers;[69] the plaintiff proceeding in forma pauperis while benefiting from court-appointed counsel;[70] the failure of a consent decree to mention fees;[71] an award of injunctive relief

65. Thus, although the civil rights fee-shifting statute allows a court to make an award "in its discretion," the Supreme Court has maintained that "that discretion is not without limit. The prevailing party 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" Blanchard v. Bergeron, 489 U.S. 87, 89 (1989) (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)). *Accord* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

66. *See* Washington v. Seattle Sch. Dist., 458 U.S. 457, 487 n.31 (1982) (plaintiffs were state-funded entities); New York Gaslight Club v. Carey, 447 U.S. 54, 70–71 n.9 (1980) (plaintiffs were represented pro bono by public interest group); Bradley v. School Bd. of Richmond, 416 U.S. 696, 710–22 (1974) (fee-shifting statute took effect after most of the litigation was completed); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (good faith by defendants).

67. Barlow-Gresham Union High Sch. v. Mitchell, 940 F.2d 1280 (9th Cir. 1991); Cooper v. Utah, 894 F.2d 1169, 1172 (10th Cir. 1990).

68. *See, e.g.*, Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982). *Accord* Lawrence v. Bowsher, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (trial court found special circumstances where plaintiff's success was actually harmful to a large class of prospective plaintiffs; court of appeals reversed, stating that prevailing plaintiff "is entitled to reasonable attorneys' fees independent of the district court's view of the greater good for the greatest number").

69. American Booksellers Ass'n v. Virginia, 802 F.2d 691, 697 (4th Cir. 1986).

70. Starks v. George Court Co., 937 F.2d 311, 315–16 (7th Cir. 1991).

71. El Club del Barrio v. Unity Community Corp., 735 F.2d 98, 100–01 (3d Cir. 1984).

only;[72] a third party financing the plaintiffs' suit;[73] and the routine nature of the case.[74]

The exceptions, cases in which claims of special circumstances succeed, generally involve highly unusual conditions. For example, the Tenth Circuit upheld a determination of special circumstances where the plaintiff won an injunction that was eventually mooted before the defendant had an opportunity to appeal, while in a virtually identical companion case, the decision for the plaintiff had been reversed on appeal.[75]

One circumstance in which a denial of fee awards is justified is where the plaintiffs waive their right to an award as part of a settlement. In *Evans v. Jeff D.*,[76] the plaintiff accepted a generous settlement offer conditioned on waiver of fees but argued on appeal that such offers place counsel in an ethical dilemma.[77] The Court rejected this argument, maintaining that counsel faced no ethical dilemma because there is no duty to pursue a fee award. The Court held that a fee award belongs to the party, not to counsel, and can be waived by the party. Thus, settlements contingent on a waiver of a fee award are valid and enforceable.[78]

72. Crowder v. Housing Auth. of Atlanta, 908 F.2d 843, 848–49 (11th Cir. 1990).

73. American Council of the Blind v. Romer, 962 F.2d 1501, 1503 (10th Cir. 1992), *vacated and remanded on other grounds*, 113 S. Ct. 1038 (1993).

74. Staten v. Housing Auth. of Pittsburgh, 638 F.2d 599, 605 (3d Cir. 1980).

75. Dahlem v. Board of Educ., 901 F.2d 1508, 1512, 1514 (10th Cir. 1990).

76. 475 U.S. 717 (1986).

77. Two circuits have rules for deciding whether fees are waived. The Third Circuit requires express stipulation of a waiver in the settlement agreement. Ashley v. Atlantic Richfield, 794 F.2d 128, 136–39 (3d Cir. 1986); El Club del Barrio v. United Community Corp., 735 F.2d 98, 101 (3d Cir. 1984). The Ninth Circuit permits inferring a waiver from "clear evidence that . . . an ambiguous clause was intended [as a waiver] by both parties." Muckleshoot Tribe v. Puget Sound Power & Light, 875 F.2d 695, 698 (9th Cir. 1989).

78. There is another concern nearly opposite the waiver issue: Counsel can reach a "sweetheart" settlement, in which defendant pays a small amount to plaintiff and high amount in attorneys' fees. This concern is greatest in class actions, where counsel are less likely to consult plaintiffs during settlement negotiations. The Third Circuit recommended a procedure to safeguard against this problem: "trial courts [can] insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only af-

## Calculating the Amount of the Award

Determining that a fee award is in order is only the beginning. The proper amount of the award must be calculated, and this involves several considerations.

### *What Constitute Fees?*

The scope of the term *attorneys' fees* is not self-evident. Two Supreme Court cases address what such fees encompass. In *Missouri v. Jenkins,*[79] the Court addressed compensation for the work of paralegals and law clerks. Although the case turned on what constitutes a "reasonable" fee for such services, not on whether such services are part of attorneys' fees (a point the defendant conceded), in addressing that question, the Court made some observations relevant to the definition of fees:

> Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profits. . . . We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for

ter court approval of the damage settlement should discussion and negotiation of appropriate compensation begin. This would eliminate the situation . . . of having, in practical effect, one fund divided between the attorney and client." Prandini v. National Tea, 557 F.2d 1015, 1021 (3d Cir. 1975). But in *Jeff D.*, the Supreme Court said courts may not require this approach, 475 U.S. 717, 738 n.30 (1986), and another Third Circuit panel and a Third Circuit task force expressed concern that the approach is unenforceable and discourages settlement. El Club del Barrio v. United Community Corp., 735 F.2d 98, 101 n.3 (3d Cir. 1984); Report of the Third Circuit Task Force, "Court Awarded Attorney Fees," 108 F.R.D. 237, 267–68 (1985). The task force suggested appointing a disinterested person to protect the interests of class members or unrepresented beneficiaries. *Id*. at 256. *See infra* note 440 (discussing several judges' use of this procedure).

79. 491 U.S. 274 (1989).

by statute should compensate the work of paralegals, as well as that of attorneys.[80]

In *West Virginia v. Carey*,[81] the Court addressed an issue directly implicating the determination of what constitute fees: whether the cost of expert witnesses should be compensated as part of an attorneys' fees award. The Court held that, unless it expressly says otherwise, a fee-shifting statute does not authorize compensation for experts' fees.[82] The basis of the holding was a long tradition of statutes that distinguish between experts' fees and attorneys' fees. The Court distinguished *Jenkins* on two related grounds. First, no fee-shifting statutes treat fees for law clerks or paralegals separately from attorneys' fees. Second, the cost of such work has traditionally been included within an attorney's fee (even though it is now generally billed separately), whereas experts' fees have always been treated as a separate item.

Taken together, *Jenkins* and *Carey* provide guidance as to what may or may not be included as part of an attorneys' fees award: the guidepost is the tradition of billing and fee-shifting practice.[83] The determination of what constitutes a *reasonable*

80. *Id.* at 285. The Court held that paralegals' and law clerks' work should be compensated at the rates at which it is billed to clients. Defendant argued that such work should be compensated by reference to its cost to the firm. In rejecting this claim, the Court said the marketplace is the guide, and attorneys generally bill clients separately (at for-profit rates) for paralegals' and law clerks' work. Defendant claimed that the extension of this approach is separate compensation for "secretarial time, paper clips, electricity, and other expenses." The Court responded that the "safeguard against [such practices] is the discipline of the market." *Id.* at 287–88 n.9. *See* Lipsett v. Blanco, 975 F.2d 934, 939 n.5 (1st Cir. 1992) (interpreting *Jenkins* to hold that "[w]hether paralegal hours may be billed at a market rate ultimately depends upon whether such a practice is common in the relevant legal market").

81. 111 S. Ct. 1138 (1991).

82. The Civil Rights Act of 1991 effectively overrode *Carey*, making fees for expert witnesses available under the civil rights fee-shifting statute. However, the act in no way undercuts the holding in *Carey* that such fees are unavailable unless expressly authorized by statute.

83. *See, e.g.*, Davis v. San Francisco, 976 F.2d 1536, 1557 (9th Cir. 1992) (instructing district court, on remand, to consider whether assorted claimed costs (e.g., a filing cabinet) "are or are not . . . ordinarily [] treated as reimbursable in a private attorney-client relationship."); Davis v. Mason Cty., 927 F.2d 1473, 1477–78 (9th Cir.) (affirming compensation for travel costs because

fee—in terms of the work performed and the billing rate—is a somewhat different matter, which is treated at length below.

### *What Is the Method of Calculating the Amount of Fees?*

In Hensley v. Eckerhart, the Supreme Court established that in fee-shifting cases the thrust of a fee award is the "lodestar"—the number of hours reasonably expended multiplied by the applicable hourly market rate for legal services.[84] This is true regardless of whether the plaintiff and the attorney had a private (contingent or hourly) fee contract.[85]

"expenses incurred during the course of litigation which are normally billed to fee-paying counsel" are compensable under the fee-shifting statutes), *cert. denied*, 112 S. Ct. 275 (1991).

84. 461 U.S. 424, 433 (1983). Before *Hensley*, many courts calculated fees by analyzing the "*Johnson* factors": (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and result obtained; (9) counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the clients; and (12) awards in similar cases. Johnson v. Georgia Highway Express, 488 F.2d 714, 717 (5th Cir. 1974). (In the Ninth Circuit, these factors are known as the "*Kerr* factors." *See* Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).) *Hensley* makes clear that these factors matter only as they bear on the market rate or hours reasonably expended, or, in rare cases, if they are a basis for adjusting the lodestar. *See infra* text accompanying notes 130–89 (discussing adjustments). Only the Fifth and Eleventh Circuits clearly require consideration of these factors in each case. *See, e.g.*, Nisby v. Court of Jefferson Cty., 798 F.2d 134, 137 (5th Cir. 1986) (reversing award because court did not address "applicability of each of the *Johnson* factors"); Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543–44 (11th Cir. 1985) (same). In the Ninth Circuit, the situation is unclear. *Compare* Davis v. San Francisco, 976 F.2d 1536, 1546 (9th Cir. 1992) ("district court *may* make reference" to *Kerr* factors) (emphasis added) *with* Lafarge Conseils Et Etudes v. Kaiser Cement, 791 F.2d 1334, 1342 (9th Cir. 1986) ("A complete failure to consider [*Kerr* factors] constitutes an abuse of discretion").

85. In Blanchard v. Bergeron, 489 U.S. 87 (1989), the Court held that a fee award may exceed the amount dictated by a contingent fee agreement. Venegas v. Mitchell, 495 U.S. 82 (1990), decided another issue involving a contingent fee agreement—this time a dispute between plaintiff and his attorney. The two contracted for counsel to receive a contingent fee to be offset by court-awarded fees. But when the contingent fee was $400,000, and the court-awarded fee $75,000, plaintiff argued that counsel should be restricted to the latter. The

### reasonable rate

The reasonable rate is determined by reference to the marketplace.[86] Courts all agree that an attorney's customary billing rate is the proper starting point for calculating fees.[87] However, that rate is not always conclusive. In *Blum v. Stenson*,[88] the Court held that a nonprofit organization is entitled to compensation at the market rate of the legal community at large.[89] The D.C. Circuit extended this holding to for-profit attorneys who charge lower rates for some clients in an effort to promote the public interest.[90] There are other exceptions as well. Most courts consider

Court disagreed: "If [plaintiffs] take advantage of the system as Congress established it, they will avoid having their recovery reduced by contingent-fee agreements. But . . . depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further section 1988's general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel." *Id.* at 89–90.

86. *See, e.g.,* Missouri v. Jenkins, 491 U.S. 274, 285 (1989) ("we have consistently looked to the marketplace as our guide to what is 'reasonable.'").

87. *See, e.g.,* Islamic Ctr. of Miss. v. Starkville, Miss., 876 F.2d 465, 469 (5th Cir. 1989); Kelley v. Metropolitan Cty. Bd. of Educ., 773 F.2d 677, 683 (6th Cir. 1985) (en banc), *cert. denied,* 474 U.S. 1083 (1986); Cunningham v. City of McKeesport, 753 F.2d 262, 268 (3d Cir. 1985), *vacated on other grounds,* 478 U.S. 1015 (1986).

88. 465 U.S. 886 (1984).

89. Despite *Blum*, some courts have held that, at least in cases not brought under a civil rights statute, a salaried union attorney is entitled only to fees calculated at a cost plus overhead rate. Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986), *cert. denied,* 484 U.S. 815 (1987); Harper v. Better Business Serv., 768 F. Supp. 817 (N.D. Ga. 1991), *aff'd,* 961 F.2d 1561 (11th Cir. 1992); Johnson v. Orr, 739 F. Supp. 945 (D.N.J. 1988), *appeal dismissed*, 897 F.2d 128 (1990). These courts reason that a market-based award would serve to subsidize the union's ordinary operation. The Third, Ninth, and D.C. Circuits hold otherwise, finding a market-based award in order provided the union deposits the fee into a segregated litigation fund. Kean v. Stone, 966 F.2d 119, 122–24 (3d Cir. 1992); American Fed'n of Gov't Employees v. FLRA, 944 F.2d 922, 937 (D.C. Cir. 1991); Curran v. Department of Treasury, 805 F.2d 1406, 1408 (9th Cir. 1986).

90. Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1524 (D.C. Cir. 1988). In Barrow v. Falck, 977 F.2d 1100 (7th Cir. 1992), the district court awarded fees based on the market rate in the community even though counsel's own rate was less. The Seventh Circuit reversed, holding that the lawyer's rate trumps the general market rate. The court recognized the possibility that the

the forum community the proper yardstick, so an award for out-of-town counsel will not be based on the rates in their usual place of work.[91] Even for local counsel, if the usual rate is sharply at odds with the prevailing market rate, courts generally have discretion to use the latter.[92] Additionally, some courts base an award on an hourly rate lower than the attorney's usual rate if the litigation is outside the attorney's usual field of practice.[93]

In *Blum*, the Court noted that the market takes into account variation in the skill and experience of attorneys. The reasonable

lawyer charged his clients less than he could obtain and noted the D.C. Circuit's holding in *Save Our Cumberland Mountains.* However, the evidence showed that counsel charges *all* his clients a submarket rate, thus posing a different situation from the one faced by the D.C. Circuit. The court opined that the D.C. Circuit may be correct to permit compensation at the market rate in cases where counsel's usual rate is the market rate but he charges a particular client (or set of clients) less. However, the Seventh Circuit expressed uneasiness with this approach, too. *Id.* at 1106.

91. *See, e.g.,* Davis v. Macon Cty., 927 F.2d 1473, 1488 (9th Cir.), *cert. denied,* 112 S. Ct. 275 (1991). Ackerly Communications v. Somerville, 901 F.2d 170, 172 (1st Cir. 1990); Polk v. New York State Dep't of Correctional Services, 722 F.2d 23, 25 (2d Cir. 1983). In some circumstances the community rate is inappropriate as a benchmark (e.g., where the case is so undesirable that attorneys in the forum community are unwilling to take it; where it requires expertise that local attorneys lack; when counsel practice in the locale where the events that give rise to the litigation take place, but the litigation is moved elsewhere; or in a multilawyer suit where fee petitions are filed from all over the country). *See, e.g.,* Gates v. Deukmejian, 987 F.2d 1392, 1404–05 (9th Cir. 1992) (affirming use of out-of-town counsel's rates where attorneys in forum were unavailable, and citing cases); *In re* Agent Orange Prod. Liability Litig., 818 F.2d 226, 232–33 (2d Cir. 1987) (discussing the exceptions).

92. *See, e.g.,* Davis v. San Francisco, 976 F.2d 1536, 1548 (9th Cir. 1992); Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir.), *cert. denied,* 484 U.S. 990 (1987); Shakopee Mdewankton Sioux Comm. v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986). *But see* Gusman v. Unisys, 986 F.2d 1146, 1150–51 (7th Cir. 1993) (lawyer's own rate is the presumptive rate, and a judge who departs from it "must have some reason other than the ability to identify a different average rate in the community"—e.g., "the lawyers did not display the excellence . . . implied by their higher rates" or the "plaintiff did not need top-flight counsel in a no-brainer case.").

93. *See, e.g.,* Dejesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 6 (1st Cir. 1991); Buffington v. Baltimore Cty., 913 F.2d 113 (4th Cir. 1990), *cert. denied,* 111 S. Ct. 1106 (1991); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Moore v. Matthews, 682 F.2d 830, 840 (9th Cir. 1982).

rate for established, experienced practitioners is likely to be greater than the rate for new attorneys in the same market.[94] For example, the Fourth Circuit affirmed an award based on a $150 hourly rate even though the defendants proffered an affidavit showing that the usual rate for civil rights attorneys in South Carolina was $50 to $75. The court cited counsel's "vast experience and expertise" and evidence on the record that "the prevailing rate for lawyers of his qualifications and experience in comparable complex litigation range is from $100–$250 in South Carolina."[95]

Some courts apply different rates to different tasks, for example, a higher rate for in-court work than for out-of-court work, or different rates for the liability phase of the litigation and the remedy phase.[96] More often, courts apply a flat rate for all work by a particular attorney in the case.[97]

### hours reasonably expended

The Supreme Court has said that counsel are expected to exercise billing judgment; district courts should "exclude from this initial fee calculation hours that were not 'reasonably expended,'" including "excessive, redundant, or otherwise unnecessary" work.[98] As a result, lower courts have reduced fee awards where there has been duplication of services;[99] excessive total time considering the lack of difficulty of the case;[100] excessive time billed for

94. 465 U.S. at 895–96 n.11.

95. Plyler v. Evatt, 902 F.2d 273, 278 (4th Cir. 1990).

96. *See, e.g.*, Leroy v. City of Houston, 906 F.2d 1068 (5th Cir. 1990).

97. *See, e.g.*, Davis v. San Francisco, 976 F.2d 1536, 1548 (9th Cir. 1992); *In re* Meese, 907 F.2d 1192 (D.C. Cir. 1990); Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); Daggett v. Kimmelman, 811 F.2d 793 (3d Cir. 1987); Wildman v. Lerner Stores, 771 F.2d 605 (1st Cir. 1985); Craik v. Minnesota State Bd., 738 F.2d 348 (8th Cir. 1984).

98. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

99. *See, e.g.*, Ackerly Communications v. Somerville, 901 F.2d 170, 171–72 (1st Cir. 1990).

100. *See, e.g.*, Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992) (not abuse of discretion to deduct hours, because "[t]his was not a complex case. Clarke's attorney took no depositions, and performed little discovery. The sole issue at trial was the amount of back pay. The trial lasted slightly more than one day. Clarke did not call any witnesses, and did not even testify. The case did not

particular tasks;[101] use of too many attorneys[102] or too much conferencing;[103] unnecessary work by a trial consultant deemed a "non-lawyer[] doing lawyers work";[104] reading or reviewing books not closely related to the case;[105] performance of secretarial or clerical tasks by lawyers;[106] and other assorted work deemed unnecessary.[107]

involve any novel issues of law. Clarke's post-trial motions were neither complicated nor abstruse.").

101. *See, e.g.*, Broyles v. Director, 974 F.2d 508, 510–11 (4th Cir. 1992) (finding several items excessive—e.g., an hour to read a brief opinion and fifteen-minute calls to the clerk of court's office, which handles most inquiries in far less time); Smith v. Freeman, 921 F.2d 1120, 1124 (10th Cir. 1990) (upholding reduction of compensable hours for work on fees motion: "neither the factual nor legal issues were especially complex and . . . [counsel] was thoroughly familiar with the issues"); Ackerly Communications v. Somerville, 901 F.2d 170, 173 (1st Cir. 1990) (disallowing claims for excessive photocopying and computer research); Ustrak v. Fairman, 851 F.2d 983, 987 (7th Cir. 1988) (thirty-eight hours preparing for oral argument "is far too much" in a short and simple case; likewise, 108.5 hours preparing fee petitions is "the tail wagging the dog, with a vengeance"); Louisville Black Police Officers Org. v. Louisville, 700 F.2d 268, 278–79 (6th Cir. 1983) (cuts in hours spent on post-trial brief and reply brief).

102. *See, e.g.*, Goodwin v. Metts, 973 F.2d 378, 383–84 (4th Cir. 1992) (fees cut in half because firm used several attorneys where one or two would have sufficed); Grendel's Den v. Larkin, 749 F.2d 945, 953 (1st Cir. 1984) ("We see no justification for the presence of two top echelon attorneys at each proceeding.").

103. *In re* Olson, 884 F.2d 1415, 1429 (D.C. Cir. 1989).

104. Davis v. Southeastern Pa. Transp. Auth., 924 F.2d 51, 56 (3d Cir. 1991).

105. Alberti v. Klevenhagen, 896 F.2d 927, 932–34 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

106. Lipsett v. Blanco, 975 F.2d 934, 940 (1st Cir. 1992) (trial court improperly permitted billing clerical work, such as court filings, at lawyers' rates).

107. *See, e.g.*, *In re* Olson, 884 F.2d 1415, 1429 (D.C. Cir. 1989) (disallowing hours spent on secretarial overtime, overtime dinner expense, a press release, and futile lobbying to defeat a bill that was sure to be enacted).

At the same time, all kinds of tasks, such as travel,[108] lobbying,[109] and public relations work,[110] are compensable if they are necessary or useful to litigating the case. Moreover, reasonable work at all stages of the litigation is compensable, including prefiling work,[111] work on appeal and defending against a petition for certiorari,[112] work on the fee petition and litigating the fee dispute,[113] and work in connection with post-judgment or post-decree administration, monitoring, or fee collection.[114]

Finally, courts have held that it is improper to engage in an "*ex post facto* determination of whether attorney hours were necessary to the relief obtained."[115] The issue "is not whether

108. *See, e.g.,* Perotti v. Seiter, 935 F.2d 761, 764 (6th Cir. 1991); Dowdell v. Apopka, Fla., 698 F.2d 1181, 1192 (11th Cir. 1983). *But see* Smith v. Freeman, 921 F.2d 1120, 1122 (10th Cir. 1990) (affirming compensation at only 25% of standard hourly rate for travel time).

109. *See, e.g.,* Glover v. Johnson, 934 F.2d 703, 717 (6th Cir. 1991); Demier v. Gondles, 676 F.2d 92, 93–94 (4th Cir. 1982).

110. *See, e.g.,* Davis v. San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992).

111. *See, e.g.,* Dowdell v. Apopka, Fla., 698 F.2d 1181, 1192 (11th Cir. 1983).

112. Cabrales v. Los Angeles, 935 F.2d 1050, 1051 (9th Cir. 1991).

113. The courts are unanimous on this point but split on whether a fee request for appellate work may be brought in the court of appeals in the first instance. *Compare* Yaron v. Northampton, 963 F.2d 33, 36 (3d Cir. 1992) (may be brought before court of appeals) and Ustrak v. Fairman, 851 F.2d 983, 990 (7th Cir. 1988) (same) *with C*rane v. Texas, 766 F.2d 193, 195 (5th Cir.) (per curiam), *cert. denied,* 474 U.S. 1020 (1985) (cannot be brought in court of appeals) and Reel v. Arkansas Dep't of Correction, 672 F.2d 693, 699 (8th Cir. 1982) (same) and Souza v. Southworth, 564 F.2d 609, 613–14 (1st Cir. 1977) (same). Some courts hold that the petition may be brought in the court of appeals, but if the court decides that a fee award is in order, it must remand to the trial court to calculate the amount. *See* Iqbal v. Golf Course Superintendents, 900 F.2d 227, 229–30 (10th Cir. 1990); Finch v. City of Vernon, 877 F.2d 1497, 1508 (11th Cir. 1989); McManama v. Lukhard, 616 F.2d 727, 730 (4th Cir. 1980) (per curiam). The Second Circuit holds that the application should be filed in the court of appeals, which, except in simple cases, will remand to the district court for decision. Dague v. City of Burlington, 976 F.2d 801, 804 (2d Cir.), *rev'd on other grounds,* 112 S. Ct. 2638 (1992).

114. *See, e.g.,* Norman v. Housing Auth., 836 F.2d 1292, 1305 (11th Cir. 1988); Spain v. Mountanos, 690 F.2d 742, 747 (9th Cir. 1982).

115. Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 978 (1993).

hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures."[116]

### *Documentation*

The burden of establishing the lodestar rests on the fee applicant, who must provide appropriate documentation of the hours spent and the market rate. Where the documentation is inadequate, the district court may reduce the award accordingly.[117]

The circuits' precise requirements or preferences differ. For example, the Eleventh Circuit has said that "the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity. . . . A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case."[118] Although the Third Circuit agrees that a fee petition should include "fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys,"[119] it has explicitly rejected the requirement of time summaries, stating that a chronological listing of time spent per task is sufficient.[120] A number of courts have required that such a listing not be overly general.[121]

116. *Id*. *Accord* Woolridge v. Marlene Indus. Corp., 898 F.2d 1169, 1177 (6th Cir. 1990); Independent Sch. Dist. v. Digre, 893 F.2d 987, 992 (8th Cir. 1990); Dennis v. Chang, 611 F.2d 1302, 1308 (9th Cir. 1980).

117. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

118. 836 F.2d at 1303.

119. Rode v. Dellarciprete, 892 F.2d 1177, 1190 (3d Cir. 1990) (quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973)).

120. Rode v. Dellarciprete, 892 F.2d at 1190.

121. *See, e.g.*, Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992) (affirming reduction of hours where "several entries contain[ed] only gauzy generalities" too nebulous to allow the opposing party to dispute their accuracy); *In re* Donovan, 877 F.2d 982, 995 (D.C. Cir. 1989) (district court properly excluded hours with "vague description[s]" such as "legal issues," "conference re all aspects" and "call re status"); Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986) (affirming reduction in hours where plaintiff listed hours spent on "research," without saying what was researched). *See also* Domegan v. Ponte,

The D.C., First, Second, Seventh, and Tenth Circuits require contemporaneous fee records and will substantially reduce or even deny a fee award in their absence.[122] The Fifth Circuit has said that such records are the "preferred practice" but are not required.[123] The Ninth and Eleventh Circuits have held that reconstructed time records suffice if "supported by other evidence such as testimony or secondary documentation."[124] The Eighth Circuit has said that "whether reconstructed records accurately document the time attorneys have spent is best left to the discretion of the [trial] court."[125]

To establish the market rate, the prevailing party must offer more than an affidavit showing the attorney's usual rate; it should offer evidence that this rate is in line with the market rate in the community.[126] This evidence generally takes the form of affidavits from other counsel attesting to their rates or the pre-

972 F.2d 401, 425 (1st Cir. 1992) (criticizing "mixed entries"—the lumping together of different activities), *vacated and remanded on other grounds*, 113 S. Ct. 1378 (1993).

122. *See In re* Donovan, 884 F.2d 1415, 1428 (D.C. Cir. 1989); Lightfoot v. Walker, 826 F.2d 516, 523 n.7 (7th Cir. 1987) (such records "generally required"); Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); McCann v. Coughlin, 698 F.2d 112, 131 (2d Cir. 1983).

123. Alberti v. Klevenhagen, 896 F.2d 927, 931 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990). The court did suggest that, in certain cases, the absence of such records will be grounds for reducing the requested fee.

124. Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1557 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990). *Accord* Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (1990).

125. Macdissi v. Valmont Indus., 856 F.2d 1054, 1061 (8th Cir. 1988).

126. *See* Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984) (fee applicant has burden "to produce satisfactory evidence—in addition to counsel's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."); Lucero v. Trinidad, 815 F.2d 1384, 1385 (10th Cir. 1987) (affirming reduced rate because plaintiff's documentation "showed only the prevailing market rates at [plaintiff's] firm. [Plaintiff] did not submit any evidence that would show that its rates are representative of the prevailing market rates in Denver or in Colorado.").

vailing market rate.[127] Several courts have stated that, especially in the absence of sufficient documentation, a trial court may rely on its own knowledge of the market.[128] It may not, however, substitute its notions of fairness for the market rate.[129]

### *Should the Lodestar Be Adjusted?*

In certain cases, the lodestar may be adjusted upward or downward to arrive at the appropriate fee award.[130]

#### downward adjustments

##### Incomplete Success

Incomplete success is the most common basis for a downward adjustment. In *Hensley*, the Court said that where the plaintiff

127. *See, e.g.,* Glover v. Johnson, 934 F.2d 703, 718 (6th Cir. 1991); (affirming award where "third-party affidavits submitted by plaintiffs established the prevailing market rate"); Columbus Mills v. Freeland, 918 F.2d 1575, 1580 (11th Cir. 1990) (affirming award where plaintiff "produced more than an affidavit of the attorney who performed the work. [Plaintiff] produced another affidavit which established that the rates were reasonable."). The affidavits should not simply vouch for the reasonableness of the fee—they should speak directly to the prevailing market rate. Norman v. Housing Auth., 836 F.2d 1292, 1304 (11th Cir. 1988).

128. *See, e.g.,* Norman v. Housing Auth., 836 F.2d 1292, 1303 (11th Cir. 1988); Miele v. New York State Teamsters Conf. Pension & Retirement Fund, 831 F.2d 407, 409 (2d Cir. 1987); Lucero v. Trinidad, 815 F.2d 1384, 1385 (10th Cir. 1987). *But cf.* Begley v. HHS, 966 F.2d 196, 198–99 (6th Cir. 1992) (the explanation cannot be merely the court's personal belief concerning the market, "ignor[ing] the only evidence" on the record); NAACP v. City of Evergreen, 812 F.2d 1332, 1336 (11th Cir. 1987) ("A trial judge cannot substitute its own judgment for uncontradicted evidence without record support."); Black Grievance Comm. v. Philadelphia Elec. Co., 802 F.2d 648, 657 (3d Cir. 1986) (district court erred in using hourly rates other than those set out in uncontested affidavits), *vacated on other grounds*, 483 U.S. 1015 (1987).

129. *See, e.g.,* Pressley v. Haeger, 977 F.2d 295, 299 (7th Cir. 1992) (award vacated where trial court used lower than market rate for work of second and third chairs at trial, presumably because it felt their rate should be less than that of lead attorney: "Prevailing plaintiffs are entitled not to a 'just' or 'fair' price for legal services, but to the *market* price for legal services.") (emphasis in original).

130. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

advances discrete, essentially unrelated claims,[131] and prevails on some but not others, it should not be compensated for work on the unsuccessful claims.[132] (In documenting their work, plaintiffs' attorneys are expected, where possible, to segregate work performed by claim.[133]) However, in the majority of cases, courts have rejected the contention that the lodestar should be adjusted downward for unsuccessful claims, usually finding that the successful and unsuccessful claims were legally or factually intertwined or that counsel devoted most of its time to the litigation as a whole.[134] The following exceptions may be instructive:

Where the plaintiff alleged that his discharge from public employment was in retaliation for exercising his First Amendment rights and that the lack of a pretermination hearing violated due process, and he prevailed on the due process claim but not the First Amendment claim, the two claims were so

131. That is, claims not involving "a common core of facts or . . . based on related legal theories." *Id*. at 435.

132. *Hensley*, 461 U.S. at 435. As the Seventh Circuit put it: *"Hensley* permits the court to award fees for losing arguments in support of prevailing claims, but not for losing claims." Pressley v. Haeger, 977 F.2d 295, 298 (7th Cir. 1992).

133. *Hensley*, 461 U.S. at 437. *See also* Von Clark v. Butler, 916 F.2d 255, 259 (5th Cir. 1990) (award reduced where plaintiffs submitted summaries of time sheets and claimed the summaries pertained only to work on their successful claim); Norman v. Housing Auth., 836 F.2d 1292, 1303 (11th Cir. 1988) ("fee counsel should have maintained records to show the time spent on the different claims"). However, the First Circuit maintains that "[i]f the fee-seeker properly documents her claim and plausibly asserts that the time cannot be allocated between successful and unsuccessful claims, it becomes the fee-target's burden to show a basis for segregability." Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992).

134. *See, e.g.*, Williams v. Roberts, 904 F.2d 634, 640 (11th Cir. 1990) (plaintiff lost transfer and demotion claims but won discharge claim); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 475 (3d Cir. 1989), *cert. denied*, 494 U.S. 1068 (1990) (successful RICO claim, unsuccessful trespass claim based on same evidence); Abshire v. Walls, 830 F.2d 1277, 1282–83 (4th Cir. 1987) (won strip search claim; lost false arrest, false imprisonment, and several other related claims); Dominic v. Consolidated Edison Co. of N.Y., 822 F.2d 1249, 1259–60 (2d Cir. 1987) (won retaliation claim; lost discrimination claim).

distinct that the district court did not err in discounting hours spent on the unsuccessful claim.[135]

Where the plaintiff prevailed against several state officials but the court dismissed claims against the governor and the attorney general, work in unsuccessfully defending against motions to dismiss was properly held noncompensable: hours expended on claims against dismissed defendants are compensable "if 'plaintiff can establish that such hours also were fairly devoted to the prosecution of the claim[s] against' the defendants over whom plaintiff prevailed. . . . [T]he court only eliminated those hours specifically attributable to defending against the motions to dismiss the Governor and Attorney General. The hours worked on those motions did not further successful claims."[136]

Where the plaintiffs' respective claims for partial and total disability under workers' compensation were based on "different factual theories" and "different legal theories," a deduction for incomplete success was in order.[137]

In *Hensley*, the Court did not limit downward adjustments for incomplete success to situations involving unrelated claims. Rather, the Court instructed that even if claims are closely related, or there is just one claim, a downward adjustment to the lodestar may be appropriate if the plaintiff achieved only limited success.[138] In such a case, the gauge of success is the result of the lawsuit in terms of relief; there should not be a downward adjustment simply because not every argument or theory prevailed.[139] Many defendants have asked courts to reduce awards

135. Winter v. Cerro Gordo Cty. Conservation Bd., 925 F.2d 1069 (8th Cir. 1991).

136. Rode v. Dellarciprete, 892 F.2d 1177, 1186 (3d Cir. 1990).

137. Hyman Constr. Co. v. Brooks, 963 F.2d 1532, 1539 (D.C. Cir. 1992).

138. Hensley v. Eckerhart, 461 U.S. 424, 435–36 (1983). The Court noted that "[t]here is no precise rule or formula" for determining the extent of the reduction. Rather, the court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified." *Id*. at 436.

139. *Id*. at 435–37. *See* Pressley v. Haeger, 977 F.2d 295, 298 (7th Cir. 1992) ("*Hensley* permits the court to award fees for losing arguments in support of prevailing claims.").

because of the plaintiff's unimpressive results, even where the plaintiff prevailed on all claims, or where the unsuccessful claims were closely related to the successful claims. Courts have usually rejected these arguments.[140] The exceptions are generally in extreme circumstances.[141]

An obvious case of limited success is an award of only nominal damages. The Supreme Court recently held that the plaintiff receiving such a judgment may be awarded "low fees or no fees,"[142] but it did not say that all awards of nominal damages must result in a denial of fees or significant downward adjustment—the "extent of success" inquiry still applies.[143] The Court provided little guidance as to how to gauge the success of a party receiving nominal damages,[144] but Justice O'Connor's concurrence cited several relevant factors: "A substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical"[145] and less

140. *See, e.g.,* Grant v. Martinez, 973 F.2d 96, 101 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 978 (1993); Herrington v. County of Sonoma, 883 F.2d 739, 745 (9th Cir. 1989); Jackson v. Crews, 873 F.2d 1105, 1109–10 (8th Cir. 1989).

141. *See, e.g.,* Fleming v. Ayers & Assoc., 948 F.2d 993, 999 (6th Cir. 1991) (no abuse of discretion to reduce award where plaintiff lost at trial and prevailed only on a claim suggested to her by the court post-trial, and even on that claim she received only a portion of back pay, although she requested reinstatement and full back pay); Gilbert v. Little Rock, Ark., 867 F.2d 1063, 1066–67 (8th Cir.) (upholding downward adjustment where plaintiffs lost on most claims and most individual plaintiffs received no relief), *cert. denied,* 493 U.S. 812 (1989); Spanish Action Comm. v. Chicago, 811 F.2d 1129, 1133–36 (7th Cir. 1987) (80% reduction where plaintiff sought primarily punitive damages and won only compensatory damages, and against only one of many defendants).

142. Farrar v. Hobby, 113 S. Ct. 566, 575 (1992).

143. The Fifth Circuit had reversed on the ground that a plaintiff who wins only nominal damages is not a prevailing party. The Supreme Court rejected that view (*see supra* text accompanying notes 24–25) but held that such a plaintiff, albeit a prevailing party, may be denied an award based on lack of success.

144. Although the Court found fees inappropriate in the case *sub judice*, it gave little explanation apart from observing that plaintiff, who sought $17 million in damages, had "accomplished little." 113 S. Ct. at 574. The majority did not respond to the dissent's view that, having determined that plaintiff was a prevailing party, the Court should have remanded for the trial court to assess what, if anything, would be a reasonable award under the circumstances.

145. *Id*. at 578 (O'Connor, J., concurring).

deserving of fees. Thus, the relief sought by the plaintiff is a consideration. However, this factor is not necessarily decisive, because "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved."[146] The court should look to the importance of the issue on which the plaintiff prevails, for example, whether the plaintiff's success serves "some public goal," such as deterring misconduct.[147]

Lower courts have wrestled with the "partial success" inquiry in various other situations:

Where the plaintiff's judgment was vacated by the Supreme Court but reinstated on remand, the plaintiff was entitled to compensation for unsuccessfully opposing the defendant's petition for *certiorari*: "If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings. Here, although the Supreme Court vacated our judgment, the Court's order was simply a temporary setback on the way to a complete victory for plaintiff. . . . [A] plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage."[148]

However, where the court of appeals vacated a judgment for the plaintiffs and remanded for retrial, and the plaintiffs then dropped the suit because they had already achieved much of the desired relief, the appeals court upheld the denial of compensation for work on the unsuccessful appeal: It may be proper to award fees for an unsuccessful appeal if the plaintiff prevails on retrial, the court said, "[b]ut in this case, the litigants decided to abandon their claims after losing on appeal. . . . Although they were prevailing parties in the case overall, it is clear that nothing associated with the appeal contributed to any favorable result achieved by the litigation."[149]

146. *Id*.
147. *Id*.
148. Cabrales v. Los Angeles, 935 F.2d 1050, 1053 (9th Cir. 1991).
149. Clark v. Los Angeles, 803 F.2d 987, 993 (9th Cir. 1986).

Where the plaintiffs received fees for obtaining a favorable consent decree, they were also entitled to fees for unsuccessfully defending against the defendant's motion to modify the consent decree:

> [the] plaintiffs' work . . . was directed toward the protection of rights originally and unambiguously vindicated in the consent decree . . . . [I]n holding that the modification should be allowed, we found it necessary to review and evaluate the full range of related reforms that were . . . implemented by the terms of the consent decree. . . . The district court did not abuse its discretion or err as a matter of law in concluding that the matters at issue . . . were so intertwined with the original claims that attorneys' fees for work on those proceedings should be awarded as to a still "prevailing party."[150]

Where the plaintiffs prevailed on one of six unrelated claims, the Seventh Circuit cautioned that, on remand, it would be error to compensate counsel for only one-sixth of the total hours expended, because some time was spent on the litigation as a whole, for example, jury selection. The proper method is to estimate how much time would have been required if the plaintiffs had pursued only the successful claim.[151]

The Seventh Circuit has observed that confusion can arise if a district court deducts from the plaintiff's proposed award for *both* partial success and excessive hours. To avoid this problem, the court set forth a clear methodology:

> First the district court should eliminate all hours claimed that are either not "reasonably expended" or inadequately explained. Only then should it adjust the total number of "reasonably expended" hours so that the final award is reason-

150. Plyler v. Evatt, 902 F.2d 273, 281 (4th Cir. 1990). The court added that its holding "should not be construed as guaranteeing attorneys' fees after resolution of every dispute involving the consent decree. The initial status of 'prevailing party' does not entitle appellees to compensation when resistance to modification is unsuccessful and the position taken was not essential to the preservation of the integrity of the consent decree as a whole." *Id*.

151. Ustrak v. Fairman, 851 F.2d 983, 989 (7th Cir. 1988). *Accord* Schultz v. Hembree, 968 F.2d 830, 834 (9th Cir.), *reprinted with dissent*, 975 F.2d 572 (1992).

able in relation to the overall results obtained by the plaintiff.[152]

### Rejecting a Rule 68 Settlement Offer

In *Marek v. Chesny*,[153] the Supreme Court held that under the civil rights fee-shifting statute, if the plaintiff rejects a settlement offer made pursuant to Federal Rule of Civil Procedure 68, and the offer proves more favorable to the plaintiff than the eventual judgment, attorneys' fees incurred after the offer are noncompensable. The Court so held because the statute provides for fees as "part of costs,"[154] thus bringing the fee award within the ambit of Rule 68's settlement rejection provision.[155] If, under a different fee-shifting statute, fees are not considered costs, a different result should obtain.[156] Of course, an award of fees is unaffected by the rejection of an informal settlement offer not made pursuant to Rule 68.[157]

### Disproportionately Low Damage Award

At least in cases advancing the public interest, the fact that the lodestar far exceeds the damage award is not itself grounds for a downward adjustment. In *Riverside v. Rivera*,[158] the plaintiffs, who were victimized by police misconduct, were awarded more than $200,000 in fees (based on the lodestar) even though the

152. Spanish Action Comm. v. Chicago, 811 F.2d 1129, 1138 (7th Cir. 1987).

153. 473 U.S. 1 (1985).

154. 42 U.S.C. § 1988 (1988).

155. Rule 68 states, in pertinent part, that "[a]t any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . . An offer not accepted shall be deemed withdrawn . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."

156. *See, e.g.*, International Nickel v. Trammel Crow Distrib., 803 F.2d 150, 157 n.2 (5th Cir. 1986) (rejection of Rule 68 offer did not preclude fee award where state fee-shifting statute authorized fees "in addition" to costs rather than "as part of costs").

157. *See, e.g.*, Cowan v. Prudential Ins., 728 F. Supp. 87, 91–92 (D. Conn.), *rev'd on other grounds*, 935 F.2d 522 (2d Cir. 1991).

158. 477 U.S. 561 (1986).

verdict was for just $33,000. The Court upheld the award, noting that the civil rights fee-shifting statute was adopted precisely because damages awards in civil rights cases are often small, which made it difficult for the plaintiffs to secure legal representation. However, only four justices joined the plurality opinion. Justice Powell cast the deciding vote in a concurrence which noted that the case involved the vindication of constitutional rights and a substantial gain to the public interest. He stated that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought," and noted that it is a "rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case."[159] The plurality did not say whether it agreed.

One district court, relying on Justice Powell's concurrence, interpreted *Rivera* to limit disproportionate fees to cases involving the public interest while requiring proportionality in cases involving only private damages. The Second Circuit reversed. The court acknowledged that "*Rivera* provides no guidance. It does not speak to a situation . . . where the monetary damage recovery benefits a single individual."[160] However, it laid down its own rule: The lodestar "should not be reduced simply because a plaintiff recovered a low damage award."[161] The Third Circuit has adopted the identical rule.[162] Likewise, the First and Seventh Circuits have said that "[disproportionality] alone does not make

159. *Id*. at 585, 586 n.3 (Powell, J., concurring) (emphasis in original).

160. Cowan v. Prudential Ins., 935 F.2d 522, 526 (2d Cir. 1991).

161. *Id*.

162. Davis v. Southeastern Pa. Transp. Auth., 924 F.2d 51, 55 (3d Cir. 1991); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 476–77 (3d Cir. 1989), *cert. denied*, 494 U.S. 1068 (1990) (rejecting contention that antiproportionality holding in *Rivera* applies only in civil rights cases); Cunningham v. City of McKeesport, 807 F.2d 49, 53–54 (3d Cir. 1986) (rejecting suggestion that disproportionate fee award is permissible only if suit advances substantial public interest), *cert. denied*, 481 U.S. 1049 (1987).

the award unreasonable."[163] The Fifth Circuit agrees that "the district court should avoid placing undue emphasis on the amount recovered."[164]

The First Circuit noted that disproportionality is nevertheless "a relevant factor to be considered in setting the size of the fee."[165] The court did not elaborate, but it appears that disproportionality could come into play when determining if counsel spent an unreasonable number of hours on the case in light of the probable outcome.[166]

Of course, an extreme case of disproportionality may result where the plaintiff receives nominal damages only. As noted, the Supreme Court held that in such cases it may be appropriate to award the plaintiff no fees or only low fees.[167]

### Factors Reflected in the Lodestar

District courts have been reversed for making downward adjustments based on factors that are subsumed in the lodestar. In one case, the district court based a downward adjustment on, *inter alia*, insufficient documentation and mediocre performance. The Ninth Circuit said that these factors should be reflected in the lodestar and are not a basis for adjusting the lodestar.[168] Simi-

163. Domegan v. Ponte, 972 F.2d 401, 421 (1st Cir. 1992), *vacated and remanded in light of* Farrar v. Hobby, 113 S. Ct. 1378 (1993); Cange v. Stotler & Co., 913 F.2d 1204, 1211 (7th Cir. 1990).

164. Von Clark v. Butler, 916 F.2d 255, 260 (5th Cir. 1990).

165. Domegan v. Ponte, 972 F.2d 401, 421 (1st Cir. 1992), *vacated and remanded in light of* Farrar v. Hobby, 113 S. Ct. 1378 (1993).

166. *See* Riverside v. Rivera, 477 U.S. 561, 590 (1986) (Rehnquist, C. J., dissenting) ("I find it hard to understand how an attorney can be said to have exercised 'billing judgment' in spending such huge amounts of time on a case ultimately worth only $33,350."). In the context of that case, Chief Justice Rehnquist's argument was rejected (i.e., the Court did not consider the hours expended unreasonable even though the damage award was low). However, the Court did not reject the notion that in some cases a small award would be relevant to a determination that counsel spent excessive time on the case.

167. *See supra* text accompanying note 142.

168. Cunningham v. Los Angeles, 859 F.2d 705, 710–13 (9th Cir. 1988). The court acknowledged that, in rare cases, quality of representation may be the basis for an adjustment to the lodestar; here, there was no showing that the mediocre performance was not subsumed in the lodestar.

larly, the Tenth Circuit held that a district court abused its discretion in making a downward adjustment based on simplicity of issues; that factor should be reflected in the lodestar.[169] Further, to make a reduction based on simplicity "could lead to the incongruous result of attorneys being less likely to take a case where a person's civil rights have been obviously and clearly violated."[170]

## upward adjustments

### Novelty or Complexity of Issues

The Supreme Court has stated on several occasions that the novelty and complexity of the litigation are reflected in the lodestar and should not be the basis of an upward adjustment.[171] Thus, the Eighth Circuit overturned an enhancement for "complexity of the case and the absence of court precedent," stating that "counsel expended greater time and effort [on account of these factors]. Consequently, counsel's lodestar figure directly reflects [these factors], and an enhancement . . . would constitute double counting."[172] Likewise, the Fifth Circuit rejected an enhancement based on novelty and difficulty because "[a]ll counsel competent to handle a case such as this one are expected to be able to deal with complex and technical matters; this expertise is reflected in their regular hourly rate. . . . Still further, the difficulty in the handling of the case is adequately reflected in the number of hours billed."[173]

### Exceptional Success or Quality of Representation

The Supreme Court has stated that exceptional results or quality of representation are reflected in the lodestar and thus are generally not a basis for an enhancement.[174] In a rare case, where the

169. Cooper v. Utah, 894 F.2d 1169, 1172 (10th Cir. 1990).

170. *Id*.

171. *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986) (Delaware Valley I); Blum v. Stenson, 465 U.S. 886, 898–900 (1984).

172. Hendrickson v. Branstad, 934 F.2d 158, 163 (8th Cir. 1991).

173. Shipes v. Trinity Indus., 987 F.2d 311, 321 (5th Cir. 1993).

174. Blum v. Stenson, 465 U.S. 886, 899 (1984).

success or quality transcends what can be expected given the hourly rates and number of hours expended, the lodestar may be enhanced.[175] The burden of documenting the appropriateness of such an upward enhancement rests on the applicant.[176] If an enhancement is granted, it must be accompanied by "detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the [lodestar]."[177]

Lower courts have heeded the admonition that an upward adjustment for outstanding representation should be rare. One exceptional case helps prove the rule: Counsel was appointed for a jury trial beginning three days later, took the case blind, and offered "superb representation under the most adverse circumstances."[178] More typical was a Fifth Circuit opinion reversing an enhancement for exceptional results where the "district court asserted that the prevailing rates for attorneys of similar skill, experience, and reputation were not sufficient to compensate

175. *Id*. at 898–900 (1984). That such enhancements should be rare was emphasized in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 567–68 (1986) (Delaware Valley I) (upward adjustment reversed because plaintiff "presented no specific evidence as to what made the results it obtained during this phase so 'outstanding' nor did it provide an indication that the lodestar figure . . . was far below awards made in similar cases where the court found equally superior quality of performance.").

176. *Delaware Valley*, 478 U.S. at 567–68; *Blum*, 465 U.S. at 898.

177. *Blum*, 465 U.S. at 900. Thus, for example, in Shipes v. Trinity Indus., 987 F.2d 311, 322 & n.9 (5th Cir. 1993), the Fifth Circuit said that the enhancement for exceptional results may have been warranted, since "victory was complete on all issues . . . resulted in a substantial award of monetary damages . . . and very importantly, [provided] future protection against discrimination in the form of injunctive relief." However, the court noted that enhancement based on exceptional results is proper in rare cases only and must be "supported by specific evidence and detailed findings by the district court." It remanded for the district court to determine "whether it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result after lengthy and protracted litigation."

178. Hollowell v. Gravett, 723 F. Supp. 107, 110 (E.D. Ark. 1989). *See also* Alberti v. Klevenhagen, 903 F.2d 352, 352 (5th Cir. 1990) (enhancement to compensate for "case undesirability" was proper where determination that enhancement was required to attract competent counsel for prison conditions litigation was supported by testimony from an expert economist on how the local market treats such cases).

[counsel at bar], but it articulated no basis for this finding."[179] Similarly, a First Circuit panel acknowledged the "strength of the attorneys' performance [and] the magnitude of their triumph," but it nevertheless reversed an upward adjustment: "[W]e see nothing in the record that indicates that the services and results overshadowed, or somehow dwarfed, the lodestar."[180]

### Delay in Payment

The Supreme Court has stated that a trial court has discretion to compensate the award recipient for delay in payment.[181] This can be achieved either by calculating the lodestar in current dollars or by factoring in interest after the lodestar has been computed using historic rates.[182] District courts should consult the law of their circuit to determine when it is necessary to take delay in payment into account,[183] whether to calculate an adjustment by using current rates or historic rates with interest factored in,[184]

179. Alberti v. Klevenhagen, 896 F.2d 927, 936 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

180. Lipsett v. Blanco, 975 F.2d 934, 942–43 (1st Cir. 1992).

181. Missouri v. Jenkins, 491 U.S. 274, 284 (1989). This rule does not apply in suits against the United States. In Library of Congress v. Shaw, 478 U.S. 310 (1985), the Court held that the "no-interest" rule, preventing recovery of interest from the United States absent a waiver of sovereign immunity, applies to fee awards. Therefore, an award against the United States should generally not be enhanced for delayed payment. The no-interest rule does not apply to suits against states. *Jenkins*, 491 U.S. at 280–82 & n.3.

182. 491 U.S. at 284. *See In re* Washington Pub. Power Supply Sys. Sec. Litig., Nos. 91-16669, 91-16685, 91-16687, 1994 U.S. App. LEXIS 5256, at *41 (9th Cir. Mar. 23, 1994) (district court abused its discretion by using historical rates and not factoring in interest).

183. *See, e.g.*, Gates v. Deukmejian, 987 F.2d 1392, 1407 (9th Cir. 1992) ("length of the delay in payment . . . is a consideration in deciding whether an award of current rather than historic rates is warranted."); Smith v. Freeman, 921 F.2d 1120, 1123 (10th Cir. 1990) (where delay is *de minimus* and there is no showing that counsel's hourly rate increased from the time the action commenced, enhancement is inappropriate).

184. *See, e.g.*, Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992) (in protracted cases, court should apply current rate to recent phase of litigations and historic rate to earlier phases), *cert. denied*, 113 S. Ct. 978 (1993); Norman v. Housing Auth., 836 F.2d 1292, 1302 (11th Cir. 1988) (expressing preference for current rates).

and, in the latter case, what interest rate to use[185] and from what date to begin the interest calculation.[186]

### Risk

In *Burlington v. Dague*,[187] the Court held that the risk or contingency of nonrecovery is not a basis for an upward enhancement.[188]

### Nonmarket Factors

Some upward adjustments have been reversed because they were based on factors that did not pertain to the market rate for fees. For example, the Fifth Circuit reversed an enhancement that was based on potential conflicts of interest and the fact that the time expended on the case prevented counsel from obtaining other

185. *See, e.g.*, Alberti v. Klevenhagen, 896 F.2d 927, 938 (5th Cir.) (court erred in using municipal bond interest rates instead of prime rate), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990); Lattimore v. Oman Constr., 868 F.2d 437, 438 n.2 (11th Cir. 1989) (approving use of IRS adjusted prime rate); Skelton v. General Motors, 860 F.2d 250, 255 (7th Cir. 1988), *cert denied*, 493 U.S. 810 (1989) (should use prime rate).

186. Most circuits require calculation to begin from the date the trial court determines fee entitlement, not the date it quantifies the award. Jenkins v. Missouri, 931 F.2d 1273, 1276 (8th Cir.), *cert. denied*, 112 S. Ct. 338 (1991); Mathis v. Spears, 857 F.2d 749, 760 (Fed. Cir. 1988); Copper Liquor v. Adolph Coors, 701 F.2d 542 (5th Cir. 1983) (per curiam). *Contra* Fleming v. County of Kane, 898 F.2d 553, 565 (7th Cir. 1990) (selecting date of quantification, without explanation). On a related matter, the court should use care to select the historic rate of the appropriate time period. *See In re* Continental Illinois Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992) ("district judge awarded attorneys' fees, on the basis of 1988 billing rates, not in 1988 but late in 1990, leaving a gap of two years.").

187. 112 S. Ct. 2638 (1992).

188. In Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) (Delaware Valley II), the court reversed a risk enhancement, but only four justices maintained that such enhancements are always inappropriate. Justice O'Connor voted to reverse the enhancement in the case at bar, but her concurrence maintained that enhancement for risk is sometimes in order. Justice Blackmun's dissent, joined by three justices, agreed that such enhancements are sometimes in order but differed on what circumstances warrant them. The result, pre-*Dague*, was confusion in the lower courts over whether and when to grant such enhancements.

clients; the court noted that these factors are not bases for increasing fee rates in the private sector.[189]

### *Awards to Defendants*

When defendants request fee awards, the calculation is largely the same, but additional factors come into play. Denying or reducing fees is appropriate if the plaintiff is impecunious,[190] and the Seventh Circuit finds a reduction in order if the defendant fails to mitigate (for example, by moving for dismissal or summary judgment).[191] A reduction for failure to mitigate could apply to prevailing plaintiffs as well—since they are entitled to compensation only for "reasonable" hours—but will more likely apply to defendants, since defending against frivolous suits often does not require substantial time.[192]

### *Procedures*

#### case law

The Supreme Court has said little about the procedural aspects of fee disputes, apart from its admonition that such disputes should not spawn "a second major litigation."[193] The courts of appeals, however, have established certain norms.

189. Alberti v. Klevenhagen, 896 F.2d 927, 934 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

190. *See, e.g.*, Toliver v. County of Sullivan, 957 F.2d 47, 49–50 (2d Cir. 1992); Cannon v. C.I.R., 949 F.2d 345, 345 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 3030 (1992); Alizadeh v. Safeway, 910 F.2d 234, 238 (5th Cir. 1990) (award may be reduced but not eliminated); Miller v. Los Angeles, 827 F.2d 617, 621 n.5 (9th Cir. 1987); Munson v. Friske, 754 F.2d 683, 697–98 (7th Cir. 1985); Charves v. Western Union, 711 F.2d 462, 465 (1st Cir. 1983); Durrett v. Jenkins Brickyard, 678 F.2d 911, 917 (11th Cir. 1982) (award may be reduced but not eliminated). Although a defendant's indigence may be a special circumstance counseling denial of an award to a prevailing plaintiff (*see, e.g., Toliver*, losing party's resources may be taken into account in any fee case), ability to pay plays a more central role when defendants seek an award. *See, e.g.*, Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1544 (11th Cir. 1985) (where defendant seeks award, plaintiff's financial resources are a "thirteenth factor" to add to the twelve *Johnson* factors).

191. Leffler v. Meer, 936 F.2d 981, 987 (7th Cir. 1991).

192. *See* Hamilton v. Daley, 777 F.2d 1207, 1215–16 (7th Cir. 1985).

193. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

The Tenth Circuit has said that "[n]ormally we would expect the district court to hold a[n evidentiary] hearing" before awarding fees.[194] Although none of the other circuits go this far,[195] several have suggested that an evidentiary hearing is necessary in certain circumstances.[196] The Eighth Circuit said that when "serious factual disputes surround an application for attorney fees, a hearing is required."[197] Likewise, the D.C. Circuit requires a hearing where "material issues of fact that may substantially affect the size of the award remain in well-founded dispute."[198] The Ninth Circuit stated that "[w]hen a factual dispute exists as to whether a party prevailed, it is wise for the district court to conduct a hearing to resolve the conflict"[199] and suggested that a hearing is required when there are vigorous disputes over the elements constituting the fee award.[200] The Fifth Circuit requires a hearing where there are "apparent factual disputes,"[201] especially if such a hearing is requested.[202] The Eleventh Circuit maintains that a hearing is not necessary if disputes concern "matters as to which the courts possess exper-

194. Wulf v. Wichita, 883 F.2d 842, 875–76 (10th Cir. 1989) (quoting Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1205 n.16 (10th Cir. 1986)).

195. For cases rejecting the contention that a hearing must be or should have been held, see Dejesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 7 (1st Cir. 1991); Carey v. Crescenzi, 923 F.2d 18, 22 (2d Cir. 1991); Norman v. Housing Auth., 836 F.2d 1292, 1303 (11th Cir. 1988); Bailey v. Heckler, 777 F.2d 1167, 1171 (6th Cir. 1985); Thomason v. Schweiker, 692 F.2d 333, 336 (4th Cir. 1982); National Ass'n of Concerned Veterans, 675 F.2d 1319, 1330 (D.C. Cir. 1982). Even the Tenth Circuit acknowledges that in certain cases a hearing would not be productive. *Mares*, 801 F.2d at 1205 n.16.

196. An amendment to Fed. R. Civ. P. 54, quoted *infra* text accompanying note 222, clarifies that district courts may adopt rules establishing special procedures to resolve fee-related disputes without resorting to an extensive evidentiary hearing.

197. Herrera v. Valentine, 653 F.2d 1220, 1223 (8th Cir. 1981).

198. National Ass'n of Concerned Veterans, 675 F.2d 1319, 1330 (D.C. Cir. 1982).

199. Church of Scientology v. U.S. Postal Service, 700 F.2d 486, 494 (9th Cir. 1983).

200. *Id*.

201. Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 329 (5th Cir. 1981).

202. King v. McCord, 621 F.2d 205, 206 (5th Cir. 1980).

tise . . . [, such as] reasonableness of the fee, the reasonableness of the hours and the significance of the outcome," but is necessary "where there is a dispute of material historical fact such as whether or not a case could have been settled without litigation or whether attorneys were duplicating each other's work."[203]

Several courts have held that if the district court orders an award lower than that proposed and documented by the plaintiff, it must provide an explanation.[204] Numerous reversals have resulted because the district court failed to explain how it arrived at a fee award.[205] The Eleventh Circuit has stated that the court "must articulate the decisions it made, give principled reasons for those decisions, and show its calculation. . . . If the court disallows hours, it must explain which hours are disallowed and show why an award of these hours would be improper."[206] Likewise, the Sixth Circuit has stated that "the district court must not only articulate findings of fact and conclusions of law regarding the *inclusion* of hours amounting to the fee awarded, but those regarding the *exclusion* of hours as well."[207] The First Circuit has stated that the court must "explicate the basis for its fee awards . . . . Although findings are necessary, however, they need not be 'infinitely precise,' . . . 'deluged with details,' or even 'fully articulated.'"[208]

Despite these norms, at least in certain circumstances most circuits permit a trial court to make deductions without identifying exactly what hours it disallows. The Tenth Circuit endorses a

203. Norman v. Housing Auth., 836 F.2d 1292, 1304 (11th Cir. 1988).

204. *See* United Steelworkers v. Phelps Dodge, 896 F.2d 403, 406 (9th Cir. 1990); Cunningham v. City of McKeesport, 807 F.2d 49 (3d Cir. 1986), *cert. denied,* 481 U.S. 1049 (1987); Gekas v. Attorney Registration & Disciplinary Comm'n, 793 F.2d 846, 851 (7th Cir. 1986).

205. *See, e.g.,* Fleming v. Ayers & Assocs., 948 F.2d 993, 1000 (6th Cir. 1991); Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. 886 F.2d 1545, 1556–57 (9th Cir. 1989), *cert. denied,* 494 U.S. 1017 (1990); Student Public Research Group v. AT&T, 842 F.2d 1436 (3d Cir. 1988); Norman v. Housing Auth., 836 F.2d 1292, 1304 (11th Cir. 1988); Johnson v. New York City Transit Auth., 823 F.2d 31, 33 (2d Cir. 1987).

206. *Norman,* 836 F.2d at 1304.

207. Glass v. HHS, 822 F.2d 19, 22 (6th Cir. 1987) (emphasis in original).

208. Foley v. City of Lowell, 948 F.2d 10, 20 (1st Cir. 1991) (citations omitted).

"general reduction of hours claimed in order to achieve what the court determines to be a reasonable number."[209] The Seventh Circuit held that a district court acted within its discretion when it cut a lump sum rather than evaluate every entry: This was a "practical means of trimming fat" from an inadequately documented petition.[210] The D.C. Circuit has endorsed this method,[211] as have the Second and Ninth Circuits, in cases where the fee petition is voluminous.[212] Likewise, the Third Circuit, which once stated that the district court must identify all disallowed hours,[213] permitted a 10% pro rata reduction in compensable hours in light of the "complex and lengthy record."[214] The Ninth Circuit emphasized that when a court makes a percentage reduction, it still must review the record, and it should explain why it chose the particular percentage.[215]

The Seventh Circuit also approved a reduction arrived at by sampling billable time sheets. The district court had closely examined two or three particular tasks described in the fee application and applied its findings to the remaining hours claimed. The court informed counsel that it would do this and gave opposing counsel the opportunity to suggest the specific work to be scrutinized. Although it affirmed, the Seventh Circuit noted that "it might be a better practice to allow both the party opposing the

209. Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1203 (10th Cir. 1986).

210. Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986); *In re* Ohio-Sealy Mattress, 776 F.2d 646 (7th Cir. 1985). More recently, the Seventh Circuit expressed reservations about a percentage reduction where a great deal of money is at stake. *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 570 (7th Cir. 1992) (common fund case).

211. Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc).

212. Gates v. Deukmejian, 987 F.2d 1392, 1399 (9th Cir. 1992); *In re* Agent Orange Prod. Liability, 818 F.2d 226, 237–38 (2d Cir. 1987) (common fund case).

213. *In re* Fine Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984).

214. Daggett v. Kimmelman, 811 F.2d 793, 797–98 (3d Cir. 1987). However, the court suggested that a different result would have obtained if the reduction had been significantly higher.

215. Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1992).

fee award and the party seeking fees to suggest the individual tasks to be sampled."[216]

The Third Circuit has held that the district court may not decrease a fee award based on factors not raised by the adverse party.[217] The Fourth Circuit appears to disagree.[218] The Seventh Circuit has stated that the plaintiff is entitled to be heard before the court makes a significant reduction in requested hours.[219]

The Ninth and Tenth Circuits have rejected the contention that the award of attorneys' fees may be submitted to a jury.[220] The Fifth Circuit has held that there is no Seventh Amendment right to a jury trial on fees, but it is permissible for a jury to determine fees.[221]

### amendments to rule 54

The procedural requirements and options available to judges faced with fee disputes were clarified by recent amendments to Federal Rule of Civil Procedure 54(d)(2):

> (C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for

216. Evans v. City of Evanston, 941 F.2d 473, 477 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3028 (1992). The Seventh Circuit reiterated its approval of the sampling method in *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 572–73 (7th Cir. 1992). "Sampling" is discussed in detail in Part 4 in connection with the case management of attorneys' fees.

217. Bell v. United Princeton Properties, 884 F.2d 713, 719 (3d Cir. 1989); Cunningham v. City of McKeesport, 753 F.2d 262, 267 (3d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986).

218. Broyles v. Director, 974 F.2d 508, 510 (4th Cir. 1992) ("Although [defendant] has not challenged the number of hours claimed, we have the responsibility of determining whether the fees sought are *reasonable*") (emphasis in original).

219. Smith v. Great Amer. Restaurants, 969 F.2d 430, 440 (7th Cir. 1992).

220. MidAmerica Federal S & L v. Shearson/American, 962 F.2d 1470, 1475 (10th Cir. 1992); Hatrock v. Jones & Co., 750 F.2d 767, 776 (9th Cir. 1984).

221. Resolution Trust v. Marshall, 939 F.2d 274, 279 (5th Cir. 1991). The court did not say whether it is wholly within the discretion of the court to have a jury determine fees or whether consent of the parties is required.

which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.[222]

## Issues on Appeal

The legal issues discussed above apply to the courts of appeals as well as to the district courts. The following issues apply only to the courts of appeals.

### *Timing of Appeal*

The Third, Sixth, and Ninth Circuits have rejected the contention that Federal Rule of Appellate Procedure 39(d) requires an appeal from a fee order to be filed within fourteen days.[223] They held that Rule 39(d) applies only to certain costs specified in the text of the rule—briefs, appendices, and copies of records allowed under 39(c)—but not to attorneys' fees. The D.C. Circuit has held to the contrary.[224] The First, Third, Fifth, Sixth, and Eleventh Circuits have held that an appellate court's order that

222. Fed. R. Civ. P. 54(d)(2)(C) and (D). Rule 54(d)(2)(E) exempts from the Amended Rule a request for attorneys' fees as a sanction.

223. McDonald v. McCarthy, 966 F.2d 112, 114 (3d Cir. 1992); Kelley v. Metropolitan Cty. Bd. of Educ., 773 F.2d 677, 682 n.5 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1083 (1986); Northern Plains Resource Council v. EPA, 670 F.2d 847, 848 n.1 (9th Cir. 1982), *vacated on other grounds*, 464 U.S. 806 (1983).

224. Montgomery & Assoc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (motion for fees untimely because not filed within the Rule 39(d) time period).

each party bear its own costs does not preclude an award of attorneys' fees.[225] The Second Circuit has held to the contrary.[226]

As a result of Supreme Court dicta,[227] district courts generally view proceedings on the merits as procedurally distinct from post-judgment fee proceedings. For example, they often enter separate orders on the merits and on the fee request. When this occurs, a separate notice of appeal from the fee decision must be filed.[228]

The Third, Fifth, Sixth, Eighth, and Eleventh Circuits have held that an order determining liability for fees but not establishing the amount is not a final, appealable order.[229] The Seventh Circuit disagrees.[230]

225. McDonald v. McCarthy, 966 F.2d 112, 115–18 (3d Cir. 1992); Chemicals Mfrs. Ass'n v. United States EPA, 885 F.2d 1276, 1278 (5th Cir. 1989); Lattimore v. Oman Constr., 868 F.2d 437, 440 n.6 (11th Cir. 1989); Kelley v. Metropolitan Cty. Bd. of Educ., 773 F.2d 677, 681 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1083 (1986); Robinson v. Kimbrough, 652 F.2d 458, 463 (5th Cir. 1981); Farmington Dowel Prod. v. Forster Mfg. Co., 421 F.2d 61, 91 (1st Cir. 1969). In so holding, these courts found that attorneys' fees are distinct from the costs referred to in Rule 39. *See also* Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980) (because fees and costs are distinct, appeal from order taxing costs did not give court of appeals jurisdiction over fee award). Some of these cases were decided before the Supreme Court's ruling in Marek v. Chesny, 475 U.S. 717 (1986), that fees are part of costs under Rule 68. However, the Third and Sixth Circuits distinguished *Marek* (*see McDonald*, 966 F.2d at 116; *Kelley*, 773 F.2d at 681–82 n.5), noting that Fed. R. Civ. P. 68 is silent as to what constitutes costs, whereas Fed. R. App. P. 39(d) specifically enumerates costs and makes no mention of attorneys' fees.

226. Toliver v. County of Sullivan, 957 F.2d 47 (2d Cir. 1992). As noted, the D.C. Circuit has held that fees are part of costs under Rule 39, Montgomery & Assoc. v. Commodity Futures Trading Comm'n, 816 F.2d 783 (D.C. Cir. 1987), and thus would presumably agree with the Second Circuit if confronted with this issue.

227. *See supra* note 15 and accompanying text.

228. McDonald v. McCarthy, 966 F.2d 112, 118 (3d Cir. 1992); Quave v. Progress Marine, 918 F.2d 33, 34 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2012 (1991); Art Janpol Volkswagon v. Art Janpol Motors, 767 F.2d 690, 697 (10th Cir. 1985); Exchange Nat'l Bank of Chicago v. Daniels, 763 F.2d 286, 291–92 (7th Cir. 1985).

229. Pennsylvania v. Flaherty, 983 F.2d 1267, 1276–77 (3d Cir. 1993); Echols v. Parker, 909 F.2d 795 (5th Cir. 1990); Gates v. Central Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986); Morgan v. Union Metal, 757

Interim fee awards, based on success of the litigation in part while other issues remain to be resolved, are generally not appealable.[231] However, the Fifth, Sixth, Seventh, and Ninth Circuits have held that they are appealable under the collateral order doctrine if the defendant would otherwise have trouble recovering its money after the litigation.[232]

### *Scope of Review*

The Supreme Court has stated that district courts' factual determinations with respect to a fee award should be reviewed deferentially under an abuse of discretion standard.[233] The First and Third Circuits have said that the legal standards used by the district court are given plenary review.[234] Similarly, the Ninth and Tenth Circuits have remarked that, although the amount of a fee award is generally reviewed for abuse of discretion, whether the plaintiff is entitled to any award is usually a question of statutory interpretation, reviewed *de novo*.[235]

F.2d 792, 794 (6th Cir. 1985); Fort v. Roadway Express, 746 F.2d 744, 747 (11th Cir. 1984). In Andrews v. Employees Retirement Plan, 938 F.2d 1245, 1248 (11th Cir. 1991), the Eleventh Circuit reaffirmed this position but nevertheless entertained the appeal because, on the facts of the case, "we see no practical purpose in delaying resolution of the attorneys' fee issue."

230. John v. Barron, 897 F.2d 1387, 1390 (7th Cir.), *cert. denied*, 498 U.S. 821 (1990); Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 826–27 (7th Cir. 1984).

231. Shipes v. Trinity Indus., 883 F.2d 339 (5th Cir. 1989).

232. People Who Care v. Rockford Bd. of Educ., 921 F.2d 132, 134 (7th Cir. 1991); Shipes v. Trinity Indus., 883 F.2d 339 (5th Cir. 1989); Rosenfeld v. United States, 859 F.2d 717, 721–22 (9th Cir. 1988); Webster v. Sowders, 846 F.2d 1032, 1035 (6th Cir. 1988).

233. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). However, such review requires a district court to "provide a concise but clear explanation for its reasons for the fee award." *Id*.

234. Domegan v. Ponte, 972 F.2d 401, 406 (1st Cir. 1992), *vacated and remanded on other grounds*; 113 S. Ct. 1378 (1993); Bell v. United Princeton Properties, 884 F.2d 713, 718 (3d Cir. 1989).

235. *See, e.g.*, Schultz v. Hembree, 968 F.2d 830, 832 n.2 (9th Cir.), *reprinted with dissent*, 975 F.2d 572 (1992); Homeward Bound, Inc. v. Hissom Memorial Hosp., 963 F.2d 1352 (10th Cir. 1992). The Ninth Circuit has also said that "any elements of legal analysis and statutory interpretation which figure in the district court's [attorneys' fees] decision are reviewable de novo."

### *May the Court of Appeals Calculate the Award?*

As a rule, when a court of appeals finds a calculation of fees to be erroneous, it remands the case for recalculation. However, on occasion the courts of appeals have decided the matter themselves in order to further the administration of justice. The Seventh Circuit suggests that where the case has been in litigation for years, this "shortcut" is justifiable.[236] The First Circuit finds a remand unnecessary where "the record is sufficiently developed that we can apply the law to the facts before us" to recalculate the award in an essentially "mechanical" manner.[237]

Coalition for Clean Air v. Southern Cal. Edison, 971 F.2d 219, 229 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1361 (1993).

236. *See* Ustrak v. Fairman, 851 F.2d 983, 989 (7th Cir. 1988) (because remand can "prolong litigation on what to begin with is a collateral matter, . . . [p]ractice has trumped theory . . . [and] in many cases in this and other circuits the court of appeals has made the adjustment in the fee award . . . without bothering to remand the case.").

237. Lipsett v. Blanco, 975 F.2d 934, 943 (1st Cir. 1992).

# 2
# Common Fund and Substantial Benefit

## Common Fund

Courts may award fees from a common fund where a suit produces a recovery for persons other than the litigant or principal litigant. The most frequent instance is the class action. Indeed, analysis of the common fund (sometimes called the "equitable fund" or "fund-in-court") doctrine requires a word at the outset about the relationship between class actions and common funds. Not all class actions are common fund cases. A class may win injunctive relief only or may create a fund but be ineligible for a common fund recovery for one of several reasons discussed below. In such cases, a fee award may still be in order if recovery is pursuant to a fee-shifting statute.

As we shall see, just as not all class actions are common fund cases, the converse is also true: Not all common fund cases are class actions (though most are).

The threshold questions with respect to fee awards are whether a fee-shifting statute applies and whether the common fund (or substantial benefit) doctrine applies. If a fee-shifting statute applies, the inquiry described in Part 1 is in order—regardless of whether the case is a class action. If the common fund doctrine applies, the inquiry outlined below is in order—again,

regardless of whether the claim is a class action.[238] Therefore, no special guidance is needed with respect to the law of attorneys' fees in class actions.[239]

A brief review of four Supreme Court cases establishes the parameters of the common fund doctrine. In the 1881 case of *Trustees v. Greenough,*[240] a bondholder's suit resulted in recovery of trust assets and realization of dividend payments to himself and other bondholders. The Court held that he should be reimbursed from the trust fund for his attorneys' fees lest the other bondholders be unjustly enriched at his expense.[241] A few years later, in *Central Railroad & Banking Co. v. Pettus*,[242] the Court expanded the common fund doctrine, holding that the plaintiff's counsel in a class action not only had standing to seek fees reimbursement for his client but also was eligible for an award of his own (not limited to what the client owed him or barred if that had been paid in full). The Court reasoned that otherwise, the class members would be unjustly enriched at counsel's expense.

*Greenough* and *Pettus* involved a kind of recovery that differs fundamentally from statutory fee shifting in that fees are shared by the beneficiaries of the lawsuit rather than shifted to the losing party. They established that the common fund doctrine gives rise to two kinds of claims: claims by plaintiffs to have their legal costs shared and claims by attorneys for an award other than that

238. It is also possible for a party (in either a class action or a non-class action) to qualify for a fee award under *both* a fee-shifting statute and the common fund doctrine. The proper approach to that unusual situation is addressed *infra* notes 288–89 and accompanying text.

239. However, the management of attorneys' fees in class actions presents unique issues and options. First, the selection of class counsel can be tied to the attorneys' fees process. Second, Fed. R. Civ. P. 23(e) requires court approval of class action settlements, many of which include attorneys' fees, and courts can take measures that make the settlement of fees fairer and easier for the court to review. Both matters are addressed in Part 4. *See infra* text accompanying notes 436–40 and p. 117.

240. 105 U.S. 527 (1881).

241. The Court suggested that fees might also be recovered directly from the other beneficiaries. *Id.* at 532. However, there are no reported cases in which such a recovery has been ordered. *Cf.* Vincent v. Hughes Air West, 557 F.2d 759, 770 (9th Cir. 1977) ("any claim must be satisfied out of the fund").

242. 113 U.S. 116 (1885).

paid or owed by the client.[243] (As in statutory fee-shifting cases, intervenors and their attorneys are also eligible for an award.[244]) Each of the two kinds of claims prevents unjust enrichment of the beneficiaries.

Although many common fund cases are class actions, like *Pettus*, the doctrine is not limited to class actions (as noted above). This point was clarified and the common fund doctrine further expanded in *Sprague v. Ticonic*,[245] which involved a trust fund that was jeopardized when a bank went into receivership. After the plaintiff successfully sued for a lien establishing her right to recover from the trust, she sought reimbursement of attorneys' fees from the trust. Although the suit had only indirectly established the rights of others, and had not created a fund, the Court held that fees were in order:

> Whether one sues representatively or formally makes a fund available for others may, of course, be relevant circumstances in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.[246]

243. *See* Skelton v. General Motors, 860 F.2d 250, 253 (7th Cir. 1988) ("Thus, in fee-shifting cases, only parties (usually plaintiffs) may seek reimbursement whereas in common fund cases *attorneys* may seek compensation.") (emphasis in original), *cert. denied*, 493 U.S. 810 (1989).

244. *See, e.g.*, Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302 (2d Cir. 1990); Kargman v. Sullivan, 589 F.2d 63, 68–69 (1st Cir. 1978); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 112 (3d Cir. 1976). The court must, of course, assess whether the intervenor made a meaningful contribution. *See, e.g.*, Bandes v. Harlow & Jones, 852 F.2d 661, 671 (2d Cir. 1988) (fees denied intervenors who "did nothing to create the fund"); *Lindy Bros. Builders*, 540 F.2d at 112 (intervenors awarded fees where "the financial strength they added to the plaintiff class . . . helped to force the settlement").

245. 307 U.S. 161 (1939).

246. *Id.* at 166.

*Sprague* notwithstanding, most common fund cases are class actions. For that reason, the case of *Boeing v. Van Gemert*[247] is significant. The Court held that the unclaimed portion of a fund established by a class action may be tapped for a fee award. It rejected the contention that the nonclaimants cannot be considered beneficiaries, reasoning that entitlement to the fund makes all class members beneficiaries for the purposes of the common fund doctrine.

Despite these cases, application of the common fund doctrine will not invariably be simple. Like fee-shifting cases, common fund cases require a three-step inquiry: (1) whether there is entitlement to a fee award; (2) how the award should initially be calculated; and (3) whether any adjustment to the presumptive award should be made.

### *Determining Whether an Award Is In Order*

#### is there a fund?

When a party requests fees from a common fund, the threshold question is whether a common fund exists. On occasion, parties seek awards where there is no common fund.[248] The requirement of a common fund, however, is not applied mechanically. For example, the D.C. Circuit rejected a contention that "the [common fund] doctrine is inapplicable because 'there is literally no common fund.'" Though retroactive salary payments were paid out of several different appropriations, "[i]n our view [this] is a mere technicality . . . . The entire sum paid to federal employees is the 'common fund'. . . to which the request or contribution is applicable."[249]

247. 444 U.S. 472 (1980).

248. *See, e.g.*, Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 211 (2d Cir.), *cert. denied*, 484 U.S. 908 (1987) ("The award appellants seek would not be payable out of any 'fund.'"); Holbrook v. Pitt, 748 F.2d 1168, 1175 (7th Cir. 1984) ("the common fund doctrine cannot be applied because there is no 'common fund'").

249. National Treasury Employees Union v. Nixon, 521 F.2d 317, 320–21 (D.C. Cir. 1975).

### did the lawsuit bring about or enhance the fund or create access to it?

In common fund cases, it is not necessary for the court to determine whether the plaintiff achieved success sufficient to warrant a fee award: The fund itself signifies success. The plaintiff must, however, establish that its suit was a "but for" cause of the fund (or at least ensured access to the fund). One case illustrates this requirement.[250] A Nicaraguan company paid an American company for a shipment of goods. The shipment was not made, in part because the Nicaraguan company was taken over by its government. The former owner sought return of the payment, and a representative of the Nicaraguan government (Alvarez) intervened. The American company interpleaded the money, and the two claimants—the former owner and Alvarez—went to trial. The former owner prevailed, but the trial court granted Alvarez attorneys' fees from the payment, presumably because the fund benefited the unrepresented shareholders and Alvarez had "demonstrated some solicitude" for them.[251] The Second Circuit reversed because Alvarez "did nothing to create the common fund."[252]

The court could have stressed that Alvarez not only did not "create" the fund but also played no role in benefiting the shareholders (since the fund would have become available even if he had not intervened). This distinction is important because the common fund doctrine does not require that the suit bring about a fund *ab initio.* The leading Supreme Court cases involved funds that predated the suit.[253] The D.C. Circuit has stated that the common fund doctrine applies to actions that "create[], enhance, preserve, or protect [a] fund."[254] The Ninth Circuit has said it applies if the plaintiff "created, discovered, increased or preserved" a fund.[255] Such formulations are underinclusive. The

250. Bandes v. Harlow & Jones, 852 F.2d 661 (2d Cir. 1988).

251. *Id*. at 671 (2d Cir. 1988).

252. *Id*.

253. *See supra* text accompanying notes 240–47.

254. Abbott, Puller & Meyers v. Peyser, 124 F.2d 524, 525 (D.C. Cir. 1941), *cert. denied*, 479 U.S. 849 (1986).

255. B.P. N. Amer. Trading v. Vessel Panamaz Nova, 784 F.2d 975, 977 (9th Cir.), *cert. denied,* 479 U.S. 849 (1986).

common fund doctrine has also been applied in cases where the suit resulted in a fund's reapportionment[256] or distribution.[257] The doctrine may apply, then, where a lawsuit creates a fund or ensures access to funds.[258]

The plaintiff's efforts need not involve an actual adjudication. Recovery can be appropriate where the common fund results from a formal settlement,[259] or where the defendant takes remedial action that moots the case.[260] In addition, a common fund recovery is arguably available from a fund created by a legislative or administrative action spurred by the plaintiff's lawsuit.[261] Finally, in one case, the Supreme Court held that an award was appropriate for *defendants* whose litigation efforts preserved a fund.[262]

256. *See, e.g.*, United States v. ASCAP, 466 F.2d 917, 918 (2d Cir. 1972); Nolte v. Hudson Navigation Co., 47 F.2d 166 (2d Cir. 1931); Dorfman v. First Boston Corp., 70 F.R.D. 366 (E.D. Pa. 1976).

257. *See, e.g.*, Powell v. Pennsylvania R.R., 267 F.2d 241 (3d Cir. 1959); Lafferty v. Humphrey, 248 F.2d 82 (D.C. Cir.), *cert. denied*, 355 U.S. 869 (1957).

258. *See* Sprague v. Ticonic, 307 U.S. 161, 166–67 (1939) (fact that fund was not "formally established by litigation" not decisive as long as suit "makes a fund available for others"). The breadth of the doctrine is occasionally overlooked. *See, e.g.*, Feick v. Fleener, 653 F.2d 69, 78 (2d Cir. 1981) (rejecting award from an estate for attorney whose work during protracted litigation enhanced the estate. The court denied fees because no fund "was created by [his] efforts," overlooking the fact that the common fund doctrine can apply when litigation enhances an existing fund).

259. *See, e.g.*, Kopet v. Esquire Realty, 523 F.2d 1005, 1008 (2d Cir. 1975).

260. *See, e.g.*, Koppel v. Wien, 743 F.2d 129, 135 (2d Cir. 1984) (fees appropriate even though "no judgment or consent decree was entered and the complaint was dismissed as moot"); Reiser v. Del Monte Properties, 605 F.2d 1135, 1139 (9th Cir. 1979) (fees not precluded where defendant voluntarily takes action, favorable to plaintiff, that moots suit).

261. *See* Winton v. Amos, 255 U.S. 373, 393 (1921) (fee recovery appropriate where attorney persuaded legislative and executive branches to restore lands and funds to his clients). *Winton* has rarely been cited, and it was rejected *sub silentio* by one appellate court. Whittier v. Emmett, 281 F.2d 24, 32 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 935 (1961) ("claim for compensation for services rendered in sponsoring favorable legislation [does] not deserve prolonged discussion"). *But see* Paris v. Metropolitan Life Ins., 94 F. Supp. 792 (S.D.N.Y. 1947) (ordering recovery from fund created by action of administrative agency).

262. *See* Rude v. Buchhalter, 286 U.S. 451, 461 (1932).

### are there beneficiaries?

In a number of cases, awards have been denied because there were no bona fide beneficiaries of the fund other than the plaintiff. In one case, a minority shareholder prevailed in a derivative suit against the officers of the corporation, who were also the other shareholders. The officers were ordered to reimburse the corporation for the diminution of stock value caused by their breach of fiduciary duty. The Fifth Circuit found a fee award inappropriate because "the effect of such an award is to shift the liability for those fees to the defendant,"[263] whereas the common fund doctrine aims to spread the fee among beneficiaries rather than shift the fee to the losing party. The court elaborated:

> The trial court's judgment on the derivative claim in this case creates no common fund benefiting the remaining former . . . shareholders other than [plaintiff]. Rather, the other shareholders are cast in judgment in the corporation's favor. Therefore, the effect of the award of attorney's fees out of the so-called derivative recovery is to increase the defendant's liability to include the plaintiff's attorney's fees. The award of attorney's fees to the plaintiff who successfully litigates the corporation's claim is not designed "to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them."[264]

Similarly, in another case, Catullo and Conservit, Inc., formed a company, Barlof, to do business in Puerto Rico. When Conservit began to compete with Barlof, Catullo brought a derivative suit on behalf of Barlof. Catullo prevailed and sought fees from the judgment recovered to "avoid burdening the plaintiff and unjustly enriching the only other shareholder—Conservit."[265] The First Circuit rejected the request because the "[p]laintiff is the sole shareholder to benefit from the derivative action. The only other party in interest, Conservit, must advance

263. Junker v. Cory, 650 F.2d 1349, 1352 (5th Cir. 1981).
264. *Id*. (quoting Mills v. Electric Auto-lite, 396 U.S. 375, 396–97 (1970)).
265. Catullo v. Metzner, 834 F.2d 1075, 1083 (1st Cir. 1987).

the money which plaintiff now proclaims to be a common fund."[266]

As noted earlier,[267] in *Sprague v. Ticonic* the Supreme Court found the common fund doctrine applicable where a suit established access to a fund through *stare decisis*—the holding giving the plaintiff a claim on a trust fund would enable other trust beneficiaries to vindicate their rights. Lower courts have applied this doctrine in situations resembling *Sprague*, that is, where the plaintiff and the beneficiary had similar claims on a particular fund.[268] They do not apply it whenever a suit establishes a rule of law that later brings success to others.[269] A Second Circuit case illustrates the limitation. New York farmers who sold milk in Connecticut challenged a government regulation that gave a larger subsidy to Connecticut farmers. When they prevailed by relying on a Supreme Court decision that invalidated a similar regulation (for farmers in other states), the attorney who won in the Supreme Court case intervened in the Second Circuit case to petition for fees. The court rejected the "novel assertion that attorneys who are victorious in one case may . . . claim fees from all subsequent litigants who might rely on it or use it in one way or another."[270]

266. *Id.* at 1084. *See also* Matter of Chicago, Milwaukee, St. Paul & Pacific R.R., 840 F.2d 1308, 1318–19 n.9 (7th Cir. 1988) (common fund recovery impermissible where it effectively shifts fees to opposing party); McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983) (same).

267. *See supra* text accompanying notes 245–46.

268. *See, e.g.*, City of Klawock v. Gustafson, 585 F.2d 428, 431 (9th Cir. 1978) (affirming fees based on *Sprague*'s *stare decisis* rule because "[s]pecific property was in the hands of the same defendant which had lost the case and that defendant's duty under the previous decision was clear.").

269. *See* Maier Brewing Co. v. Fleischmann Distilling Corp., 359 F.2d 156, 164 n.13 (9th Cir. 1966) (*Sprague* usually applied "in cases having closely analogous facts."), *aff'd*, 386 U.S. 714 (1967). In *Sprague* itself, the Court cautioned without elaboration that fees for a suit benefiting others via *stare decisis* are limited to "exceptional cases" involving "dominant reasons of justice." 307 U.S. at 167.

270. Cranston v. Hardin, 504 F.2d 566, 580 (2d Cir. 1974); *Accord* Schleit v. British Overseas Airways Corp., 410 F.2d 261 (D.C. Cir. 1969) (per curiam) (rejecting claim of lawyer who successfully challenged discriminatory user fees and sought attorneys' fees when another foreign carrier benefited from the decision in a subsequent suit).

The Ninth Circuit expanded *Sprague* in one respect. In the Ninth Circuit case, unlike *Sprague*, the underlying decision that benefited other parties was made by a district court (with no appeal taken) and thus lacked *stare decisis* effect.[271] The Ninth Circuit held that a fee award was nevertheless in order and found that it would be unfair to penalize the plaintiff because the case did not go up on appeal.[272] However, the Second Circuit reached a different conclusion and denied fees because "it is at least doubtful whether [the plaintiff's] unreviewed judgment would work as a collateral estoppel in favor of another similarly situated plaintiff."[273]

### can fees be shifted to the beneficiaries with precision?

A common fund fee award must result in costs being "shifted with some exactitude to those benefiting."[274] Thus, courts deny awards where there are only a few beneficiaries and other parties would be harmed by recovery of fees from the fund. In one case, the plaintiff sued a pension plan, challenging its procedures for awarding disability benefits. The plaintiff prevailed, but the Second Circuit found a fee award inappropriate because "the financial benefit of [the plaintiff's] success . . . accrue[s] to a relatively few members of the Plan, which provides pension as well as disability benefits."[275] Similarly, the Ninth Circuit denied fees where a suit stopped the construction of a state highway and thereby preserved the state highway fund. The fund could not be shifted "proportionately and accurately" to the beneficiaries because "it would be impossible to determine which beneficiary bears what costs, since residents and taxpayers pay varying amounts into the fund."[276]

271. City of Klawock v. Gustafson, 585 F.2d 428 (9th Cir. 1978).

272. *Id.* at 431.

273. Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 115 (2d Cir. 1978).

274. Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 265 n.39 (1975).

275. 589 F.2d at 115.

276. Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1123 (9th Cir. 1981).

As the Ninth Circuit case illustrates, courts generally reject claims for a common fund recovery out of the government treasury: The award will come at the expense of all taxpayers, not solely the beneficiaries of the lawsuit.[277]

The paradigmatic situation where a fee award would be fairly and precisely spread among beneficiaries is a class action in which "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum recovered on his behalf."[278] Of course, plaintiffs in non-class actions

277. *See, e.g.*, Petition of Hill, 775 F.2d 1037, 1041 (9th Cir. 1985); Grace v. Burger, 763 F.2d 457, 459 (D.C. Cir.), *cert. denied*, 474 U.S. 1026 (1985); Jordan v. Heckler, 744 F.2d 1397, 1400 (10th Cir. 1984). *Jordan* is illustrative. Because the suit forced Health and Human Services (HHS) to make a change in policy that figured to increase the number of Social Security recipients, the trial court awarded fees under the common fund doctrine. The Tenth Circuit reversed. Common fund awards must be borne by beneficiaries, but "[a]n award of fees against the Secretary does not have such a consequence. If the award is taken from the Social Security Trust Fund it will not in any way reduce the payments to [the beneficiaries] . . . . The trust fund comes from Social Security taxes on all workers and from general treasury funds. It is simply an award against the government or all persons who pay Social Security taxes and is not related or restricted to [the beneficiaries]." In similar circumstances the D.C. Circuit approved an award of fees from a state treasury, Puerto Rico v. Heckler, 745 F.2d 709 (D.C. Cir. 1984), but cast doubt about this decision *sub silentio* a year later, denying an award in a substantial benefit case because it "would ultimately be born[e] by all taxpayers, rather than just those benefiting [from the suit]." 745 F.2d 457 at 459 (quoting Trujillo v. Heckler, 587 F. Supp. 928 (D. Colo. 1984)).

In some common fund and substantial benefit cases, plaintiffs argued that all citizens or taxpayers did benefit. The courts denied fees, however, because if awards were permitted on that basis, the common fund and substantial benefit doctrines "would merge into the private-attorney general concept rejected in *Alyeska*." Satoskar v. Indiana Real Estate Comm'n, 517 F.2d 696, 698 (7th Cir.), *cert. denied*, 423 U.S. 928 (1975). *Accord* Petition of Hill, 775 F.2d 1037, 1041–42 (9th Cir. 1985); McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983); Stevens v. Municipal Court, 603 F.2d 111, 113 (9th Cir. 1979).

278. Boeing v. Van Gemert, 444 U.S. 472, 479 (1980). The Court noted that, "[a]lthough the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery." *Id*. However, not all class actions result in an "entire judgment fund," as was the case in *Boeing*. A class action may establish liability and leave each class member's claim to be

that achieve a similar result are also eligible for common fund awards.

In *Alyeska*, the Court noted that in its common fund cases the beneficiaries were "small in number and easily identifiable."[279] This dictum (in a non-common fund case) seems more diverting than helpful. The Court's common fund cases do not discuss the size of the beneficiary class, and it does not appear germane.[280] It is hard to see why a fee award from a common fund would be inappropriate simply because the class is large.[281] The requirement that beneficiaries be "identifiable" is subsumed under the requirement that an award shift fees with precision.

### does the court have "control" of the fund?

In *Greenough*, the Supreme Court stated that the common fund must be "subject[] to the control of the court."[282] In *Boeing*, the Court explained that this means the court must have "[j]urisdiction over the fund involved in the litigation."[283] This criterion is generally satisfied by jurisdiction over a party that controls the fund,[284] usually the defendant. Therefore, absence of control, by itself, is rarely the basis for denial of a fee award.[285]

determined individually without establishing a total judgment amount. In such circumstances, the common fund doctrine presumably does not apply—there is no common fund—and the attorneys who prosecute the individual claims would be compensated by the individual claimants. Of course, gray areas may arise (in terms of the relief awarded and the relationship between class members and class counsel), and courts may wish to consider flexible application of the common fund doctrine to prevent unjust enrichment by some class members or inadequate compensation for class counsel.

279. 421 U.S. at 265 n.39.

280. Suits against the government are an exception, where, as noted, courts deny recovery if the alleged beneficiaries are the entire population or all taxpayers. *See supra* note 277 and accompanying text.

281. *See infra* note 385 (discussing a Third Circuit case making precisely this point in connection with the substantial benefit doctrine).

282. 105 U.S. at 536.

283. 444 U.S. at 478.

284. *See* Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees § 2.03, at 2-27 to 2-34.1 (1992) (discussing various ways in which a court may exercise control of a fund).

285. As one commentator puts it, the control criterion amounts to whether there are sufficient means "at the disposal of the court to effectuate the end of

### does some other circumstance militate against an award?

Even where the above conditions are met, the following circumstances may render a fee award improper.

#### Congressional Intent

In *Bloomer v. Liberty Mutual Insurance*,[286] an injured longshoreman successfully sued the shipowner. Since the plaintiff was required by law to give part of his recovery to the stevedore to offset payments that the stevedore had made to the plaintiff through workers' compensation, the plaintiff sought to have the stevedore pay a portion of his attorney's fees. He argued that his judgment against the shipowner created a common fund from which the stevedore would draw an ascertainable amount. Although the usual conditions of a common fund recovery were met, the Supreme Court denied recovery because the Longshoremen's and Harbor Workers' Compensation Act addressed the longshoreman–stevedore–shipowner triangle and did not seem to contemplate a distribution of fees.[287]

fairly apportioning the legal fees." *Id*. at 2-28. Thus, the issue of control is generally subsumed in the matters already discussed in the text—whether there is a fund, and beneficiaries, and whether a fee award would fairly spread the costs among the beneficiaries (and only them). By contrast, the "control" criterion has independent significance in substantial benefit cases. *See infra* text accompanying notes 394–98.

286. 445 U.S. 74 (1980).

287. Similarly, the Seventh Circuit interprets a Supreme Court dictum to suggest that common fund recoveries are inappropriate in Title VII and civil rights cases. Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3028 (1992). In Blanchard v. Bergeron, 489 U.S. 87, 95 (1989), the Court stressed that, under the civil rights fee-shifting statute, damages should not be overemphasized and nonmonetary relief should not be shortchanged. The court in *Evans* read this analysis to suggest the impropriety of common fund awards in Title VII and civil rights cases because such awards could "skew the incentives of plaintiffs' lawyers toward damages rather than equitable remedies." 941 F.2d at 479. The Seventh Circuit did not, however, decide the issue, because the district court had made a statutory award and was "correct to rule that it was unnecessary to allow *both* a recovery from the defendants and the common fund in this case." *Id.* (emphasis in original).

While acknowledging that a statute governing a particular area can vitiate a common fund award if it manifests congressional intent not to share fees,[288] the Second, Third, and Seventh Circuits have held that, absent such a showing of legislative intent, the fact that a fee-shifting statute applies to a particular case does not preclude recovery from a common fund.[289] No courts have held to the contrary.

### Adverse Interests

In certain circumstances, fee sharing is inappropriate because the other beneficiaries of the plaintiff's suit had interests adverse to those of the plaintiff.[290] In the seminal case of *Hobbs v. McLean*,[291] the plaintiff obtained a judgment on behalf of a bankrupt. Believing that the sum recovered rightly belonged to them, and fearing that the plaintiff would distribute it to creditors, two other parties brought suit against the plaintiff and won. The plaintiff then moved for attorneys' fees for his efforts in winning the original judgment. The Supreme Court denied the motion, finding the common fund doctrine inapposite in this situation:

> We see no reason why [they] should pay [him], who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which [he] seeks pay . . . were not rendered in their behalf, but in hostility to their interest. When many persons have a common

288. *See, e.g.,* Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990) ("obviously, if, under a particular combination of facts, the operation of the equitable fund doctrine conflicts with an intended purpose of a relevant fee-shifting statute, the statute must control and the . . . doctrine must be deemed abrogated to the extent necessary to give full effect to the statute.").

289. *Suffolk*, 907 F.2d at 1327; Skelton v. General Motors, 860 F.2d 250, 255 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 583 (3d Cir. 1984). *See infra* text accompanying notes 314–15 (discussing situations where recovery could be pursuant to either a fee-shifting statute or the common fund doctrine).

290. Earlier we discussed cases in which courts held there were no beneficiaries (other than plaintiff) because the alleged beneficiaries were actually harmed by the suit. *See supra* text accompanying notes 263–66. In the cases discussed in this section, others *do* benefit from the common fund; however, if plaintiff had its way, they would not have.

291. 117 U.S. 567 (1886).

> interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity . . . will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. But where one brings adversary proceedings to take the possession of trust property from those entitled to it . . . and fails in his purpose, it has never been held . . . that such person had any right to demand reimbursement.[292]

This doctrine was applied in a recent case.[293] The U.S. government condemned territory and named Johnson, an owner of the land, in its complaint. Although the parties negotiated, Tobias, who claimed to own a portion of the land, intervened. A settlement was reached in which the government deposited a sum in court and left Johnson and Tobias to fight over it. They went to trial, and a judgment was entered splitting the fund between them. Johnson moved for Tobias to defray his fees, claiming his negotiations with the government increased the value of the fund, which benefited Tobias. The district court granted a fee award, but the Fourth Circuit, citing *Hobbs,* reversed: "A party may not recover and try to monopolize a fund, but then, failing in the attempt, declare it a 'common fund' and obtain his expenses from those whose rightful share of the fund he sought to appropriate."[294]

The Second Circuit held that the plaintiff's opposition to the class settlement that eventually took place was not a ground for denying attorneys' fees from the settlement pot where the plaintiff had made a substantial contribution to the class.[295] This case

292. *Id*. at 581–82.

293. United States v. Tobias, 935 F.2d 666 (4th Cir. 1991).

294. *Tobias*, 935 F.2d at 668. The court rejected Johnson's contention that he and Tobias were not adverse parties, since both were named defendants in the condemnation action. "We will not adopt such a mechanical test. This case was a pure title dispute between the 'co-defendants.' No equitable doctrine will ignore the reality of the controversy by looking only to which side of the 'v' the disputants are on." *Id*.

295. Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990).

is reconcilable with *Hobbs* and its progeny because, although the plaintiff opposed the particular settlement that was made, its interests and posture in the litigation were not in opposition to that of the class.

Fund Claimants That Were Represented

Several courts have held that where beneficiaries to the common fund are themselves represented by counsel, they are "deemed not to have taken a 'free ride' on the efforts of another's counsel," and their portion of the fund should therefore not be used to defray the plaintiff's legal costs.[296] Where lead counsel are appointed and do a disproportionate amount of the work, courts may waive this rule.[297]

### *Calculating the Amount of the Award*

what method should be used?

Percentage v. Lodestar

Courts have traditionally determined the amount of common fund fee awards by considering several factors, especially the size of the fund, and frequently have based awards on what they consider a reasonable percentage of the fund. In the early 1970s, courts began moving away from this practice and toward the lodestar method.[298] However, in the 1980s two developments sparked reconsideration of the lodestar in common fund cases. First, in a footnote in *Blum v. Stenson*,[299] the Supreme Court distinguished between the calculation of fees under fee-shifting statutes and calculation under the "'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class."[300] Second, in 1985, a Third Circuit task

296. *Tobias*, 935 F.2d at 668. *Accord* Vincent v. Hughes Air West, 557 F.2d 759, 771 (9th Cir. 1977); *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1019 (5th Cir. 1977).

297. *Tobias*, 935 F.2d at 668; *Vincent*, 557 F.2d at 772.

298. The seminal case was Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166–69 (3d Cir. 1973). Other courts quickly followed suit.

299. 465 U.S. 886 (1984).

300. *Id*. at 900 n.16.

force on attorneys' fees recommended the percentage method in common fund cases.[301]

In large part as a result of the *Blum* dictum and the task force's recommendations, the percentage method has been gaining favor in common fund cases. Only the Second Circuit clearly rejects this method and requires the lodestar in common fund cases.[302] The D.C. and Eleventh Circuits require the percentage method.[303] The First, Seventh, Ninth, and Tenth Circuits have stated that the district court may use either the percentage method or the lodestar method.[304] Of these circuits, the First and Seventh have indicated that the percentage method is preferred.[305] The Ninth Circuit has suggested that the percentage method is particularly appropriate where there are multiple claims and it would be difficult to determine what hours were expended on the claims that produced the fund.[306] The Ninth

301. Report of the Third Circuit Task Force, "Court Awarded Attorney Fees," 108 F.R.D. 237, 255–56 (1985).

302. *In re* Agent Orange Prod. Liability Litig., 818 F.2d 226, 232 (2d Cir. 1987); Detroit v. Grinnell Corp., 560 F.2d 1093, 1098 (2d Cir. 1977) (Grinnell II); Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974) (Grinnell I). It is possible that the Fifth Circuit, too, requires the lodestar, though it is hard to discern. In Longden v. Sunderman, 979 F.2d 1095, 1099 (5th Cir. 1992), the court noted that "[t]his circuit utilized the 'lodestar method' to calculate attorneys' fees" and dropped a footnote stating that, "[a]lthough the prevailing trend in other circuits and district courts has been towards awarding fees and expenses in common fund cases based on percentage amounts, the Fifth Circuit has yet to adopt this method." However, this was in the context of affirming a district court's use of the lodestar; it is not clear that the court would reverse if a district court opted for the percentage method.

303. *See* Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993); Camden I Condominium Ass'ns v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991).

304. *See In re* Washington Pub. Power Supply Sys. Sec. Litig., Nos. 91-16669, 91-16685, 91-16687, 1994 U.S. App. LEXIS 5256, at *5 (9th Cir. Mar. 23, 1994); Harman v. Lyphomed, 945 F.2d 969, 975 (7th Cir. 1991); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 526 n.10 (1st Cir. 1991) ; Brown v. Phillips Petroleum, 838 F.2d 451 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988).

305. *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 572–73 (7th Cir. 1992); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 526 n.10 (1st Cir. 1991).

306. Thus, in Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268 (9th Cir. 1989), the court approved use of the percentage method, finding that it

Circuit also suggested that the lodestar is preferable where "special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors."[307]

The primary rationale for the lodestar in fee-shifting cases does not apply in common fund cases. Statutory fee shifting is designed to ensure the procurement of competent counsel for certain kinds of cases, and requiring defendants to pay plaintiff's counsel at their market rate serves this function. However, in the common fund situation the goal is to prevent unjust enrichment.[308] This is not necessarily achieved by the lodestar, which focuses on the extent of counsel's work rather than on its effect on the beneficiaries.[309]

The percentage method offers several advantages. It helps ensure that the fee award will simulate the marketplace, since most common fund cases are the kinds of cases normally taken on a contingency fee basis, with counsel promised a percentage of any recovery. In addition, if fees are based on the lodestar, plaintiff's

would be "impractical if not impossible" to determine precisely the hours spent creating the fund, but in State of Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990), it upheld use of the lodestar, because "we have no such division of claims."

307. Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990). *See also In re* Washington Pub. Power Supply Sys. Sec. Litig., supra note 304, at *8–9 ("As always, when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be '*reasonable under the circumstances.*'") (quoting Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990) (emphasis added)).

308. Although the Court has invoked unjust enrichment, some suggest that common fund awards reflect the principle of *quantum meruit*. *See, e.g.,* Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973). At this point in the evolution of the common fund doctrine, this distinction has little practical significance.

309. In Harman v. Lyphomed, 945 F.2d 969, 974 (7th Cir. 1991), the Seventh Circuit made the case in favor of the lodestar in common fund cases, noting, inter alia, that a percentage method can lead to overcompensation. However, the court's endorsement of the lodestar was lukewarm at best. It acknowledged that the lodestar "certainly has problems" and concluded only that "we think it premature to banish it now." In a subsequent case, the Seventh Circuit expressed a preference for the percentage method. *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 572–73 (7th Cir. 1992).

counsel has no incentive to settle the case early—counsel continues to rack up fees by litigating the case. Further, the lodestar requires detailed record keeping by plaintiffs and consumes far more of the court's resources.[310] Defendants in common fund cases have no incentive to scrutinize fee requests, and individual fund beneficiaries generally lack sufficient incentive to do so.[311] Thus, the court is saddled with the entire burden of reviewing submissions concerning hours expended and the hourly rate.[312]

### Lodestar–Percentage Hybrid

The court may use a percentage for an initial determination and adjust it upward or downward depending on various factors, including those reflected in the lodestar, for example, hours expended and the market rate.[313] This is sometimes referred to as a

310. However, even if the court uses a percentage, it may ask counsel to maintain time-keeping records in case it is later deemed desirable to switch to a lodestar calculation or because these records may affect the percentage chosen or an adjustment to it. *See* Third Circuit Task Force, 108 F.R.D. at 271–72.

311. *See, e.g., In re* Continental Illinois Sec. Litig., 962 F.2d 566, 568 (7th Cir. 1992) (district court reviewed submissions "despite the absence of an adversary presentation. (The class was notified of the fee request, but no member of the class objected. There is no appellee.)"). An exception is where several law firms vie for fees from a limited source, so each has incentive to scrutinize others' applications. *See, e.g., In re* Fine Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984). In statutory fee-shifting cases, by contrast, defense counsel generally relieve the court of much of the burden of reviewing plaintiff's lodestar figures.

312. The court often offers the only protection for fund beneficiaries. As a result, it is generally agreed that courts have not only authority but also responsibility to review fee requests *sua sponte* in common fund cases—*see, e.g., In re* Continental Illinois Sec. Litig., 962 F.2d 566, 573 (7th Cir. 1992)—and several courts have said that fee requests from common funds are subject to heightened judicial scrutiny. *See, e.g.,* Skelton v. General Motors, 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 583 (3d Cir. 1984). *See also* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 519 (1st Cir. 1991) (In case of "clear sailing" agreement—i.e., where party paying fees agrees not to contest the court-awarded amount as long as it does not exceed a negotiated ceiling—"rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable.").

313. Alternatively, the court may permit these factors to influence what percentage it chooses. The choice of percentage is discussed *infra* text accompanying notes 319–27.

"hybrid approach." Upward and downward adjustments in common fund cases, whether to the lodestar or to a percentage of the fund, are discussed below.

### Fee-Shifting Statute Litigation Establishes a Common Fund

A case governed by a fee-shifting statute may, through settlement or judgment, create a common fund. As noted, a common fund award is not necessarily precluded in such a case.[314] The Second and Seventh Circuits have suggested that the court has discretion to make either a fee-shifting award against defendants or an award from the common fund, but it should not grant both.[315]

### lodestar in common fund cases

If the court uses the lodestar in a common fund case, it should engage in virtually the same analysis as it does in fee-shifting cases. Thus, for example, the Seventh Circuit, using several aspects of the analysis outlined in Part 1, found a number of errors in the calculation of the lodestar in a recent common fund case. It found that the trial court substituted its own notions of a reasonable hourly rate for the market rate, refused to allow compensation of paralegals at market rates, and slashed hours without identifying which hours were excessive and why.[316]

The calculation of the lodestar differs in common fund cases in one respect. Although fees for time spent preparing the fee application and litigating fee disputes are compensable in statutory fee-shifting cases, they are not compensable in common

314. *See supra* text accompanying notes 288–89.

315. Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990) ("Duplicative recovery is to be avoided, of course"); Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir. 1991) (district court made statutory award and was "correct to rule that it was unnecessary to allow *both* a recovery from the defendants and the common fund in this case") (emphasis in original), *cert. denied*, 112 S. Ct. 3028 (1992). The Third Circuit task force recommends that "those statutory fee cases that are likely to result in a settlement fund" should be treated like common fund cases from the beginning (i.e., a percentage fee should be established early in the case). 108 F.R.D. at 255.

316. *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 568–70 (7th Cir. 1992).

fund cases.[317] Such efforts do not serve the beneficiaries—indeed, if fees were compensated they would deplete the common fund from which the beneficiaries draw.[318]

### choosing a percentage

If a court opts for the percentage method it is faced with the task of finding an appropriate percentage.[319] Most district courts select a percentage in the 20% to 30% range,[320] and the Ninth Circuit has indicated that 25% is the "benchmark" award.[321] The Tenth Circuit has said that the twelve *Johnson* factors should be applied to determine the proper percentage.[322] The Eleventh Circuit agrees that these factors should be considered and adds other relevant factors: "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by settlement, and the economics involved

317. *See, e.g.*, Kinney v. International Bhd. of Elec. Workers, 939 F.2d 690, 694 n.5 (9th Cir. 1991); Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir.), *cert. denied,* 479 U.S. 817 (1986); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 595 (3d Cir. 1984).

318. Kinney v. International Bhd. of Elec. Workers, 939 F.2d 690, 694 n.5 (9th Cir. 1991); Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir.), *cert. denied*, 479 U.S. 817 (1986).

319. This determination can be made at any stage of the litigation. *See infra* notes 436–41 (discussing the implications of the timing in connection with case management).

320. There are different ways the court can select the percentage. It can have the fee negotiated, which may take longer but decreases the prospects of an objection down the road. If the court opts for negotiations, it may appoint a disinterested person to negotiate a fee on behalf of the beneficiaries, subject to judicial approval and revision. And in class actions, one judge has the percentage determined through competitive bidding as part of the process of selecting class counsel. These methods are discussed in Part 4 in connection with case management.

321. Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

322. Brown v. Phillips Petroleum, 838 F.2d 451, 454–55 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988). The court suggested that the essential factor in fee-shifting cases—time and labor required—may be less important in common fund cases than the results obtained and amount involved. *Id*. at 456.

in prosecuting a class action."[323] The court stated further that, as a general rule, 50% may be established as an upper limit.[324] Other courts have not set such a limit and do not require consideration of the *Johnson* factors when determining a percentage.

Some courts award a lower percentage if the fund is large.[325] A few courts have used a sliding scale, allowing recovery of a given percentage of a certain amount of the fund, and decreasing percentages of subsequent amounts.[326] Courts have discretion to use whatever percentage arrangements may prove just or workable in a particular case. For example, if a colossal fund is created, fees may be extracted from the interest earned rather than from the corpus of the fund.[327]

### should the fee be adjusted?

Regardless of the method used for calculating the initial fee, a court can make an upward or downward adjustment based on the individual circumstances of a case.[328] Some of the factors justifying an adjustment of the lodestar in fee-shifting cases will also apply in a common fund situation (regardless of whether the lodestar or percentage method is used). In addition, the Ninth Circuit has stated that courts should consider all pending fee applications to ascertain whether "the combined effect of granting the fee applications in toto would be to reduce substantially the size of the common fund available for distribution to the

323. Camden I Condominium Ass'ns v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991).

324. *Id*. at 774.

325. *See, e.g.*, *In re* Smithkline Beckman Sec. Litig., 751 F. Supp. 525, 534 (E.D. Pa. 1990) ("the percentage of recovery fee should decrease as the size of the common fund increases").

326. *See, e.g.*, *In re* Fidelity Bancorporation Sec. Litig., 750 F. Supp. 160, 163 (D.N.J. 1990) (awarding 30% of the first $10 million, 20% of the next $10 million, and 10% of any fund beyond $20 million).

327. *In re* Agent Orange Prod. Liability Litig., 611 F. Supp. 1296 (E.D.N.Y. 1985) ($180 million fund case earned $15 million interest, out of which $10 million was assigned as fees), *modified*, 818 F.2d 226 (2d Cir. 1987).

328. However, if the court selects a percentage for recovery based in part on the kind of factors normally used to make an adjustment, an adjustment would be inappropriate because it would involve a double impact of certain factors.

plaintiff class."[329] The court implied that trial courts may adjust an award if attorneys would otherwise receive an unacceptably high portion of the common fund.[330]

Before the Supreme Court's decision in *City of Burlington v. Dague*,[331] courts permitted risk enhancements in common fund cases.[332] In *Dague*, the Court repudiated risk enhancements in fee-shifting statutes but did not address whether they survive in common fund cases. One of the Court's chief rationales for eliminating risk enhancements was that Congress did not intend for defendants to compensate plaintiffs' counsel for losses in other cases. Because there is no congressional intent to frustrate in using enhancements in common fund cases, this rationale does not apply.[333] However, the Court had a second objection to risk enhancements, one that appears to apply to common fund cases as much as it does to statutory fee-shifting cases:

> [T]he interest in ready administrability that has underlain our adoption of the lodestar approach . . . and the related interest in avoiding burdensome satellite litigation . . . counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.[334]

329. State of Florida v. Dunne, 915 F.2d 542, 546 (9th Cir. 1990).

330. *Dunne*, 915 F.2d at 546 (remanding for further fact finding and noting that "[t]he fact that 72% of the common fund could be distributed in attorneys' fees and costs in this case is disturbing.").

331. 112 S. Ct. 2638 (1992).

332. *See*, *e.g.*, Skelton v. General Motors, 860 F.2d 250 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989); Bebchick v. Washington Metro. Area Transit, 805 F.2d 396, 406–07 (D.C. Cir. 1986).

333. In a pre-*Dague* case, the Seventh Circuit noted that where risk enhancements are concerned, "the arguments . . . against risk multipliers in statutory fee cases have much less application in common fund cases." Skelton v. General Motors, 860 F.2d 250, 254 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989).

334. 112 S. Ct. 2638, 2643 (1992).

In light of its clear desire to facilitate administration and avoid arbitrariness, it seems likely that the Court would reject risk enhancements in common fund cases.[335]

### the effect of a private fee agreement

A private agreement between the plaintiff and its counsel—whether for payment by hourly rate or contingent fee—does not necessarily dictate the amount of fees to be recovered from a fund, because such an agreement could still leave the beneficiaries unjustly enriched by the lawyers' work (or be unfair to the beneficiaries).[336] Thus, notwithstanding any private agreement, courts must independently determine a reasonable fee under the circumstances of the case.[337]

### may plaintiffs be compensated for personal expenses?

The question arises whether the plaintiffs' compensation from a common fund may go beyond attorneys' fees to include the private costs incurred in bringing the suit. In *Greenough,* the Supreme Court held that it may not:

> [T]here is one class of allowances made by the [lower] court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. . . . [Allowing compensation] would present too

335. However, the only court of appeals to decide the issue held that *Dague* does not apply in common fund cases and district courts retain the discretion to award risk enhancements in such cases. *In re* Washington Pub. Power Supply Sys. Sec. Litig., Nos. 91-16669, 91-16685, 91-16687, 1994 U.S. App. LEXIS 5256, at *19 (9th Cir. Mar. 23, 1994). Several district courts have held to the contrary. Nensel v. Peoples Heritage Fin. Group, 815 F. Supp. 26 (D. Me. 1993); Weinberger v. Great N. Nekoosa Corp., 801 F. Supp. 804 (D. Me. 1992); Bolar Pharmaceutical v. Gackenbach, 800 F. Supp. 1091 (E.D.N.Y. 1992). *See also In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 619 (1st Cir. 1992) (Lay, J., sitting by designation, concurring) (in vacating fee award for other reasons, majority did not address propriety of risk enhancement in common fund case; Judge Lay expressed his view that *Dague* does apply to common fund cases).

336. *See* Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 126–27 (1885).

337. *See, e.g.,* Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 120 (3d Cir. 1976).

> great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon . . . having all their private expenses paid.[338]

However, two appellate courts have recently limited the apparent reach of this holding. The Sixth Circuit permitted reimbursement for money the plaintiff spent on accountants and investment bankers, maintaining that these expenditures were "related to advancing the litigation" and thus "not 'private' in the sense found objectionable in *Greenough*."[339] The Seventh Circuit noted that since "without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance calls, which are compensable."[340] The court denied compensation for the plaintiff's personal expenses in the case *sub judice*, maintaining that such compensation is in order only if the record suggests that no named plaintiff could otherwise have been recruited.

The Seventh Circuit did not mention the Supreme Court's seemingly categorical rejection of recovery for the plaintiff's personal expenses, but perhaps it thought that the century-old holding does not apply where the modern class action is concerned. However, the Seventh Circuit's rationale for sometimes permitting recovery of such expenses—that it may be necessary to attract a class representative—seems to import the rationale for fees under fee-shifting statutes into the common fund territory. Whereas fee-shifting statues are aimed at encouraging certain kinds of actions, the common fund doctrine is generally said to rest on an unjust enrichment rationale.[341]

338. Trustees v. Greenough, 105 U.S. 527, 538 (1881).

339. Granada Investments v. DWG Corp., 962 F.2d 1203, 1206 (6th Cir. 1992).

340. *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992).

341. *See, e.g.*, Boeing v. Van Gemert, 444 U.S. 472, 479 (1980).

### procedures

Because the fee request is often unopposed, and yet fund beneficiaries are affected by the award, the case for an evidentiary hearing is more compelling in common fund cases than in fee-shifting cases—at least if the lodestar is used. As the D.C. Circuit put it:

> In "common fund" cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the bounty . . . . By contrast . . . where the prevailing party's fees are paid by the loser pursuant to statute, the adversary papers . . . may actually illuminate the factual predicate for a reasonable fee. This is so because the losing party in statutory fee cases retains an interest in contesting the size of the fee. This is not the case in "common fund" fee litigation, so the district court in those cases has a special obligation to ensure that the fee is fair.[342]

The Third Circuit requires a hearing before a common fund award is made,[343] and the D.C. and Second Circuits, at a minimum, strongly encourage one.[344] The First Circuit encourages such a hearing where large sums are at stake.[345] These holdings are all in cases involving use of the lodestar. If a court

342. Copeland v. Marshall, 641 F.2d 880, 905 n.57 (D.C. Cir. 1980).

343. *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 584 (3d Cir. 1984) ("the hearing on a fee application in an equitable fund case requires compliance with those procedural rules which assure fair notice and an opportunity to be heard. Equally plainly, the requirement of an evidentiary hearing demands the application in that hearing, of the Federal Rules of Evidence.").

344. *Id*. ("A hearing may be vital in cases involving attorney's fees to be paid from a common fund."); Detroit v. Grinnell Corp., 495 F.2d 448, 470, 473 (2d Cir. 1974) (Grinnell I) ("the court should typically take pains to allow a complete airing of all objection to a petitioner's fee claim"; where there are overt factual disputes, "an evidentiary hearing, complete with cross-examination, is imperative"; even absent such disputes, there may "still remain a need for an additional hearing" to fill any "factual voids which remain before an adequate fee can be fairly determined.").

345. *In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 614 (1st Cir. 1992) (evidentiary hearing not necessary in all cases, but here district court held one, "wisely, we think, considering the stakes").

uses the percentage method and there are no factual disputes concerning an upward or downward adjustment, a hearing would seem less necessary. The court can protect the interests of beneficiaries or potential beneficiaries by choosing a reasonable percentage. The court need not expend time examining submissions by counsel, as it does in cases involving the lodestar.

If a hearing is held, the court should ensure that all attorneys staking a claim to fees are given a reasonable opportunity to be heard.[346] Presumably, beneficiaries who wish to be heard on the subject of fees should also be given such an opportunity.

The Eleventh Circuit has said that the district court "should articulate specific reasons for selecting the percentage upon which the attorneys' fee award is based. . . . [It] should identify all factors upon which it relied and explain how each factor affected its selection of the percentage."[347] The Tenth Circuit, too, requires the court to articulate reasons for the percentage chosen.[348] More generally, in common fund cases no less than in fee-shifting cases, effective appellate review requires the trial court to articulate clearly the bases for its decisions and calculations.[349]

Amendments to Federal Rule of Civil Procedure 54, quoted earlier, apply in the common fund context as well.

### *Issues on Appeal*

#### timing

A decision awarding or denying fees from a common fund, like a decision pursuant to a fee-shifting statute, is severable from the decision on the merits and separately appealable.[350] The dis-

346. *Id.* (reversing fee award in large-scale consolidated case where at evidentiary hearing lawyers from steering committee were permitted to testify, examine witnesses, and offer oral argument, but other lawyers representing individual clients were not).

347. Camden I Condominium Ass'ns v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991).

348. Brown v. Phillips Petroleum, 838 F.2d 451, 454 (10th Cir.), *cert. denied,* 488 U.S. 822 (1988).

349. *Id*. at 456; *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 596 (3d Cir. 1984).

350. Trustees v. Greenough, 105 U.S. 527, 531 (1881); Boeing v. Van Gemert, 444 U.S. 472, 479 n.5 (1980); *In re* Nineteen Appeals Arising Out of

cussion of the timing of appeals from statutory fee determinations[351] also applies to appeals of common fund decisions.

### scope of review

Courts have said little about the scope of review in common fund cases. A district court's factual determinations clearly must be reviewed deferentially.[352] The Ninth and Tenth Circuits have suggested that a district court's decision of what method to use to calculate the award is also entitled to deference.[353]

### may the court of appeals calculate an award itself?

The same considerations that might lead a court of appeals, in a rare statutory fee-shifting case, to calculate the award itself rather than remand for calculation[354] would appear to apply as well in common fund cases.

## Substantial Benefit

The substantial benefit (or the common benefit) doctrine extends the common fund doctrine to cases where lawsuits produce nonmonetary benefits. Application of the two doctrines is similar, but there are also noteworthy differences.[355]

Two seminal Supreme Court cases applied the substantial benefit doctrine. *Mills v. Electric Auto-lite*[356] involved a derivative suit by minority shareholders to set aside a merger. Finding that

San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 609–10 (1st Cir. 1992); Overseas Dev. Disc. v. Sangamo Constr., 840 F.2d 1319, 1324 (7th Cir. 1988).

351. *See supra* text accompanying notes 14–19.

352. *In re* Agent Orange Prod. Liability Litig., 818 F.2d 226, 237 (2d Cir. 1987).

353. Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990); Brown v. Phillips Petroleum, 838 F.2d 451, 454 (10th Cir.), *cert. denied,* 488 U.S. 822 (1988).

354. *See supra* text accompanying notes 236–37.

355. Although courts often used to treat the common fund doctrine and substantial benefit doctrine as one, the trend is to treat them independently. Of course, if a suit produces both a common fund and a substantial nonmonetary benefit, both doctrines may be applicable.

356. 396 U.S. 375 (1970).

the merger violated securities laws, the Court remanded for the district court to fashion a remedy and specified that the plaintiffs should be awarded attorneys' fees. The Court noted that "this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid" but maintained that, "[a]lthough the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses."[357] Rather, fees may be awarded where litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction of the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[358]

In *Hall v. Cole*,[359] the Court applied this doctrine in a "union democracy" case. In assessing fees against a labor union that expelled the plaintiff for violating a union rule found to be unconstitutional, the Court held that the plaintiff "necessarily rendered a substantial service to his union as an institution and to all its members. . . . [B]y vindicating his own right (of free speech), the successful litigant dispel[led] the 'chill' cast upon the rights of others."[360] Extracting fees from the union treasury "simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.'"[361]

In *Alyeska*, although the Court rejected the "private attorney general" doctrine as a basis for attorneys' fees, it affirmed the vitality of the substantial benefit doctrine developed in *Mills* and in *Hall*.[362] The Court noted that when fees are claimed under this doctrine, the primary inquiry is similar to that required in a common fund case: Did the plaintiff's suit produce a substantial

357. *Id.* at 392.

358. *Id.* at 393–94. The beneficiaries were the shareholders, and an award against the corporation spread costs proportionately among them.

359. 412 U.S. 1 (1973).

360. *Id*. at 8.

361. *Id*. at 9 (quoting *Mills*, 396 U.S. at 397).

362. 421 U.S. at 264–65 n.39.

benefit for an identifiable class of beneficiaries, and can the benefits be traced and the costs shifted fairly and with some accuracy?[363] (As in statutory fee shifting and common fund cases, intervenors are eligible for awards based on the substantial benefit doctrine.[364])

### *Determining Whether an Award Is In Order*

#### did the suit confer a substantial benefit?

In *Mills*, the Court said that a substantial benefit "must be something more than technical in its consequence" and must "accomplish[] a result which corrects or prevents an abuse which

363. *Id*. The Ninth Circuit has held that the "tracing" requirement does not apply in labor cases because *Mills* did not mention it. Southerland v. International Longshoremen's Union, 845 F.2d 796, 798–99 (9th Cir. 1987). No other court has so held, and both the Third and D.C. Circuits have cited the tracing requirement in labor cases. Brennan v. United Steelworkers of America, 554 F.2d 586, 604–05 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978); Usery v. Local Union No. 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 382 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977). In any case, *Mills* requires an "ascertainable class" of beneficiaries; where there is such a class, benefits can generally be traced with accuracy.

364. Donovan v. CSEA Local Union 1000, 784 F.2d 98, 103 (2d Cir.), *cert. denied*, 479 U.S. 817 (1986); Brennan v. United Steelworkers of America, 554 F.2d 586, 604 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978); Usery v. Local Union No. 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 382–89 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977). Indeed, substantial benefit awards in labor cases are often to intervenors. These cases are brought under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401–531, which authorizes suit by the Secretary of Labor only. The court must determine the extent to which the intervenor's work helped secure the benefit as opposed to merely duplicating the efforts of the Secretary. *See, e.g.*, Marshall v. United Steelworkers, 666 F.2d 845, 852 (3d Cir. 1981) (reversing denial of fees to intervenors whose efforts "narrowed the issues for Labor and helped to isolate the specific problems with the election" but upholding denial of compensation for work at later stages found by district court to be either duplicative of the Secretary's work or ineffectual); Donovan v. Local Union 70, 661 F.2d 1199, 1203 (9th Cir. 1981) (award proper in light of Secretary's counsel attesting to intervenor's assistance, but the "modest amount awarded strongly suggests it does not exceed the value of the intervenor's contribution."). The intervenor often confers a benefit on the membership "by identifying, investigating and presenting for the Secretary's ultimate prosecution, evidence of union violations." *Donovan*, 784 F.2d at 106.

would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest."[365] Even apart from the fact that this statement applies only to shareholder suits, it provides limited guidance. Lower courts have not developed a more precise standard,[366] and determinations of whether suits conferred a substantial benefit have been largely fact-specific. Nevertheless, the case law provides guidance on some important issues.

As should be clear from *Mills*, not every beneficiary must benefit personally for the plaintiff to recover fees. In labor cases involving, for example, an improper election or a violation of free speech, the remedy affects all members only insofar as they are presumed to benefit from a more democratic union; this is sufficient for recovery of fees.[367] Indeed, the Third Circuit rejected a claim that an award was improper because it secured free elections for only one district. The defendant argued that "it strains belief to conclude that a benefit bestowed upon District 31, whose membership comprises approximately 9% of the entire union membership, inures to the benefit of the steelworkers as a whole." But the court held that, "to the extent that prosecution of LMRDA [Labor-Management Reporting and Disclosure Act] violations supports union democracy, such activity confers direct and substantial benefit upon the entire union membership."[368]

365. *Mills*, 396 U.S. at 396 (quoting Bosch v. Meeker Coop. Light & Power Ass'n, 101 N.W.2d 423 (Minn. 1960)).

366. *But cf.* Southerland v. International Longshoremen's Union, 845 F.2d 796, 800–01 (9th Cir. 1987) (equating substantial benefit with "valuable service").

367. *See, e.g.*, Zamora v. Local 11, 817 F.2d 566, 571 (9th Cir. 1987) (where suit forced union to provide Spanish translation at its meetings, defendant argued that fee award was improper because most members did not benefit; court disagreed because the suit "benefits the entire membership, including English-speaking members, by facilitating discussion and participation at the monthly meetings.").

368. Brennan v. United Steelworkers of America, 554 F.2d 586, 605 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978). Of course, the benefit must be more than that shared by the entire population. *See, e.g., id.* at 606 (doctrine inapplicable where "every individual might be said to benefit"); Crane Co. v. American Standard, 603 F.2d 244, 255 (2d Cir. 1979) (denying fees because "[t]he shareholders . . . received no benefit from this litigation, other than the

The Fifth Circuit has suggested that the benefit cannot consist solely of the likelihood that the defendant will change its practices to prevent future liability.[369] However, no court has so held, and the Eleventh Circuit explicitly disagreed, finding that a labor union's "incentive to change" constituted a substantial benefit to the members: "[W]e do not find such incentive an insubstantial benefit. Substantiality does not rest on compulsory reform or injunctive relief."[370]

As a general matter, the substantial benefit need not be achieved by a formal judgment.[371] For example, a suit may confer a substantial benefit if a settlement is reached,[372] or if the defendant takes action that moots the case.[373] In the latter situation, the Third and Ninth Circuits required the plaintiff to demonstrate that its complaint was "meritorious."[374]

The Sixth Circuit held that a suit conferred a substantial benefit where a preliminary injunction forced a union to distribute the plaintiffs' campaign literature. The case was subsequently mooted before the court could rule on the merits—the suit "did create a 'common benefit' for all of the union members: it ensured free and democratic elections of candidates for union

incremental benefit which arguably accrues to all participants in the securities markets whenever violations of the securities laws are uncovered").

369. Shimman v. International Union of Operation Eng'rs, 744 F.2d 1226, 1235 n.13 (5th Cir. 1984) (en banc) ("Since there was no injunction . . . the benefits received by other union members were achieved not by direct operation of the judgment, but rather were the result of a realization that the union would have to reform itself or risk exposure to further liability"), *cert. denied*, 469 U.S. 1215 (1985). This must be regarded as dictum, as it consisted of a footnote in an opinion rejecting the fee award on other grounds.

370. Erkins v. Bryan, 785 F.2d 1538, 1549 (11th Cir.), *cert. denied*, 479 U.S. 961 (1986).

371. *See* Ramey v. Cincinnati Enquirer, 508 F.2d 1188, 1196 (6th Cir. 1974) ("So long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion"), *cert. denied*, 422 U.S. 1048 (1975).

372. *See, e.g.*, Koppel v. Wien, 743 F.2d 129, 135 (2d Cir. 1984).

373. *See, e.g.*, Lewis v. Anderson, 692 F.2d 1267, 1270 (9th Cir. 1982); Ramey v. Cincinnati Enquirer, 508 F.2d 1188, 1196 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975).

374. Lewis v. Anderson, 692 F.2d 1267, 1270–71 (9th Cir. 1982); Kahan v. Rosenstiel, 424 F.2d 161, 167 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

office."[375] This holding is consistent with the Eleventh Circuit's reversal of a fee award where the plaintiff was granted a preliminary injunction preventing the imposition of a trusteeship on the union but then lost on the merits.[376] The Eleventh Circuit found the award inappropriate because the plaintiff's success procured no meaningful or lasting benefit for the union members.[377]

The Ninth Circuit held that fees are inappropriate for a labor union defendant that succeeds in defending a suit.[378] Such an award would shift costs away from the beneficiaries and on to the opposing party—this is not the rationale in substantial benefit cases.[379]

### is there an identity of interest between the defendant and the beneficiaries?

In keeping with *Mills* and *Hall*, substantial benefit awards are usually suits by a shareholder against a corporation or by a labor union member against a union.[380] Fees are paid by the defendant,

375. Bliss v. Holmes, 867 F.2d 256, 258 (6th Cir. 1988).

376. Markham v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 901 F.2d 1022 (11th Cir. 1990). *See also* Benda v. Grand Lodge, 584 F.2d 308 (9th Cir. 1978) (finding award premature where plaintiff was granted preliminary injunction but decision on the merits had yet to be reached), *cert. dismissed*, 441 U.S. 937 (1979).

377. *Markham*, 901 F.2d at 1028. The court explicitly held open the possibility of fees where a preliminary injunction "form[ed] a vital function in changing the legal relationship between the parties."

378. Ackley v. Western Conference of Teamsters, 958 F.2d 1463 (9th Cir. 1992).

379. In Oldfield v. Athletic Congress, 779 F.2d 505, 509 (9th Cir. 1985), the Ninth Circuit applied the same reasoning in a non-labor case, holding that a victorious defendant could not be awarded fees against plaintiff because plaintiff "has not benefited from this action. To saddle him with the attorney's fee will only increase his losses from this action, not correlate costs with benefits." In the union context, the Ninth Circuit has stated a second rationale for the denial of fees against plaintiff: The "mere prospect of such an award would 'chill union members in the exercise of their statutory right to sue the union.'" Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1479 (9th Cir. 1992) (quoting Pawlak v. Greenawalt, 713 F.2d 972, 980 (3d Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984)).

380. The shareholder suits are generally class actions or derivative suits. The courts split on whether the substantial benefit doctrine can apply where

because it is the alter ego of the beneficiaries who would otherwise be unjustly enriched by the suit. Absent such an identity between the defendant and the beneficiaries, an award against the defendant is improper because it would shift the costs unfairly.[381]

A Ninth Circuit case illustrates this point. A suit by residents of an irrigation district forced the Secretary of Interior to free up land for the residents to buy below market price. The plaintiffs sought fees from the district, since members of the district benefited from the suit. However, the Ninth Circuit found an award inappropriate because

plaintiff brings suit as an individual shareholder. *Compare* Bailey v. Meister Brau, 535 F.2d 982, 995 (7th Cir. 1976) (doctrine inapplicable because award would shift costs to losing party) *with* Reiser v. Del Monte Properties, 605 F.2d 1135, 1139 (9th Cir. 1979) (to require that suit be brought derivatively or representatively misconstrues the purpose of the doctrine). The *Reiser* court makes a strong case that as long as the suit benefits shareholders, recovery should not depend on the status of the plaintiff. *See also Meister Brau*, 535 F.2d at 997 (Swygert, J., dissenting) ("The majority employs a formalistic approach . . . which obscures the purpose of the [substantial benefit] rule . . . and thereby achieves an inequitable result. That purpose is to insure that the costs of litigation are not borne solely by one or a few shareholders" where a benefit is conferred on all the shareholders).

It should be noted that successful shareholder derivative actions qualify for a substantial benefit award only when they produce nonmonetary relief. Where they produce a monetary recovery for the corporation, the common fund doctrine would apply.

381. *See, e.g.*, Johnson v. HUD, 939 F.2d 586, 590 (8th Cir. 1991) (denying award because "defendants are neither the alter ego nor the representative of the benefited class"); Oster v. Bowen, 682 F. Supp. 853, 857 (E.D. Va.) ("Where the common benefit rule is invoked against a stock corporation or a union, the beneficiaries may incur their share of the costs by such means as reduced dividends or higher union dues. MSVRO, however, is a non-stock corporation. Plaintiff has demonstrated no financial relationship whatsoever between MSVRO and the physicians who may benefit from the new procedures."), *appeal dismissed*, 859 F.2d 150 (4th Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989). *See also* Home Savings Bank v. Gillam, 952 F.2d 1152, 1163 (9th Cir. 1991) (where bank sued and recovered severance benefits from its former CEO, award of fees was reversed because defendant was hurt by the suit, and where "the party ordered to pay fees is not a beneficiary . . . the common benefit exception does not apply.").

> the result achieved is not beneficial to all landowners within the District. Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there would be no congruence between the funds disbursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.[382]

Even in shareholder suits or suits by labor union members against a union, an award may be inappropriate because of insufficient congruence between the defendant and the beneficiaries; that is, the suit may not benefit all shareholders or union members, in which instance a fee award unfairly penalizes the nonbeneficiaries. Thus, the Ninth Circuit found an award inappropriate where a suit established that a union's policy, as it applied to the plaintiff, resulted in the unfair denial of pension benefits. Not all—or even most—union members benefited from the suit.[383] Significantly, the change in policy resulting from the

382. United States v. Imperial Irrigation Dist., 595 F.2d 525, 531 (9th Cir. 1979), *rev'd in part, vacated and remanded on other grounds*, 447 U.S. 352 (1980).

383. Burroughs v. Board of Trustees, 542 F.2d 1128, 1132 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). The court also noted that because "no records . . . reveal[] the identity of persons benefited by [the] action," the class of beneficiaries is "of indeterminable size and not easily identifiable." This focus is misleading because even if the beneficiaries were identified, an award would have been improper because many members of the union were not beneficiaries yet would have shared in the costs of any fee award. These two concerns—unequal benefits and difficulty identifying beneficiaries—often overlap. *See, e.g.*, Edwards v. Heckler, 789 F.2d 659, 660 (9th Cir. 1985) (reversing award where suit resulted in more lenient standard for Social Security benefits: "the class of persons benefited is not easily identifiable because it includes all who will benefit in the future from the new standard . . . . The benefit will be difficult to trace because each class member will receive a different amount depending upon his or her circumstances. Lastly, the costs cannot be shifted with exactitude [for these reasons]"); Cantwell v. San Mateo, 631 F.2d 631, 639 (9th Cir. 1980) (fees properly denied where suit required county to change policy with respect to retirement benefits: "The decision in this case will affect all county employees in the entire state of California. . . . There is no ready way to identify all the employees who might be able to avail themselves. . . . More importantly, for the

suit would not make the union more democratic; its only benefit was to the handful of employees whose pensions would be increased.

Similarly, most courts reject the applicability of the substantial benefit doctrine in suits against the government.[384] If only some members of the population benefit from the suit, an award from the government treasury is inappropriate because it would involve all taxpayers in the fee sharing.[385] Indeed, because of the required identity between the defendant and the beneficiaries, claims for fees based on the substantial benefit doctrine infrequently succeed outside the corporate and labor union context.

same reason, there is no method of shifting the costs with some exactitude."), *cert. denied*, 450 U.S. 998 (1981).

384. *See, e.g.*, Linquist v. Bowen, 839 F.2d 1321, 1326 (8th Cir.), *cert. denied*, 488 U.S. 908 (1988); Petition of Hill, 775 F.2d 1037, 1041 (9th Cir. 1985); Grace v. Burger, 763 F.2d 457, 459 (D.C. Cir.), *cert. denied*, 474 U.S. 1026 (1985); Jordan v. Heckler, 744 F.2d 1397, 1400 (10th Cir. 1984).

385. As noted, *see supra* note 277, if all citizens or taxpayers benefit, courts generally reject an award because it would merge the substantial benefit doctrine into the rejected private-attorney general concept. In *Alyeska*, the Court noted that in its substantial benefit and common fund cases, the beneficiaries were "small in number." 421 U.S. at 265 n.39. However, the number of beneficiaries does not appear to be ground for denial of fees *except* in suits against the government. *See supra* notes 279–81 and accompanying text (discussing this point in connection with common fund cases). In one substantial benefit case, the Third Circuit rejected the contention that an award was inappropriate because there were too many beneficiaries:

> The magistrate apparently understood that language [in *Alyeska*] to mean absolute numbers, and indicated that a class of 1,400,000 was too large to have benefited. Like any other statement, that one must be viewed in context. Given this context, mere size does not support the contention that the class of USWA members did not receive a common benefit from [plaintiff's] activity . . . . In our view, the requirement of identifiability weighs heavily in this determination, and USWA members, though numerous, are readily identifiable as the benefited group.

Brennan v. United Steelworkers of America, 554 F.2d 586, 606 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978).

### has the plaintiff benefited disproportionately?

The Sixth Circuit has held several times that where the plaintiff receives a damage award from a labor union, a fee award would shift the costs unfairly.[386] As one court observed, if the plaintiff who received a personal award were also awarded fees,

> he would pay no greater portion of the fees than any other union member who benefited only incidentally. The fee award would not distribute fees in proportion to benefits.
>
> This is clearly not a case where the plaintiff "benefits a group of others in the same manner as himself." . . . [Plaintiff] obtained redress for personal injuries not shared by other union members. The purpose of the common benefit exception is to shift the costs of litigation to "the class that benefited from them and that would have had to pay them had it brought the suit." . . . Other union members could not have brought suit to redress [plaintiff's] personal injuries.[387]

Similarly, the D.C. Circuit has said that fees are inappropriate where "a litigant obtain[s] a direct and pecuniary benefit, and the 'benefit' to the class . . . is incremental and relatively intangible."[388] The Tenth Circuit agrees.[389]

Other courts have awarded fees based on the substantial benefit doctrine, even though the plaintiff recovered damages, without discussing the disproportionality issue.[390] In any case, the

386. Black v. Ryder, 970 F.2d 1461, 1472 (6th Cir. 1992); Guidry v. International Union of Operation Eng'rs, 882 F.2d 929, 944 (6th Cir. 1989), *vacated on other grounds*, 494 U.S. 1022 (1990); Shimman v. International Union of Operation Eng'rs, 744 F.2d 1226, 1235 (5th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1215 (1985).

387. *Shimman*, 744 F.2d at 1235 (citations omitted).

388. American Ass'n of Marriage v. Brown, 593 F.2d 1365, 1369 (D.C. Cir. 1979).

389. Aguinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1480, 1484–85 (10th Cir. 1993).

390. *See, e.g.*, Bise v. International Bhd. of Elec. Workers, 618 F.2d 1299 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980); Rosario v. Amalgamated Ladies Garment Cutters Union, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977); McDonald v. Oliver, 525 F.2d 1217 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976).

Sixth Circuit's position has limited scope. First, it appears to apply only to cases where the plaintiff recovers damages personally—not to cases where damages are ordered paid to the union.[391] Second, it does not apply if the plaintiff receives damages *and* an injunction that directly benefits the other union members.[392] Finally, it cannot be construed to apply beyond money damages. Clearly, a fee award should not be denied[393] simply because the plaintiff benefits more than other beneficiaries, for example, if a suit that overturns a fraudulent election results in the plaintiff becoming elected.

### does the court have jurisdiction to make an award?

As we have seen, the requirement in common fund cases that the court have jurisdiction over the fund is generally met because the court has jurisdiction over the defendant who controls the fund.[394] In substantial benefit cases, where there is no fund, the "jurisdiction" or "control" criterion has occasionally proved to be more complex.

In one Sixth Circuit case, the plaintiff sued both his labor union and an automobile company for various offenses. He prevailed against the company for making improper payments to union officers. The district court awarded fees against the union, but the Sixth Circuit held that the district court lacked jurisdiction to make such an award, since the union was not party to the claim for which fees were awarded:

391. *See* Erkins v. Bryan, 785 F.2d 1538, 1549 (11th Cir.) (distinguishing *Shimman* in case where damages award was ordered paid to the union), *cert. denied,* 479 U.S. 961 (1986).

392. *Shimman* itself could arguably be read to suggest that fees may be in order in such cases. *See* 744 F.2d at 1235 nn.13, 14. A year later, the Sixth Circuit removed any doubt. *See* Murphy v. International Union of Operating Eng'rs, 774 F.2d 114, 127 (6th Cir. 1985), *cert. denied,* 475 U.S. 1017 (1986).

393. *See, e.g.,* Marshall v. United Steelworkers, 666 F.2d 845, 853 (3d Cir. 1981) (error to deny fees to plaintiff whose suit overturning union election led to his own election: "That the individual who brought suit also receives a direct personal benefit from it is of no matter"), *cert. denied,* 459 U.S. 823 (1982). In addition, it is irrelevant that plaintiff's motive in bringing the suit may have been to help himself rather than the union. Pawlak v. Greenawalt, 713 F.2d 972, 980 (3d Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984).

394. *See supra* text accompanying notes 282–85.

> In holding that the court need only "have 'jurisdiction over an entity through which the contribution can be effected'" . . . the district court has confused jurisdiction over the person with jurisdiction over the subject matter . . . . Liability for attorneys' fees cannot rest, without more, on the fortuitous chance that the claim on which a plaintiff seeks recovery of fees may be joined in the same action with a separate claim against the intended source of that recovery. The court making the award must have jurisdiction over the target of that award *by virtue* of its jurisdiction over the *subject matter* of the claim on which the award is based.[395]

The Ninth Circuit has held that the substantial benefit doctrine does not create subject matter jurisdiction, and it therefore dismissed a suit for recovery of fees filed after completion of the underlying litigation.[396] After the plaintiffs settled their inverse condemnation proceeding, they brought action for fees in federal court against property owners who were not parties to the litigation but who had benefited from the settlement. There was no independent basis for federal jurisdiction, and the Ninth Circuit held that the substantial benefit doctrine did not supply a basis for jurisdiction. The court acknowledged that this issue had not been raised in the numerous cases awarding fees based on the substantial benefit (and common fund) doctrine, but it noted that "in each such case the fee request was part of the original proceeding and the district court's jurisdiction rested on grounds independent of the fee request."[397]

Note that the plaintiffs could not have recovered from the property owners as part of the original suit because the property owners were not parties. In general, a court cannot order fees

395. Toth v. UAW, 743 F.2d 398, 406 (6th Cir. 1984) (emphasis in original, citations omitted).

396. Sederquist v. Court, 861 F.2d 554, 557 (9th Cir. 1988) (substantial benefit doctrine is not part of the federal common law but "merely an equitable exception to the traditional 'American Rule' governing attorneys' fees" and does not confer jurisdiction under 28 U.S.C. § 331).

397. *Id*.

paid by beneficiaries personally if they are not party to the litigation.[398]

#### is an award contrary to congressional intent?

As in the common fund context, a remedial scheme or other evidence that Congress did not intend a fee award in a particular class of cases will defeat such an award.[399]

### *Method for Determining Amount of Award*

The lodestar is generally used to determine the amount of fees in substantial benefit cases.[400] The kinds of adjustments to the lodestar permitted in cases under the fee-shifting statutes may be made in substantial benefit cases as well.[401] In addition, the Sixth Circuit has said that an award may be adjusted upward or downward to reflect the extent of the benefit conferred.[402]

Unlike in common fund cases, in substantial benefit cases, work preparing a fee request or litigating over fees is compensable.[403] In common fund cases, the work on fees, if compensated, would deplete the very fund that benefits the beneficiaries. This is

398. Thus, in Cantwell v. San Mateo, 631 F.2d 631, 639 (9th Cir. 1980), *cert. denied,* 450 U.S. 998 (1981), the court rejected a creative fee-sharing proposal by plaintiff. As a result of plaintiff's suit, the county had to adopt a policy that would make some county employees eligible for additional retirement benefits. Plaintiff proposed requiring the first nineteen employees who came forward to claim such benefits to contribute toward plaintiff's attorneys' fees. The court rejected the idea, in part because it "raises serious jurisdictional questions because none of the [prospective] affected employees are parties to this case or have filed similar suits in federal court."

399. Usery v. Local Union No. 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 386–88 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1123 (1977).

400. *See, e.g.,* Southerland v. International Longshoremen's Union, 845 F.2d 796, 800–01 (9th Cir. 1987).

401. Kinney v. International Bhd. of Elec. Workers, 939 F.2d 690, 695–96 (9th Cir. 1991) (rejecting argument that adjustment to lodestar "is inappropriate in any case where the award of fees is based upon" the substantial benefit doctrine).

402. Smillie v. Park Chemical, 710 F.2d 271, 275 (6th Cir. 1983).

403. Kinney v. International Bhd. of Elec. Workers, 939 F.2d 690, 693–95 (9th Cir. 1991); Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir.), *cert. denied,* 479 U.S. 817 (1986); Pawlak v. Greenawalt, 713 F.2d 972, 983–84 (3d Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984).

not so in substantial benefit cases, where the benefit conferred by the lawsuit is nonpecuniary.[404]

### *Issues on Appeal*

The discussion on appellate issues in common fund cases[405]—specifically, the timing of appeals, the scope of review, and whether the court of appeals can calculate the award itself—applies in toto to substantial benefit cases.

404. *See Kinney*, 939 F.2d at 694 n.5; *Donovan*, 784 F.2d at 106; *Pawlak*, 713 F.2d at 981.

405. *See supra* text accompanying notes 350–54.

# 3
# The Obligation of Bankruptcy Courts to Examine Fee Petitions

The usual fee petition in bankruptcy court does not present an adversarial situation. Because an award of attorneys' fees is paid by the estate, not by an opposing party, fee petitions are often unopposed. This puts an additional burden on the bankruptcy court if it scrutinizes the fee petition. The question arises, however, whether bankruptcy judges are obligated (or even authorized) to scrutinize fee petitions *sua sponte* and reduce or deny compensation where that is warranted.

The reasons supporting such an obligation are manifold. First and foremost, simple justice requires that attorneys not receive a disproportionate award at the expense of the estate and ultimately its creditors, yet that is likely to happen if courts do not scrutinize the fee request. Second, when attorneys reap windfalls, public confidence in the legal system erodes. Third, the relevant rules and statutes[406] do not forbid judges from scrutinizing fee petitions on their own initiative, and judges' equitable powers would seem to authorize it. Finally, when bankruptcy courts have scrutinized fee petitions, neither reviewing courts nor Congress objected. For all these reasons, the overwhelming number of bankruptcy courts to address the question have held that bankruptcy courts have not only the power but also the obligation to scrutinize fee petitions *sua sponte*.[407] The district courts to address the issue generally concur.[408]

406. *See, e.g.*, 11 U.S.C. §§ 327–331; Fed. R. Bankr. P. 2014.

407. *See, e.g.*, *In re* Gillett Holdings, 137 B.R. 462, 466 (Bankr. D. Colo. 1992); *In re* Bank of New England, 134 B.R. 450, 453 (Bankr. E.D. Mass. 1991);

This prevailing sentiment, however, does not settle the issue. Although most bankruptcy courts that have written opinions about this issue concluded that they have the authority and the obligation to review an award *sua sponte*, bankruptcy judges who do not believe they have this authority, or see it as purely discretionary, have little reason to state their views in written opinions—no party in the lawsuit is asking them to scrutinize the award.[409] Thus, the view that bankruptcy courts have this authority and responsibility may predominate only among those who have written on the subject; there are silent dissenters who do not scrutinize awards *sua sponte*. Moreover, a recent flurry of orders by district courts in the Eastern District of Pennsylvania explicitly hold that bankruptcy courts lack authority to reduce a fee award *sua sponte*,[410] relying on Third Circuit holdings that district courts may not *sua sponte* reduce a fee request in statutory fee-shifting cases.[411] These decisions have sparked controversy in the Eastern District that could spread and that, in any event, illuminates this question for all bankruptcy courts.

*In re* Bush, 131 B.R. 364, 265 (Bankr. W.D. Mich. 1991); *In re* Gold Seal Prod., 128 B.R. 822, 827–28 (Bankr. N.D. Ala. 1991); *In re* Concept Clubs, 125 B.R. 634, 636 (Bankr. D. Utah 1991); *In re* Saunders, 124 B.R. 234, 236 (Bankr. W.D. Tex. 1991); *In re* E Z Feed Cube, 123 B.R. 69, 73 (Bankr. D. Or. 1991); *In re* Sounds Distributing Corp., 122 B.R. 952, 957 (Bankr. W.D. Pa. 1991); *In re* CVC, Inc., 120 B.R. 874, 876–77 (Bankr. N.D. Ohio 1990); *In re* Great Sweats, Inc., 113 B.R. 240, 242 (Bankr. E.D. Va. 1990); *In re* Gary Fairbanks, Inc., 111 B.R. 809, 811 (N.D. Iowa 1990); *In re* Oberreich, 109 B.R. 936, 937 (Bankr. D. Wis. 1990); *In re* Inslaw, Inc., 106 B.R. 331, 333 (Bankr. D.D.C. 1989); *In re* Miami Optical Export, 101 B.R. 383, 384 (Bankr. S.D. Fla. 1989). This list is partial. Many other cases reach the same conclusion.

408. *In re* Taxman Clothing Co., 134 B.R. 286 (N.D. Ill. 1991); *In re* NRG Resources, Inc., 64 B.R. 643, 650 (W.D. La. 1986).

409. Bankruptcy judges report that some of their colleagues do not review petitions *sua sponte*.

410. *In re* Conston Corp., 1992 WL 55694 (E.D. Pa. 1992); *In re* Ross, 135 B.R. 230, 239 (E.D. Pa. 1991); In re T & D Tool & Die, Inc., 132 B.R. 525, 528 n.1 (E.D. Pa. 1991); *In re* Jensen's Interiors, 132 B.R. 105, 106 (E.D. Pa. 1991); *In re* Pendleton, 1990 WL 29645 (E.D. Pa. 1990); Fleet v. United States Consumer Council, Inc., 1990 WL 18926 (E.D. Pa. 1990).

411. *See supra* note 217 and accompanying text.

In *In re Rheam of Indiana,*[412] the Eastern District of Pennsylvania Bankruptcy Court thoroughly addressed "the now-controversial issue"[413] of whether bankruptcy courts may review fee applications *sua sponte*. The court held that they have the "right *and duty*" to do so.[414] The court noted that Congress required court approval of the trustee's employment of professionals "in order to eliminate abuses and detrimental practices such as cronyism . . . [and to] preserve the bankrupt estate by preventing unnecessary professional excursions."[415] Moreover, "[m]any creditors and interested parties have too small a stake in cases to hire counsel to file and prosecute objections to fee applications. . . . [T]hese parties assume that, since a judge must sign an order awarding fees, the judge must review the matter first before signing. This very logical assumption should not be proven inaccurate."[416]

The court also argued that fee applications in bankruptcy cases are "'fund-in-court' rather than statutory fee cases."[417] The Third Circuit precedent forbidding *sua sponte* reductions involved fee-shifting cases decided in an adversarial context.[418] For this reason, the court disputed the contention that Third Circuit precedent precluded *sua sponte* review by bankruptcy courts. Where the entity that has to pay the fees is an active party in the lawsuit and chooses not to object, courts must stay their hand; but in the bankruptcy context, the court must protect absent creditors and the integrity of the system.[419]

412. 137 B.R. 151 (Bankr. E.D. Pa.), *vacated in part on other grounds*, 142 B.R. 698 (E.D. Pa. 1992).

413. 137 B.R. at 152.

414. *Id*. (emphasis added).

415. *Id.* at 156 (quoting *In re* Philadelphia Mortgage Trust, 930 F.2d 306, 309 (3d Cir. 1991)).

416. *Id*. at 158.

417. *Id*. at 156 n.2.

418. As noted, *see supra* note 312, in the common fund situation courts have found *sua sponte* scrutiny appropriate, though the Third Circuit has not addressed that specific question.

419. To illustrate the injustice that results from a bankruptcy court's failure to scrutinize fee applications, the *Rheam* court noted that in one of the cases where the district court held that a bankruptcy court cannot reduce the request *sua sponte*, the district court "directed this court to enter an order allowing the

At least one of the courts to hold otherwise did so because of the establishment of the United States Trustee (UST) system.[420] The UST system, it maintained, protects the interests of the estate and creditors against overreaching attorneys, so that the bankruptcy court's special solicitude is no longer necessary. The *Rheam* court found this to be an unrealistic assessment of the UST system, claiming that the UST lacks the resources to scrutinize all fee applications.

Finally, the *Rheam* court recognized that the "thankless and therefore unpleasant task"[421] of reducing or denying awards *sua sponte* must be undertaken because "no less than public confidence in the bankruptcy system is at stake."[422] The court elaborated:

> Our review of stories which appear in the general news media suggests to us that the public suspects that bankruptcy courts are, if anything, far too liberal in awarding compensation . . . . Removal of the review process of the bankruptcy judge, weighing a fee request, in the context of the thousands the judge has seen, cannot have any effect but to justifiably undermine public confidence in the legitimacy of the entire bankruptcy process.
>
> . . . .
>
> . . . This court will therefore continue to review fee applications, even though, at this juncture, the UST and interested parties rarely, if ever, object to even the few egregious examples of overreaching among the thousands of applications presented.[423]

Debtor's counsel every penny of $368,440.34 sought in a final application, even though counsel quoted a top hourly rate of $325, far above the top rate of any other firm in this jurisdiction, in a large but not particularly problematic case." *Id*. at 158 n.4. The case in question is *In re* Conston Corp., 1992 WL 55694 (E.D. Pa. 1992).

420. *In re* Jensen's Interiors, 132 B.R. 105 (E.D. Pa. 1991).

421. 137 B.R. at 158.

422. *Id*.

423. *Id.* at 158–59.

The court recognized that this policy causes judges to spend an inordinate amount of time reviewing fee applications.[424] As a result, it adopted a prudent policy to limit the burden: "[H]earings are scheduled only if there is an objection filed or if the court has particular questions about an application. We consider these practices to be necessary to prevent our calendar from being overwhelmed by fee applications."[425]

Subsequently, the Third Circuit resolved the issue in its jurisdiction. In *In re Busy Beaver Building Centers*, the court employed essentially the same reasoning as the *Rheam* court, and reached the same conclusion—"Beyond possessing the power . . . the bankruptcy court has a *duty* to review fee applications, notwithstanding the absence of objections. . . . "[426]

The court emphasized, however, that it did not intend for bankruptcy courts to "become enmeshed in a meticulous analysis of every detailed facet of the professional representation."[427] Rather, noting that bankruptcy courts' time is precious, the Third Circuit clarified that the bankruptcy court faced with an unopposed fee application "need only correct reasonably discernible abuses, not pin down to the nearest dollar the precise fee to which the professional is ideally entitled."[428]

The *Rheam* and *Busy Beaver* courts made a compelling case that bankruptcy judges may, indeed must, review fee applications even when there is no objection. These courts recognized the potential burden on judicial administration and recommended appropriate measures to reduce it. Much more can be done to control the attorneys' fees process (in both the district courts and the bankruptcy courts) by case management, which we discuss in Part 4.

424. *See* Gordon Bermant, Patricia A. Lombard, & Elizabeth C. Wiggins, *A Day in the Life: The Federal Judicial Center's 1988–89 Bankruptcy Court Time Study*, 65 Am. Bankr. L.J. 491, 513–14 (1991) (bankruptcy judges nation-wide spend a significant percentage of their time reviewing fee petitions).

425. 132 B.R. at 155.

426. No. 92-3566, 1994 WL 73256, at *5 (3d Cir. Mar. 11, 1994) (emphasis in original).

427. *Id.* at *7–8 (quoting Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976) (en banc)).

428. *Id.* at *8.

# 4
# Techniques for Managing Attorneys' Fees

In this part we discuss case management techniques that judges use or have considered using for controlling the attorneys' fees process. Most of the ideas were gleaned from interviews with judges.[429] To the extent possible, we describe the techniques in the judges' own words.[430]

Most of the time that judges spend on fees involves reviewing fee applications and conducting hearings. We consider methods for dealing with each of these tasks and then discuss rules of thumb that may apply to either hearings or review of petitions.

## Facilitating Review of Fee Applications

According to most of the judges we interviewed, reviewing fee applications to ensure their reasonableness is the most burdensome aspect of the attorneys' fees process. Determining the appropriate rate can be difficult, and assessing the reasonableness of the hours claimed is more difficult. A number of methods are available to make this process more manageable.

429. We also interviewed lawyers, computer specialists, and U.S. trustees. Although we are unable to quote everyone we interviewed, we are grateful for their assistance.

430. When we quote a judge or someone else for the first time, we supply the date of the interview in a footnote. Any subsequent quotes from that person are from the same interview.

### *Sampling*

The law permits courts to award only "reasonable" fees, but examining every item in a fee petition can be enormously time-consuming. A few judges test the reasonableness of the hours claimed without scrutinizing the entire petition: They "sample" certain parts of the petition and apply the findings to the entire petition. In *Evans v. Evanston,* the Seventh Circuit approved this approach: "This sampling procedure operates on the reasonable premise that a lawyer's billing and work habits and practices are, in fact, habits and practices, which will uniformly apply to all of the lawyer's work."[431] Judge James Zagel of the Northern District of Illinois, the trial judge in that case, elaborates on this method:

> I apply the same kind of principles that auditors apply. Unless they do a full fraud audit, no accountant looks at every single paper and verifies every single thing and makes a judgment of reasonableness about every single hour. I simply pick what I believe to be a reasonable sample of work done. In *Evanston,* I told both lawyers in advance that after the bill was submitted I would give the defense lawyer an opportunity to select three blocks. I would review in detail—hour by hour—those three blocks, and whatever I found there would apply to the rest of the bill. The defense counsel picked the summary judgment motion, a day of trial, and something else. I actually was not entirely satisfied with the selection, so I picked a fourth item.[432]

Other judges also use the sampling technique. Judge Charles Matheson, chief judge of the Colorado Bankruptcy Court, explains how he uses it:

> Sometimes I sample some discrete services that were provided, particularly those that were litigated in front of me, because that gives me a pretty strong feel for what it was all about. I then measure the total efficiency of the attorneys' practice in the case by the efficiency in those few discrete items. Suppose the attorney says, "I spent twenty-five hours on this task," and I think the attorney should have spent twenty hours. If I feel

431. 941 F.2d 473, 476 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 3028 (1992).

432. Interview with Hon. James B. Zagel, April 22, 1993. Although it approved this technique, the Seventh Circuit expressed a preference for allowing both parties to suggest which tasks are to be sampled. 941 F.2d at 476.

> that his work on that task was fairly representative of how he worked, then I'll reduce the other time by 20%. You can sample on a random basis—just go through the billing sheets and look at every tenth day or every tenth sheet. Or you can look at a discrete activity. It should, however, be the kind of thing where the primary activity is played out in front of you so that you can really see what's going on.[433]

Marcy Tiffany, U.S. trustee for the Central District of California Bankruptcy Court, has made across-the-board objections to fee petitions based on conclusions she drew from sampling:

> In one case, we looked at the number of hours that were billed for internal communication and found that more than 50% of the billing was for internal communication. From that we drew the conclusion that the professionals were spending too much billing time on that kind of activity, and we made an across-the-board objection. I think we can do that kind of thing effectively—where we find an abuse of that nature, we can generalize it to the billing across the board.[434]

### *Requiring a Pretrial Estimate of Hours*

Several judges have considered requiring attorneys at the beginning of the case to submit an estimate of the work they anticipate the case will entail. This approach makes sense in light of the fact that the reasonableness of fees, according to most courts, should not be based on hindsight.[435] It also facilitates review of the fee application, because hours in excess of the submission can be presumed unreasonable (although the presumption may be rebutted). In addition, requiring a pretrial estimate or budget tracks the workings of the marketplace: many clients require attorneys to submit estimates for legal work.

433. Interview with Hon. Charles E. Matheson, April 22, 1993.

434. Interview with Marcy Tiffany, April 6, 1993.

435. *See supra* text accompanying notes 115–16. A pretrial plan or budget will help a court ensure that counsel approached the case reasonably from the beginning—the court will be less prone to make its assessment of reasonableness according to how the case turned out.

Judge Vaughn Walker of the Northern District of California finds this technique appealing and describes how it might work:

> I've been toying with the idea of requiring the lawyers at the first conference to set forth the terms under which they're going to charge fees. . . . I'd require the plaintiff's lawyer to say, "We think this case will result in a recovery of X dollars, and we intend to charge a fee of 1/3 X, or 1/4 X"; or alternatively, "We think it's going to take Y hours and our fee is Z dollars per hour, and therefore we project the fee to be so many dollars." And they would specify the dollar amount anticipated at various stages. If you made counsel put that up front, then at the end of the case, when it came time to award fees, you'd refer back to their proposal and be able to measure the actual fee application against the estimate. . . . How strictly you would hold the attorneys to the estimate is hard to say. I recognize that you can't predict at the beginning with absolute certainty what the outcome of the case is going to be. Still, it might be a very helpful exercise to require the parties to explain why it is their fee applications departed from the estimate.[436]

Judge Vincent Zurzolo of the Central District of California Bankruptcy Court believes a similar approach could be effective in bankruptcy courts:

> I'm contemplating requiring on the employment application an estimated budget of professional fees. Or if the case reaches a certain threshold, I would set a hearing early in the case (before fee applications are heard) to set up some kind of a budget. I would ask the attorney seeking employment to make an estimate of how much it will cost the estate in professional fees for the case to be successfully prosecuted.[437]

Magistrate Judge Ivan Lemelle of the Eastern District of Louisiana requires a pretrial estimate of hours in order to facilitate settlement of fee disputes: "I require the attorneys to send me an evaluation [of the case and fees], which I keep confidential. After the case, if they come back to me without a settlement on the fees issue, I'll pull out the evaluation."[438]

436. Interview with Hon. Vaughn Walker, April 21, 1993.
437. Interview with Hon. Vincent R. Zurzolo, April 29, 1993.
438. Interview with Hon. Ivan L. R. Lemelle, April 27, 1993.

### *Bidding*

Judge Vaughn Walker has pioneered a method for awarding fees in common fund cases—selecting class counsel through competitive bidding. In a celebrated case,[439] he had each firm that wanted to represent the class submit an application (under seal) that established the firm's qualifications and specified a schedule of percentages according to which it would request fees.[440] He reasoned that bidding "most closely approximates the way class members themselves would make these decisions and should result in selection of the most appropriately qualified counsel at the best available price."[441] In a subsequent opinion, Judge Walker expressed satisfaction with the result: "arrangements fully consistent with the . . . standard of reasonable compensation" and "accomplished without the 'protracted, complicated, and exhausting' fee litigation that typically accompanies lodestar determinations."[442] In an interview, he offered further thoughts about the merits of this method and how to apply it:

> It worked very well. The lawyers didn't like it at first, but they'll grow accustomed to it. I don't know whether the amount of fees will be materially different under a bidding process as compared with the lodestar, but bidding is much more convenient for the court, and the information you get is far more reliable. It puts the responsibility for allocating the resources of litigation where it belongs—on the shoulders of the lawyers. If fees are established in advance (or at least the terms and conditions under which fees are going to be awarded are established in advance), the lawyers have incentive to work efficiently and to make the right trade-off between effort and expense. That trade-off is not something judges are in a position to make, because we cannot know all the uncertain-

439. *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990), *modified*, 132 F.R.D. 538 (N.D. Cal. 1990).

440. The bid of the firm selected called for different percentages for different ranges of recovery: 24% of the first $1 million recovered, 20% of the next $4 million, 16% of the next $10 million, and 12% of any additional recovery. These percentages were to apply if the case was resolved within a year; higher percentages were to apply otherwise.

441. 131 F.R.D. at 690.

442. 132 F.R.D. at 547–48.

> ties of the case in the way lawyers can. For example, if the case doesn't go to trial we can't know whether the decision not to use a witness was reasonable. We'll never sit down and review all of the documents in the way that the lawyers do and get a real feel for the case, and that's what you need in order to make an intelligent decision about how much effort a case requires.

Judge Walker has used the method more than once, and he intends to continue to use it. He notes that he does not necessarily appoint the lowest bidder as class counsel:

> In one case, I did not give the lower bidder the award. There wasn't a great difference, but the firm which I designated as class counsel bid slightly higher than another firm. [The firm selected] was in a related case, so it was more familiar with the facts. And it had invested much time and effort and was doing a good job. So I found it appropriate to give it a break. My point is that you don't always need to select the low bidder. There are quality considerations that need to be kept in mind, just as there are when a client chooses counsel.

Even judges who have not used the "bidding" approach recommend negotiating a fee at the outset of a case that is likely to create a common fund.[443] Judge Richard Bilby of the District of Arizona says, "In large common fund cases, I negotiate a contingent fee up front with plaintiff's counsel. That saves an incredible amount of time, and is still fair to the lawyers and parties. In the Lincoln Savings & Loan case, it worked very well. What would

443. The Third Circuit task force recommended establishing a percentage at the "earliest practicable moment." 108 F.R.D. at 255 (1985). Even if the percentage is not established early on, the court can tell the parties that the percentage method will be used, thus reducing incentive to increase hours expended. This, in turn, can induce early settlement. As a case progresses, the court may find that the lodestar is more suitable than a percentage, and thus want to shift from a percentage to the lodestar. *See id*. at 272. Therefore, the court might require plaintiff's counsel to maintain billing records. Judge Richard Bilby of the District of Arizona notes that in cases where he has negotiated a fee up front, "counsel still keep their hours so they have backup if someone wants to fight about fees later." Interview with Hon. Richard M. Bilby, April 1, 1993.

have taken an inordinate amount of my time took maybe two hours."[444]

### *Using Computers to Review Submissions*

Computers are also useful in reviewing the hours that attorneys claim to have spent on a case. U.S. Trustee Tiffany explains their potential:

> There is under development in the private sector a billing program that can do the kind of categorization we ask for and more. Once billing is computerized, there are different "sorts" that can be performed to provide insight into billing practices. For example, in some cases we would find it useful to see how much time was billed by each professional on a daily basis. You see some interesting things. In one case a professional totaled more than twenty-four hours in a single day; this is something that doesn't necessarily jump out at you on another kind of

444. In class actions, some judges follow the Third Circuit task force's recommendation and appoint someone to protect the interests of class members. Judge Lee Sarokin of the District of New Jersey has done so in a few cases: "It works very nicely. I try to get someone experienced, knowledgeable, and strong enough to negotiate on behalf of the class. I've used a former judge. I personally contact them, ask if they'll do it, and tell them their responsibility. When I make the appointment, I fix the amount of compensation not to exceed a certain amount, and I require that plaintiff's counsel guarantee it if for some reason there isn't a fund. Otherwise, it comes out of the fund." Interview with Hon. H. Lee Sarokin, April 5, 1993.

Judge William Browning, chief judge of the District of Arizona, thinks he'll use such a procedure in the future: "I'll seek out prominent members of the bar and advise them that they'll be paid at their hourly rate or a set fee, depending on the case. I'll have that person represent the class and hammer out at arm's length a fair fee for the anticipated work. They'll define the parameters of the anticipated work so that at the end of the case, I can say, 'this involved more or less work than we thought it did, so we're going to adjust that fee.' But under that plan, adjustments would be the exception not the rule." Interview with Hon. William D. Browning, April 21, 1993.

Judge Carl Rubin of the Southern District of Ohio appoints a representative of the class, but not to negotiate the fee: "I have an independent attorney look at the fee application and render a report to me. I ask someone I know and have confidence in, sometimes a former law clerk. I compensate that person out of the fund. I give the attorneys a chance to respond to the report, but I am strongly influenced by the independent analysis." Interview with Hon. Carl B. Rubin, April 23, 1993.

> sort. You may find "rounding," where lawyers bill the same amount of time every day. That suggests they're probably not keeping accurate time records. You might also spot the "in and out" lawyer who bills only a few hours every few weeks; we can guess that person is just filling time rather than making a positive contribution. May or may not be, but at least you can identify these kinds of things and follow up.

The use of computer-based billing programs in large cases enables judges to analyze fee requests rapidly, discerning such indicia of reasonableness as the ratio of partners to associates and the time spent on various activities, such as discovery, research, intra-office conferences, travel, and so forth.

### *Keeping Computerized Records of Attorneys' Rates*

In some larger geographical areas, there are numerous submarkets for attorneys, which makes it difficult to determine reasonable rates. Sometimes judges hold lengthy hearings in which attorneys testify about their rates and rates in the area generally. Judge Geraldine Mund of the Central District of California Bankruptcy Court avoids such an inquiry by using a computer to keep track of local rates:

> I keep track on my computer of about 100 attorneys and how much they charge. My computer sorts it in various ways, and I update it about twice a year (and send it to my colleagues). It shows me how much they charge, their hourly rate, what firm they're with, whether they're a partner or an associate, when they were admitted to practice, how many years they've been in practice, etc. So I can see how much a fee applicant is charging in hourly rate compared with other people who have the same level of experience. I may find that someone who has ten years' experience is charging an hourly rate equivalent to what everybody else who has eighteen years' experience is charging.[445]

445. Interview with Hon. Geraldine Mund, April 2, 1993.

### *Requiring Attorneys to Categorize and Produce Clearer Records*

Many judges remark that the difficulty in reviewing fee applications stems from the opacity of the information contained in them. U.S. Trustee Tiffany (among others) has found a way to get the information in a more easily digestible and verifiable form.[446]

> When I came into this office, I found that lawyers submitted bills in a fashion that was virtually impossible to understand. The bills were done chronologically. This is how most lawyers submit bills to clients, but when they do it in a large case with a lot of lawyers billing, you get a garbled hodgepodge of entries. It's impossible to determine how much time was spent on a given activity, let alone whether that time was reasonable. Say a lawyer is working on five different activities related to a proceeding, and every day he does some of these activities. On each day's entry you'll see descriptions of what he did that day. In order to figure out how much time he spent on a particular aspect of litigation—let's say, doing research on some topic—you have to look through all the pages of billing and identify those entries relevant to that activity and add them all up. That's asking too much of people who review bills. So we issued guidelines that require categorization. We provided model categories for the parties to use that should cover most of the routine activities you're going to encounter.[447]

Whether or not judges require specific categorization, they can insist on more detailed, comprehensible records.[448] Judge

446. In Part 1, we discussed courts of appeals' requirements for documentation. *See supra* text accompanying notes 117–29. Here, we explore how district courts can go beyond the minimum requirements to facilitate the process of reviewing petitions.

447. Pertinent parts of the U.S. trustee's guidelines are presented in Appendix A.

448. For example, Martin Bostetter, chief judge of the Eastern District of Virginia Bankruptcy Court, says, "I've required for many years, and incorporated into the rules of this district, that attorneys list, line by line, the date of the service, the service performed, and the amount of time for each service. I do not permit blocking. Blocking would be a long paragraph with the amount of the fee at the end of it. There is no way I can determine from that whether there has

Randall Newsome of the Northern District of California Bankruptcy Court suggests requiring attorneys "to have the time broken down in different ways: how much time each individual spent over a given period of time, as well as how much time was spent on each project. . . . If it's not broken down both ways, you can fail to note that some people are spending twenty-eight hours a day working on the case."[449]

Judge Randolph Wheless of the Southern District of Texas Bankruptcy Court requires a system of record keeping that he calls "narrative quantification," which is harder on the attorneys but helpful for the court:

> I have the lawyers present their fee applications in the form of a narrative. For example, if they were trying to locate records, why did they spend fifteen hours looking? What is the story behind that? The lawyer might write, "We were looking for a document we were told existed; it was the key to the case. Here's what the document was supposed to have said. The debtor claimed he gave it to his lawyer. The lawyer said no, he gave it to the accountant. The accountant said he gave it back to the debtor." Then, you can assess the problem the lawyer faced and the need for the fifteen hours. The narrative should be quantified step by step, telling the number of hours, the lawyer, and the rate.[450]

Some judges find periodic filing of records helpful. Judge Bilby has lawyers file records quarterly (under seal) because "that allows me to go back and look at the bills and our electronic docketing to see what was going on. It's a lot easier for the lawyers, because they keep records on an ongoing basis rather than trying to reinvent after the case is over. And the judge knows the filing was done contemporaneously with the work."

been proper performance for the amount charged." Interview with Hon. Martin V. B. Bostetter, April 7, 1993.

Similarly, Judge Sidney Brooks of the Colorado Bankruptcy Court reports that "case law in my district has developed that requires detailed statements on a daily basis, all services provided, and a breakdown of those services if there are multiple services in a given time frame, time kept in tenths of hours, identification of the attorneys, etc." Interview with Hon. Sidney D. Brooks, April 1, 1993.

449. Interview with Hon. Randall J. Newsome, May 4, 1993.

450. Interview with Hon. Randolph F. Wheless, Jr., May 3, 1993.

Likewise, Judge Sarokin of the District of New Jersey sometimes requires an interim report on the time the attorneys are devoting. "From time to time I'll look at it to get a sense of the direction fees are taking."

Attorney Laura Bartell notes that "lawyers are used to billing clients periodically. They can churn out a computer printout of their time on a moment's notice. And the judge can monitor whether too many people are piling on and too many hours are being devoted. It helps not only in managing the fee process, but in managing the case."[451]

### *Having Defendants Submit Records*

Many judges agree with Judge Edward Becker of the Third Circuit that "the most difficult aspect of handling fee awards is assessing how much time it should have taken a lawyer to do a given piece of work."[452] Some judges make this task easier, and reduce disputes, by requiring defense counsel to submit their own billing records. These records provide a reference point for particular activities: If defendants claim that plaintiffs spent too much time researching an issue, it is instructive to see how much time their counsel spent. On occasion, this method will uncover blatant contradictions. Opposing counsel may have billed unequal amounts for attending the same conference. Judge William Browning, chief judge of the District of Arizona, found it useful to require defendants to submit their records in one case, noting that "[w]e found a significant amount of discrepancies."

Judge Zagel, who has required defendants to submit records, explains why, when, and how he applied this approach:[453]

> If there is much objection to the fee petition, the plaintiff may say, "If you think we're so unreasonable, let's see what you billed." I'll require defense counsel to submit their billing if I feel their objections to plaintiff's petition are outside the realm

451. Interview with Laura B. Bartell, partner, Shearman & Sterling, April 9, 1993.

452. Interview with Hon. Edward Becker, May 25, 1993.

453. Judge Zagel no longer requires defendants to submit their time records, since he now relies on "sampling" (*see* discussion *supra* text accompanying notes 428–29).

of reason. I do it as a message to defense counsel, but it also enables me to compare plaintiff's hours against the defense's hours. It has worked pretty well. But you must remember there is no necessary or exact correspondence between plaintiff's fees and defendant's. For example, if you have a plaintiff who barely pleads a decent complaint and whose theories are not sharply defined, you may very well have a defendant who spends much more time than the plaintiff trying to figure out what the plaintiff is actually hanging his hat on. On the other hand, if you have a sharply focused plaintiff's case, the defense is likely to put in many fewer hours than the plaintiff. . . . In the cases where I've had defense counsel submit records, I've allowed plaintiff's counsel to see them. However, I permitted certain redactions to protect work product.

## Eliminating or Streamlining Hearings

A number of judges have adopted measures that preclude the need for or at least streamline fee hearings.

### *Tentative Ruling*

To avoid unnecessary hearings, Judge Mund issues a tentative ruling on the fee petition. She explains why she adopted this procedure and how she implements it:

> It was painful to see attorneys come to fee hearings with their clocks running: you know, thousands of dollars to sit there waiting for me to say "approved as requested." So I instituted "a tentative ruling" procedure. I have a form I use for tentative rulings on fee applications. I print a page on each professional who requests fees and fax it to lead counsel, with an instruction that they fax a copy to each professional involved. They get it any time from Monday to Wednesday; my miscellaneous motion calendar is on Thursday. They are told that if they submit to the tentative ruling, they don't have to appear—just send back a fax to my secretary. They're also told that if anybody shows up to object, I'll continue the matter and give them notice, and they can come and fight the objection. But if nobody shows up to object, that will be my final ruling. I also tell them they're not going to get paid for an appearance [at a

> hearing] if they do not convince me to change my tentative ruling. I'll say in the tentative ruling, "no fees for a court appearance because your not appearing saves money." It's worked wonderfully. In 90% of the fee applications, they submit to the tentative ruling, and that's the end of it.[454]

Although Judge Mund sits in bankruptcy court, tentative rulings could cut down on the number of hearings in district courts as well. And by alerting counsel to parts of the petition that the judge finds troublesome, tentative rulings help focus hearings that do take place.

### *Use or Threatened Use of an Audit, To Be Paid by Loser of the Fee Dispute*

Judge Bilby has successfully avoided hearings by threatening to use an accountant to audit the fee petition, and to have one of the parties bear the cost of the audit:

> When there are objections to an application, I tell counsel I am seriously thinking about employing an accounting firm to do an audit. If the audit comes back and I find that it's reasonable and it shows the fees should be closer to what the plaintiff said than what the defendant said, then the cost of the audit will be borne by the defendant. Conversely, if it turns out the fee is too high, then the plaintiff will pay for the accountant out of their share of the fee. And I say, "before I do this, I'll give you an opportunity for thirty days to see if you can resolve it among yourselves."

Judge Bilby has yet to order an audit in the manner described above: "I've threatened it on three occasions, and every time the lawyers saw the light [and reached agreement]."

### *Written Declaration in Lieu of Testimony*

Judge Matheson streamlines fee hearings by using written declarations in lieu of direct testimony:

> When we have contested fee hearings, it serves no purpose for an attorney to take the stand and testify for hours about what

454. The form Judge Mund faxes to lead counsel is reproduced in Appendix B.

> he did. He ought to have put that in his fee application in the first instance. So I have the attorneys present their direct evidence by way of a written declaration, and have them called for cross-examination. Requiring up-front written declarations shortens fee hearings tremendously.[455]

### *Informal Conference*

An informal conference can either prevent or focus a fee hearing. Magistrate Judge Michaelle Wynne of the Eastern District of Louisiana uses a prehearing conference to resolve disputes:

> We have a conference on the attorneys' fees, and I make the plaintiff's lawyer go back and do the itemization, the date, who performed the service, what they charge per hour, how long it took them to do it, etc. Then they file that into the record, and we'll have another conference afterwards to see if we can resolve fees. If we can't, then we set a hearing.[456]

Judge William Schwarzer of the Northern District of California sees great potential in holding an informal conference to narrow and define issues before a hearing:

> After the application is filed, it may be worthwhile to have a conference to discuss with counsel which matters are contested and which are not. It's conceivable, for example, that opposing counsel will say, "We don't have any quarrel with the hourly rates, but we think that there are too many hours charged." Then the judge can say, "Be specific; tell me what it is you complain about and then we can look into that." Defense counsel might say, "They are charging X number of hours to pursue what turned out to be an unsuccessful claim." You might be able to resolve that dispute then and there. . . . I think a lot can be done to narrow the issues by having a conference when the fee petition is filed. A formal hearing might be ap-

455. *See* Charles Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony To Be Submitted in Written Form Prior to Trial,* 72 Geo. L.J. 73 (1983) (advocating this technique for trials).

456. Interview with Hon. Michaelle Wynne, May 3, 1993.

propriate if it's necessary to take testimony,[457] but that should be the last resort.[458]

## General Techniques

The above techniques are specific measures for facilitating review of applications and avoiding or streamlining hearings. Some more general ideas for managing fees also emerged from our interviews.

### *Setting a Framework Early in the Case*

Many judges stressed the importance of informing the attorneys, early in the case, what is expected of them in regard to attorneys' fees. Judge Martin Feldman of the Eastern District of Louisiana notes that

> lawyers tend to wait until after the merits of the case have been concluded to even think about fees, and that delays a final resolution of the case. I try to prevent that by letting them know at the pretrial conference that I would prefer for them to take any discovery on the issue of fees that may be necessary and to be prepared to resolve the matter of fees immediately after the trial on the merits.[459]

Some judges lay down specific instructions at the outset of the case. Judge Bilby says:

> I tell attorneys I will not pay for more than a certain number of hours a day—usually around ten. And I usually set guidelines as to travel. I may say, "If you're traveling from Tucson to Chicago and it takes you two and a half hours, I don't expect you to bill two and a half hours at full rate. If you certify that you're working, I'll let you bill half the travel time at your rate. With respect to expenses, I'm going to restrict you to a per diem just like the government, and you fly in the back of the

457. *See supra* text accompanying notes 194–203, 342–46 (discussing the fact that some circuits require hearings in certain circumstances).

458. Interview with Hon. William W Schwarzer, March 18, 1993.

459. Interview with Hon. Martin Feldman, April 8, 1993.

airplane just like I do." The lawyers have been good about that. Once they know the guidelines, there's no problem.

Ground rules can also cover staffing of the case generally; staffing at depositions, hearings, and trials; and an approximate division of labor between partners and associates. Attorney Laura Bartell says:

> Those sorts of ground rules should be established at the beginning. It's not fair to change the rules after counsel has already incurred all the expenses and say, "Oh, by the way, you're not going to get reimbursed for X, Y, and Z." . . . Also, the attorneys should be told what is expected in terms of the form of the fee petition, the areas that should be covered, when the judge wants to see it, whether there are going to be periodic progress reports on fee billings, etc.

In addition to addressing the matters just mentioned, Magistrate Judge Lemelle uses the initial conference to remind attorneys of the district's rule governing attorneys' fees and to direct them to opinions he has written that "outline at least my general approach on the documentation needed."

The court can also assess the likely stakes of the case and establish guidelines accordingly. Judge Schwarzer recounts that in the pretrial proceedings of one sexual harassment case,

> we went over the dispute, and it seemed to me a rather modest case. I thought plaintiff would never recover more than $50,000, but plaintiff's counsel made this a cause célèbre, and a lot of lawyers appeared in conferences and discovery proceedings. Early on I said, "I may be wrong, but I have a hunch this case is worth between $25,000 and $50,000. You better be thinking about this case in more modest terms, because you will be in here asking me to award fees, and you will likely have a modest judgment, and I will be reluctant to give you much more than the judgment."[460] . . . While judges can't know what the jury is going to do, they often have a pretty good intuition about how a case is shaping up and what is likely to be at

460. *See supra* text accompanying notes 165–66 and note 166 (discussing the fact that, although courts do not require proportionality between the fee award and the amount of damages recovered, in some cases the amount reasonably expended can be linked to likely recovery).

> stake—not necessarily who is going to win, but the magnitude of what is at stake. The judge can tell the lawyers his views of what is at stake, so they can have that in mind when they make decisions about how to litigate the case and how much effort to put in. . . . You can't order lawyers to have only one person at a deposition, but you can say you're going to allow compensation for only one attorney at a deposition. I think that is something that it is well to raise early in the proceeding. If the judge thinks there is a danger of overstaffing, it is generally reasonable to say, "I'm going to allow compensation for one person for work on a deposition, or a motion for that matter. If you want to bring other people along for experience you're free to do that, but don't charge for it."

### *Local Rules, Guidelines, and Written Opinions*

A number of courts have adopted billing guidelines or local rules for attorneys.[461] Judge Rubin of the Southern District of Ohio distributes a booklet that outlines the procedures he follows. He also keeps a document that lists local rates in the court clerk's office:

> I have a booklet called "Instructions for Trial Preparation."[462] As soon as a case is filed, we send this booklet to the plaintiffs' attorneys. As soon as we find out who is defense counsel, they get a copy. And there is a portion of it on attorneys' fees where I say, "the court considers the position taken by the Hon. Joseph L. McGlynn, Jr., in the case of *In Re Fine Paper Antitrust Litigation* and the position of the Hon. John F. Grady in *In Re Continental Illinois Securities Litigation* to be persuasive and the procedural suggestions made in those opinions will usually be followed." Counsel are urged to read these opinions.[463]

461. For a few examples, see Appendices A, D, and E.

462. Pertinent parts of the booklet are reproduced in Appendix C.

463. In *Fine Paper*, Judge McGlynn awarded only 25% of plaintiffs' requested fees on the grounds that counsel engaged in duplicative and unnecessary work, incurred excessive expenses, and exaggerated the value of services rendered. 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3d Cir. 1984). Shortly thereafter, in *Continental Illinois*, Judge Grady issued a pretrial order containing guidelines explicitly designed to avoid the abuses discussed by Judge McGlynn. 572 F. Supp. 931 (N.D. Ill. 1983).

> In 1983 I appointed a committee of lawyers to advise me as to what the appropriate fee rates were. . . . [Based on the findings of the committee], I prepared a document called "In Re: Attorney Fees," and it's in the clerk's office. And, in "Instructions for Trial Preparation," there is a reference to that document in the clerk's office. The problem, obviously, is that a 1983 determination is not nearly as good in 1993 as it was in 1985. . . . I really should appoint a new committee of lawyers and non-lawyers who could advise me as to what appropriate fees or hourly rates are, depending upon the experience of the lawyer. And I would publish the findings.

Similarly, the Northern District of California Bankruptcy Court relies on written guidelines.[464] Judge Newsome discusses the drafting, disseminating, and content of those guidelines:

> All the judges in the Northern District of California agreed to set fee guidelines for all cases. When we came up with the guidelines, we submitted them for comment to a local attorneys' committee that meets with the judges periodically. We got the word out that we were considering implementing these guidelines and were interested in comments. We got some comments, and we've also taken it upon ourselves to review the guidelines every year to see whether anything should be changed. It's basically been done in the same fashion that local rules are put together, except they're not really rules; they're guidelines in the strictest sense of the word. The bar wasn't happy that we instituted them, but I think they've gotten used to them and agree that it's better to know what the guidelines are, even if you don't like them. The guidelines require that there be project billing, giving us the total number of hours spent on each particular project or area of representation. The guidelines also limit certain kinds of expenditures or expenses: the amount you can charge for fax and Xerox and messengers—that sort of thing. These guidelines have been a big help. They've been published, and we've done everything we can to make sure everybody knows about them. If we have out-of-town counsel, in the first hearing we'll give them a copy. We have made them available in the clerk's office as well.

464. Pertinent sections of the guidelines are reproduced in Appendix D.

Judge Wheless has guidelines of his own as well, and he is pleased with the results:

> I've adopted written guidelines and attached a sample fee petition to show what I'm looking for in an application. The guidelines are on a table up front in the courtroom. Plus, we have a group of lawyers and judges that meets monthly, and at these meetings I've talked about the guidelines and their availability. Anyone can get the guidelines by calling my secretary or my case coordinator. I've also got an order [explaining requirements for fee applications] posted on the door to the courtroom, saying, "Do not enter without reading this."[465]

Judge Becker would like to see circuit-wide guidelines that apply to billing for certain tasks: "I think a given circuit can try to come up with figures as to how much time should be allowable for certain basic tasks, such as drafting a complaint in a simple or medium-sized case or preparing an answer. We could then establish some kind of circuit-wide standard as to a benchmark amount."[466]

Some courts rely on informal rules or guidelines. For example, Judge Martin Bostetter, chief judge of the Eastern District of Virginia Bankruptcy Court, has "established through hearings and by statements in open court certain criteria. For instance, I don't allow more than $175 an hour unless the case is very complicated or unusual. I haven't published these rules for the simple reason that I don't want them cast in concrete to the extent that they couldn't be changed or reasonably interpreted."

Still other judges rely on written opinions to clarify their approach to fees. As noted, at the status conference Magistrate Judge Lemelle asks counsel to read a few opinions in which he has laid out his approach to fees. Judge Sidney Brooks of the Colorado Bankruptcy Court makes a point of writing opinions to clarify important fees matters. Judge David Scholl of the Eastern

465. Pertinent sections of Judge Wheless's guidelines are reproduced in Appendix E.

466. Similarly, U.S. Trustee Tiffany observes that it would be helpful to have estimates of the amount of time certain tasks generally require, so that deviations could be easily spotted and pursued. She notes that here, too, computers can be of assistance. Collecting and computerizing the data on numerous fee applications would help determine reasonable estimates.

District of Pennsylvania Bankruptcy Court puts his ground rules on the front of each order approving an attorney's employment.[467]

Many judges emphasize that, one way or another, it is helpful for a court to establish and publicize a modus operandi concerning attorneys' fees. Guidelines should at least direct attorneys to submit fee applications in a readable and comprehensible form and to provide appropriate informative summaries to save the judge from having to plow through voluminous backup data.[468]

### *Delegation*

At every stage of the fee process, the court should consider calling on others for assistance.

#### law clerks and secretaries

Most judges are reluctant to delegate attorneys' fees matters to law clerks and secretaries because they lack experience. However, Judge Schwarzer notes that law clerks can check the nature of the work claimed by "going back to the file and looking at what was going on in the case and what was filed. If somebody charges twenty-five hours to prepare a motion, and you find that it's a perfunctory motion a few pages long, you have an indication that the charges are excessive." Indeed, Judge Browning notes:

> We do some cross-checking to make sure the lawyers are accurate. We match the statistics that are kept on the judge's in-court time against the lawyer's claim for time. We do the same with court reporters' and courtroom deputy's time records that are kept pursuant to statute. And we sometimes have billings from opposing counsel, so we can cross-check entries that pertain to interaction with other lawyers. The law clerks pretty much do this. The courtroom deputy does a significant amount of it, but it's all under a law clerk's supervision. After talking to me, the law clerk will decide exactly how much of an examination it will take. A spot check may reveal that the lawyers are conservative in their time estimates, in which case

467. Interview with Hon. David A. Scholl, April 2, 1993.

468. *See, e.g.,* Appendix A, Guideline No. "B," General Information Required.

> we don't pursue it at great length. Conversely, if we find an overreaching, intentional or otherwise, we take a closer look.

Likewise, Judge Norma Shapiro of the Eastern District of Pennsylvania says, "I use my law clerks extensively to compare the final petition to interim submissions. And if you have a secretary who is really terrific, that person can help with fees. You need someone to sit down with a calculator and check all the addition, and check the multiplication—the hours times the hourly rate."[469]

### magistrate judges

Referral of attorneys' fees issues to magistrate judges varies throughout the courts. Some judges don't refer matters at all, whereas Judge Sarokin explains that, absent settlement, "my practice is to refer the amount of the fees to the magistrate judge for a hearing or determination of the appropriate amount." Many judges adopt a middle ground, calling on magistrate judges to handle fees in complex cases. Judge Jack Weinstein of the Eastern District of New York says that in large cases he will "give it to the magistrate judge with criteria on what to allow and what not to allow. I may say half-time for travel, no time for attending conferences that were educational, things like that."[470]

### special masters

Some judges appoint special masters to assist with attorneys' fees, especially in complex cases. Attorney Laura Bartell, who has served as a special master, notes that the parties liked it "because it meant the fee application was going to be decided fast. They were very happy to see that somebody had responsibility for this who was not going to be distracted by a docket, by the Speedy Trial Act, or anything else, and was just going to focus on this,

469. Interview with Hon. Norma Shapiro, May 12, 1993. Judge Zurzolo also has his law clerks do preliminary review of fee petitions, with the assistance of worksheets: "I have created worksheets for the law clerk to do a preliminary analysis of the fee application. They check whether the petition provided the information required by our local rules and whether it complied with the U.S. trustee's guidelines."

470. Interview with Hon. Jack B. Weinstein, April 6, 1993.

decide it, write the opinion, and issue it so they could get paid."[471]

### experts

On occasion, expert assistance may be necessary. Some judges observe that they have been away from practice so long that they are out of touch with billing practices and rates. Judge Joseph Sneed of the Ninth Circuit believes "you need people with daily experience with this sort of thing, so they get a good idea of the market rates. It seems to me that most fee-setting should be done by someone whose job it is to do that—magistrate judges, masters, special panels of magistrates, or as the British call it 'fee masters,' at various levels of the judiciary."[472]

Judges are increasingly availing themselves of expert assistance, especially in bankruptcy court. Judge Brooks has, on several occasions, used a court-appointed expert to

> examine fees, create raw data, and cull the information, filter it, in order to identify problem areas. Problem areas include duplicate work, unnecessary work, work performed by a higher salaried or higher hourly rate person than is called for, unnecessary expenses, multiple meetings or multiple attorneys at a given meeting when it might not be necessary or appropriate, and travel time charges if they turn out to be unproductive or excessive. . . . I've heard expressions of "it's too costly" or "it's not good use of the estate's assets," but there has never been strong or pronounced opposition. I do it in big cases, if the fees are anticipated to be a half-million dollars or more. . . . I ask the parties to recommend people that they can mutually agree upon as being competent and unbiased. That has worked thus far.

The process of finding such experts is getting easier, as more lawyers and other consultants are offering to provide these services.

471. We noted earlier, *see supra* note 441, that in common fund cases some judges appoint someone to protect the interests of unrepresented beneficiaries. Judge Rubin has used a special master in this capacity, noting that "it really does not make sense to appoint both a special master and a representative of the class" if the special master can adequately represent the class.

472. Interview with Hon. Joseph T. Sneed, March 31, 1993.

### settlement judge

Judge Bilby reports that "in one case, plaintiffs' counsel had a problem apportioning fees. I finally said, 'Well now I'm going to give you until such-and-such a date. During that time you are to negotiate this and you can use my settlement judge if you care to, and I expect you to resolve it among yourselves.' And they resolved it."

### lead counsel

In class actions, lead counsel can be given chores that facilitate the judge's management of fees. Judge Shapiro says that

> in class actions, where multiple law firms will seek fees, I require lead counsel to supervise fee petition submissions. I require all firms' time records to be submitted on a monthly basis to lead counsel. And I require uniformity by category. In other words, I will ask lead counsel to consult with the others and submit categories of expenses—whether it's preparing pleadings, discovery, attending depositions, writing a brief, coming to court, and so on. I explain that I will not honor any request for fees if the time isn't recorded in those monthly submissions. I require lead counsel to collect and examine those submissions, and submit to me on a monthly basis and under seal a certification that the time was necessary to represent the interests of the class and was not repetitive. When the case is over and the final fee petition is submitted, I have my law clerk unseal the monthly certifications and compare them with what is claimed on the final petition. We then make a list of all the discrepancies. We have a hearing on the fees, and counsel have a chance to give a reason for something.

Of course, the techniques discussed above are not exhaustive. Apart from presenting ideas for judges to consider, this discussion should encourage judges to be innovative in their efforts to manage the attorneys' fees process.

# Appendix A
# U.S. Trustee Guidelines

*The following guidelines are from the Office of the United States Trustee (Central District of California), issued May 15, 1992.*

## Guideline No. "A": Billing Guidelines*

Professional Fees

1. Discuss strategy with client (i.e., the debtor, trustee, committee chair, etc.) both at the outset of the case and on an ongoing basis, at least quarterly. If a particular project is likely to require in excess of five thousand dollars of billable time, excluding travel and court time, the client should be consulted in advance and provided an estimate of the expected total cost for the project.
2. Consult with the client in advance on any expense disbursements in excess of one thousand dollars.
3. Delegate assignments, consistent with performance of high-quality work, to those who will provide the best value for the time spent. Counsel should consult the client with respect to the initial staffing and any staffing increases.
4. Do not charge for educating junior personnel in basic substantive or procedural rules, law or principles.

* This Guideline supersedes any inconsistent or contradictory provisions in any Guidelines previously issued by the Office of the United States Trustee. Failure to comply with the requirements of this Guideline may result in an objection from the Office of the United States Trustee.

5. Do not charge learning time for replacing staff or professionals.
6. It is expected that most routine hearings and meetings will require only a single professional. Where two professionals routinely appear at meetings or hearings or whenever more than two are in attendance, specific justification must be provided in the fee application.
7. Internal conferences and meetings should be conducted only when necessary and appropriate.
8. Do not "double charge" for long distance travel time; i.e., when work is performed for this or another client while traveling, there should not be an additional charge for travel time. Also, where travel is on behalf of more than one client, it should be prorated between them.
9. Billing statements must be provided to the client on at least a monthly basis.
10. Neither hourly fees nor expense charges may exceed those applicable to nonbankruptcy clients.
11. Services should be billed at the hourly rate applicable when performed.
12. Any deviations from the requirements of this guideline are to be highlighted and explained.

Reimbursable Expenses: The following expenses are reimbursable at actual cost only.

1. Postage.
2. Long distance telephone charges.
3. Messenger and overnight delivery services.
4. Filing fees.
5. Computer research services.
6. Outside photocopy services.
7. Reasonable parking expenses.
8. Charges for meals during travel, but not to exceed $50.00 per day, per person.
9. Reasonable charges for meals provided in the course of an in-office business meeting with "outside" individuals.

10. Charges for transmitting facsimiles that do not exceed $1.00 per page.*
11. In-house photocopy charges that do not exceed 20 cents per page.*
12. Charges for receipt of facsimile copies that do not exceed 20 cents per page.*

Non-Reimbursable Expenses: Absent extraordinary circumstances, the United States Trustee will object to the following as not actual, necessary expenses.

1. Staff overtime.
2. Travel expenses for "first class" or other luxury transportation.
3. Local meals for professional or support staff.
4. Normal overhead expenses such as rent, insurance, utilities, secretarial work, word processing, office supplies, docketing time, tending photocopy or facsimile machines, "opening file" administrative expenses, and other similar internal operating or overhead expenses.

* These charges are intended to approximate actual costs, given the difficulty of an accurate determination. To the extent that actual costs can be documented, they should be used. To the extent that non-bankruptcy clients are charged less, the lesser amount should be used.

* *Id.*

* *Id.*

*The following guidelines are from the Office of the United States Trustee (Central District of California), issued May 15, 1992.*[1]

## Guideline No. "B": Applications for Professional Fees and Expenses[2]

General Information Required

The application for payment of professional fees and expenses shall contain the following information.

1. The entry date of the order approving employment and the date services commenced.
2. The date of the applicant's last fee application. Note, unless otherwise specifically approved by the court, applications for payment should not be filed more frequently than once every 120 days.
3. A summary of fees paid and costs reimbursed including:
   a. Advance fee payment received.
   b. Advance fee payment remaining.
   c. Payments made pursuant to prior applications.
   d. Amount remaining to be paid pursuant to prior applications.
   e. Any amount reserved pending final fee application.
4. A narrative summary of the significant events in the case during the relevant time period.
5. A brief statement for each major activity code category used, noting the total fees charged for that category and the particular benefits generated to the estate.

1. This Guideline must be followed with respect to all billing entries made on or after August 17, 1992. However, professionals should endeavor to comply with the Guideline immediately.

2. This Guideline supersedes any inconsistent or contradictory provisions in any Guidelines previously issued by the Office of the United States Trustee. Failure to comply with the requirements of this Guideline may result in an objection from the Office of the United States Trustee.

6. In Chapter 11 cases, a statement by counsel for the debtor in possession discussing prospects for reorganization and estimating when the disclosure statement and plan will be submitted.

7. In Chapter 7 cases, a statement by the trustee or trustee's counsel estimating when the final report will be filed and what further work must be performed before the estate will be in a position to be closed.

8. A notation and explanation of any items that deviate from the requirements of Guidelines A and B.

9. A declaration by the applicant's designated professional that the application complies with the Guidelines A and B except as specifically noted and justified in the application and indicating the amount, if any, that the bill has been reduced as a result of discussion with the client (see Example 6, attached).

10. A written statement by the client that he/she has reviewed the billing and indicating what objections, if any, the client has not been able to resolve. If the client is unwilling to provide such a statement, the professional should indicate that the bill was provided to the client, the client was informed of this requirement and has declined to comply.

11. The final fee application must cover all of the services performed in the case and must seek approval of all prior interim fee awards. It may not merely cover the last period for which fees are sought.

Billing Format—Professional Fees

12. The applicant's Time and Billing Statement shall be submitted in chronological order by activity code category (see paragraph 15, below) in substantial compliance with the following format. The total hours and amount for each activity code category should also be provided (Example 1).

Activity Code Category—Name, Type, Hourly Rate, Date, Hours, Total Amount, Description

"Type" refers to the type of professional performing the services: e.g., (P) for partner, (A) for associate, (PL) for paralegal. A key to

the abbreviations used should be provided. An acceptable alternative would be to combine name and type by using initials, e.g., BHP to indicate Benjamin Harrison, partner, so long as a key to the full name and type coding is provided.

"Hourly Rate" is the rate applicable at the time the services were performed.

"Hours" should be calculated by tenths; no "lumping."

"Description" should include sufficient detail to identify the particular persons, motions, discrete tasks performed and other subject matters related to the service.

13. In addition to the Time and Billing Statement, the applicant should submit:

    Biographical Information—a brief biography for each billing professional (Example 5);

    Monthly Summary of Fees—a summary showing the total amount billed on a monthly basis for each activity code category (Example 3);

    Professional Activity Summary—a summary for each activity code category listing the name and type of professionals who billed under that category, each professional's billing rate, and the total hours and amount billed by that professional under that category (Example 2).

Billing Format—Expenses

14. Expenses (e.g., long distance telephone, copy costs, messengers, computer research, airline travel, etc.), should be listed by category and month incurred (Example 4). Unusual expense items or those in excess of $1000.00 should include the date incurred; description; amount and explanation of need. Backup documentation for all expenses should be retained whenever possible and made available to the United States Trustee on request.

Activity Code Categories

15. The following is a list of activity code categories that are applicable to most bankruptcy cases. Only one category should

be used for any given activity and professionals should make their best effort to be consistent in their use of categories. This applies both within and across firms. Thus, it may be appropriate for all professionals to discuss the categories in advance and agree generally on how activities will be categorized. The application may contain additional categories as the case requires. For example, each litigation matter should have its own category. But every effort should be made to use the listed categories in the first instance and to coordinate the use of additional categories with other professionals in the case.

The following categories are generally more applicable to attorneys but may be used by all professionals as appropriate.

Asset Analysis And Recovery: Identification and review of potential assets including causes of action and non-litigation recoveries.

Asset Disposition: Sales, leases (§ 365 matters), abandonment and related transaction work.

Business Operations: Issues related to debtor in possession operating in Chapter 11 such as employee, vendor, tenant issues and other similar problems.

Case Administration: Coordination and compliance activities, including preparation of statement of financial affairs; schedules; list of contracts; United States Trustee interim statements and operating reports; contacts with the United States Trustee; general creditor inquiries.

Claims Administration and Objections: Specific claim inquiries; bar date motions; analyses, objections and allowances of claims.

Employee Benefits/Pensions: Review issues such as severance, retention, 401K coverage and continuance of pension plan.

Fee/Employment Applications: Preparation of employment and fee applications for self or others; motions to establish interim procedures.

Fee/Employment Objections: Review of and objections to the employment and fee applications of others.

Financing: Matters under §§ 361, 363 and 364 including cash collateral and secured claims; loan document analysis.

Litigation: There should be a separate category established for each matter (e.g., XYZ Stay Litigation).

Meetings of Creditors: Preparing for and attending the conference of creditors, the § 341(a) meeting and other creditors' committee meetings.

Plan and Disclosure Statement: Formulation, presentation and confirmation; compliance with the plan confirmation order, related orders and rules; disbursement and case closing activities, except those related to the allowance and objections to allowance of claims.

The following categories are generally more applicable to accountants and financial advisors, but may be used by all professionals as appropriate.

Accounting/Auditing: Activities related to maintaining and auditing books of account, preparation of financial statements and account analysis.

Business Analysis: Preparation and review of company business plan; development and review of strategies; preparation and review of cash flow forecasts and feasibility studies.

Corporate Finance: Review financial aspects of potential mergers, acquisitions and disposition of company or subsidiaries.

Data Analysis: Management information systems review, installation and analysis, construction, maintenance and reporting of significant case financial data, lease rejection, claims, etc.

Litigation Consulting: Providing consulting and expert witness services relating to various bankruptcy matters such as insolvency, feasibility, avoiding actions, forensic accounting, etc.

Reconstruction Accounting: Reconstructing books and records from past transactions and bringing accounting current.

Tax Issues: Analysis of tax issues and preparation of state and federal tax returns.

Valuation: Appraise or review appraisals of assets.

Example 1: Professional Fee Statement, Harrison & Polk

## XYZ Stay Litigation

| Name | Type | Hourly Rate | Date | Hours | Total Amt. | Description |
|---|---|---|---|---|---|---|
| Harrison, B. | P | 305.00 | 4/1/92 | 0.1 | 30.50 | Telephone conference with M. Fillmore from ABC re: stipulation to cancel hearing on XYZ's motion to lift qutomatic stay. |
| Arthur, C. | A | 155.00 | 4/1/92 | 1.6 | 248.00 | Preparation of stipulation to cancel hearing on XYZ's motion to lift automatic stay. |
| Harrison, B. | P | 305.00 | 4/2/92 | 0.4 | 122.00 | Review of stipulation to cancel hearing on XYZ's motion to lift automatic stay. |
| | | | Totals | 2.1 | 400.50 | |

## Business Operations

| Name | Type | Hourly Rate | Date | Hours | Total Amt. | Description |
|---|---|---|---|---|---|---|
| Harrison, B. | P | 305.00 | 4/1/92 | 1.5 | 457.50 | Review Form 10-Q. |
| Polk, J. | P | 285.00 | 4/2/92 | 1.2 | 342.00 | Meet with Debtor regarding next Board Meeting. |
| Pierce, F. | PL | 80.00 | 4/3/92 | 2.5 | 200.00 | Review and summarize schedules and all contracts attached as exhibits to the real estate briefs. |
| Polk, J. | P | 285.00 | 4/4/92 | 1.0 | 285.00 | Attend Board of Directors meeting. |
| | | | Totals | 6.2 | 1,284.50 | |

Example 2: Professional Activity Summary, Harrison & Polk

## XYZ Litigation

| Name | Rate | Hours | Amount |
|---|---|---|---|
| Partner | | | |
| Harrison, B. | 305.00 | 0.5 | 152.50 |
| Associate | | | |
| Arthur, C. | 155.00 | 1.6 | 248.00 |
| | Matter Totals | 2.1 | 400.50 |

## Business Operations

| Name | Rate | Hours | Amount |
|---|---|---|---|
| Partner | | | |
| Harrison, B. | 305.00 | 1.5 | 457.50 |
| Polk, J. | 285.00 | 2.2 | 627.00 |
| Paralegal | | | |
| Pierce, F. | 80.00 | 2.5 | 200.00 |
| | Matter Totals | 6.2 | 1,284.50 |

Example 3: Monthly Summary of Fees, Harrison & Polk

| Matter | April | May | June | Total |
|---|---|---|---|---|
| XYZ Stay Litigation | 400.50 | 587.00 | 939.00 | 1,926.50 |
| Business Operations | 1,284.50 | 2,642.00 | 727.00 | 4,653.50 |
| Fee/Employment Applications | 583.50 | 475.00 | 0 | 1,058.50 |
| Case Administration | 1,397.00 | 1,959.00 | 942.00 | 4,298.00 |
| Total Fees | 3,665.50 | 5,663.00 | 2,608.00 | 11,936.50 |

Example 4: Expense and Disbursement Summary, Harrison & Polk

| Expense Category | April | May | June | Total |
|---|---|---|---|---|
| Litigation Support | 30.00 | 20.00 | 35.00 | 85.00 |
| Computer Legal Research | 50.00 | 35.00 | 25.00 | 110.00 |
| Outside Reproduction | 20.00 | 0 | 40.00 | 60.00 |
| Total | 100.00 | 55.00 | 100.00 | 255.00 |

Example 5: Biographical Information, Harrison & Polk

Partners

Benjamin Harrison
Mr. Harrison has extensive experience in the area of land acquisition as well as special expertise in antitrust law. In addition to his distinguished military service as a Colonel in the 70th Indiana Volunteers and as a Brevet Brigadier General he served as Commissioner for the Court of Claims; City Attorney; State Supreme Court Reporter and a Member of the U.S. Senate. Mr. Harrison was educated at Farmer's College and received his degree at Miami University.

James K. Polk
Mr. Polk received his degree from the University of North Carolina. He has overseen some major acquisitions and has a special emphasis on international property disputes. Mr. Polk has had a distinguished political career, having served as a Member of the Tennessee Legislature, a U.S. Representative, Speaker of the House of Representatives and Governor of Tennessee.

Associate

Chester A. Arthur
Mr. Arthur is a corporate associate who graduated with honors from Union College of Schenectady. He has specialized experience relating to import-export duties having served as Collector of Customs for the Port of New York.

Paralegal

Frank Pierce
Specializes in civil litigation. Graduate of Bowdoin College.

Example 6: Declaration of Benjamin Harrison

1. I, Benjamin Harrison, am an attorney at law licensed in the State of California and admitted to practice in the Central District of California. I am the designated professional responsible for overseeing the billing in this matter and for assuring compliance with the Guidelines of the United States Trustee relating to billing. I have personal knowledge of the facts set forth herein, and if called upon to do so, could and would competently testify to those facts.
2. The fee application submitted by Harrison & Polk for the time period from April through June 1992 complies with United States Trustee Guidelines A and B except as specifically noted and justified in the application.
3. As a result of discussions with the client, the total bill for this time period was reduced by $150.00.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: _____

Benjamin Harrison

# Appendix B
# Notice of Tentative Ruling on Fees

*The following is a copy of the form Judge Geraldine Mund (Central District of California Bankruptcy Court) uses for tentative rulings on fee applications.*

Case:
Professional:
Date of Hearing:
Tentative Ruling:

If you wish to submit on the tentative without appearance, please send a fax to Yolanda Garcia, my judicial assistant, at 213-894-3943 and notify her of that fact. The tentative ruling will then become the order of the court. If there is any opposition received to your application (or any party appears to object at the hearing) and they do not also agree that the tentative ruling will be the order of the court, I will continue this matter to a future date for hearing. If you submit on the tentative, you are to submit a proposed order to the court with the correct amounts, hearing date, copies, envelopes, etc.

Date: May 11, 1993

Geraldine Mund
Bankruptcy Judge

TO:
You are requested to immediately advise all other professional applicants of this tentative ruling.

# Appendix C
# Instructions for Trial Preparation

*The following was taken from Judge Carl B. Rubin's Instructions for Trial Preparation (United States District Court for the Southern District of Ohio at Cincinnati). Revised November 1, 1991.*

Introduction

A lawsuit in which you represent a party has been assigned to me for trial. You will want to know what is expected of you and your opponent. The following procedures are designed to deal with your case promptly and efficiently without impeding your ability to present your client's view fully and fairly.

Feel free to call the assigned Law Clerk if you have any questions.

III. Attorney Fees

In any case involving a cause of action where attorney fees may be awarded, the following conditions will be applied.

A. Form of Submission

A fee application must be filed within 30 days of a final Order of this Court. In such application, counsel will provide a clear and detailed listing for each attorney of time spent, purpose of such time and rate of compensation requested. If an appeal is filed no fee award will be made until after disposition of such appeal.

B. Time Records

All fee applications must be accompanied by time records. Such records must be submitted by *activity,* not by a chronological listing of unidentified time for each attorney. For example: com-

pensation for a memorandum or brief prepared over a period of time or by more than one attorney must be presented by an entry such as "Preparation of Memorandum or Brief re: _____." The memorandum or brief must be described specifically and time listed for each date on which work was done, each person who worked on it and the number of hours spent by such person.

If compensation for a conference is requested, an entry such as "Conference re: _____" must be presented with an indication of all persons who participated and the time spent by each. Where time is claimed in conference, a brief statement will be required indicating what was discussed and what conclusions were reached. In the event that statement involves privileged information, the details may be submitted *In camera.*

No award will be made for generalized items such as "Research," "Review of Pleadings," "Examination of Records," etc.

C. "Prevailing" Rates

A study of hourly rates prevailing in Cincinnati was made in 1983 by an Ad Hoc Committee appointed by the Court. The report has been filed in the Office of the Clerk of the Court of Cincinnati under the title "In Re: Attorney Fees," No. MS-1-83-056.

The Conclusion of the Committee will be considered persuasive but not binding. Foreign counsel as well as local counsel will be compensated at local rates.

"Upward adjustments" will be considered only in case of exceptional success. See *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983).

D. Limitation On Fees

(1) Depositions

Only one attorney will be compensated for the taking of a deposition. In the event there are multiple defendants with separate representation at such deposition, a second attorney may be compensated.

All deposition charges will indicate whose deposition was taken and the relationship of that person to the case.

(2) Preparation of Pleadings

Only one attorney will be compensated for the preparation of complaints, answers and replies. Reasonable compensation may be awarded to additional attorneys for research and preparation of motions, interrogatories and memoranda necessary under the rules of this Court. The Court will determine the appropriate length of time that such matters should require.

(3) Court Appearance

Only one attorney will be compensated for arguments on motions. A second attorney present in the courtroom may also be compensated only in the event there are multiple opposing litigants each represented by a separate attorney.

(4) Trial

Ordinarily not more than two attorneys will be compensated for appearance at trial. In the event the matter is complex or involves multiple opposing parties or for any other reason which appears to be appropriate, the Court may compensate additional attorneys.

(5) Other Matters

In considering compensation for services not included above, the Court will take into account the apparent necessity for such services, the experience of counsel, the status of the case at the time and all other considerations that bear upon the stated policy of this Circuit of compensation for a "reasonable number of hours at a reasonable rate."

The Court maintains a notebook of its Orders awarding fees which is available for inspection.

E. Authorities

The Court will follow the holdings of *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978); *Lavender v. Califano*, 683 F.2d 133 (6th Cir. 1982); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983); and *Blum v. Stenson*, 465 U.S. 886; 104 S. Ct. 1541 (1984).

The Court considers the position taken by The Honorable Joseph L. McGlynn, Jr. in the case of *In Re: Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983) and the position of The

Honorable John F. Grady in the case of *In Re: Continental Illinois Securities Litigation,* 572 F. Supp. 931 (N.D. Ill. 1983) to be persuasive and the procedural suggestions made in those opinions will usually be followed. Counsel are urged to read such opinions.

# Appendix D
# Guidelines for Compensation and Expense Reimbursement of Professionals

*The following was taken from the fee guidelines of Judge Randall J. Newsome (U.S. Bankruptcy Court, Northern District of California), effective August 1, 1992.*

The Narrative

3. Project Billing—The narrative should categorize by subject matter and separately discuss each professional project or task. All work for which compensation is requested should be in a category. Miscellaneous items may be included in a category such as "Case Administration." The professional may use reasonable discretion in defining projects for this purpose, provided that the application provides meaningful guidance to the Court as to the complexity and difficulty of the task, the professional's efficiency and the results achieved. With respect to each project or task, the number of hours spent and the amount of compensation and expenses requested should be set forth at the conclusion of the discussion of that project or task.

4. Billing Summary—Hours and total compensation requested in each application should be aggregated and itemized as to each professional and paraprofessional who provided compensable services.

Time Records

8. Time Records Required—All professionals, except auctioneers, real estate brokers, appraisers and those employed on a contingency fee basis, must keep accurate contemporaneous time records. The Court may, however, specifically direct that time records be kept on a contingent fee matter.

9. Increments—Professionals are required to keep time records in minimum increments no greater than 6 minutes. Professionals who utilize a minimum billing increment greater than .1 hour are subject to a substantial reduction of their requests.

10. Descriptions—At a minimum, the time entries should identify the person performing the services, the date performed, what was done, and the subject involved. Mere notations of telephone calls, conferences, research, drafting, etc., without identifying the matter involved, may result in disallowance of the time covered by the entries.

11. Clumping—If a number of separate tasks are performed on a single day, the fee application should disclose the time spent for each such task (i.e., no "grouping" or "clumping").

12. Conferences—Professionals should be prepared to explain time spent in conferences with other professionals or paraprofessionals in the same firm. Failure to justify this time may result in disallowance of all fees related to such conferences.

13. Multiple Professionals—Professionals should be prepared to explain the need for more than one professional or paraprofessional from the same firm at the same court hearing, deposition or meeting. Failure to justify this time may be result in compensation for only the person with the lowest billing rate.

14. Airplane Travel Time—Airplane travel time is not compensable, but work actually done during a flight is compensable. If significant airplane travel time is expected in a case, specific guidelines should be obtained for that case.

15. Administrative Tasks—Time spent in addressing, stamping and stuffing envelopes, filing, photocopying or "supervising" any of the foregoing is not compensable, whether performed by a professional, paraprofessional or secretary.

# Appendix E
# Guidelines for Fee Applications

*The following was taken from the fee guidelines of Judge R. F. Wheless, Jr. (United States Bankruptcy Court, Southern District of Texas). Effective January 1, 1993; revised May 5, 1993.*

What to put and what not to put in the fee application—including how to better prepare time records

1. Insufficiently Described Services

An applicant must present a detailed and accurate record of time spent working on a bankruptcy case or proceeding. This record must include the substance of the service provided as well as the time expended on the service. This court will not approve entries, such as "review files," "conferred with attorney regarding docket," "reviewed file at clerk's office," "reviewed files and conferred with attorney," "conference regarding pending matters," without a complete description of the subject matter of the activities.

2. Trustee Work

An attorney is never entitled to professional compensation for performing duties which the Bankruptcy Code imposes on the trustees. Be careful to show that you are not doing work which the trustee is supposed to do. It is the applicant's burden to show that the work was required legal work and was not trustee work. *Wildman,* pages 706–707; *Matter of Vlachos,* 61 B.R. 473–479 (Bankr. S.D. Ohio 1986); *In re Taylor,* 66 B.R. 390, 393 (Bankr. W.D. Pa. 1986).

3. Telephone Calls

An entry of "telephone call" or even "telephone call with Mr. X" is insufficient. The date and time of the call, the name of all participants and why they were involved (if they are included in this application), the reason for the call, and the result of the call must be clearly set out. This information should be incorporated into contemporaneously kept time records.

4. Conferences

Similarly, an entry of "conference" or "meeting," "conference with X" or "conversation with X" is insufficient. The date and time of the conference; the name of all participants and why they were involved, if they are part of this application; the reason for the conference, and the result reached from the conference should all be clearly set out in the time records. In addition, multiple conferences by and between attorneys in the same firm or with the trustee should be avoided. This may be considered duplication of effort unless it is clearly illustrated why it is not.

In all conferences or telephone calls, as well as in all multiple lawyer participation, an explanation of each lawyer's participation and why each lawyer was necessary to the endeavor should be clearly set forth. There is a difference between duplication of effort and coordination services, but the applicant must give a full explanation in order that the court can make a determination here.

5. Interoffice Conferences

The court will allow only one professional charge for services rendered when more than one person from the same firm attends an interoffice meeting unless the attendance of more than one professional at the meeting is justified by an explanation in the application. If an applicant fails to state the particular parties who attended interoffice conferences or the need for each attorney's or paralegal's participation in the particular conference is not itemized separately as to time spent in interoffice meetings, the time will be disallowed. If a participant has a particular area of expertise that is needed in such a conference, this should be spelled out.

6. Duplicate Billing for Other Services

Generally, the court will allow only one professional charge for reviewing a court document or order, reviewing and revising pleadings, and attending courtroom hearings and other meetings without further justification in the application.

7. Drafting Letter or Documents

Similar requirements apply here. Time entries for drafting documents should specify the document involved and the matter to which it pertains. Time entries for drafting letters should briefly set forth the nature and substance of each letter and to whom it was sent. The result of such document or letter should be disclosed.

8. Legal Research

Entries of "research," "legal research," or "bankruptcy research" are insufficient. The legal issue involved that created the research should be set forth, including how it arose. The application should further include what was done to treat the problem, including who was involved in the legal research, why they were involved (if more than one), the amount of time each lawyer spent and why it was necessary to spend it (why it was so difficult), what legal conclusion was reached as a result of the research and how it was utilized in furtherance of the estate's interest, if it was.

The applicant might consider giving the citation to the major cases or other authority relative to the point and the possibility that a copy of any legal brief might be attached. If the research took substantial time, an explanation of what the difficulties were in resolving the legal question should be clearly set forth.

9. Computer Research Charges

The court will allow reimbursement for computer research charges at the invoiced cost from the vendor, assuming the time spent conducting the research is reasonable and necessary. The court will therefore require the applicant to itemize the invoice cost from the vendor for such things as "LEXIS charges" stemming from specific research projects relating to the services rendered on behalf of the debtor during the time covered by the application prior to approving the charges.

10. Depositions

In connection with depositions, consider explaining what the difficulties were in producing the evidence, and why it was necessary to depose a respective witness and the essence of the information produced by each. This would be particularly valuable if a great deal of depositions were taken.

11. Lumping

The court will not compensate for time which is "lumped" together in a fee application. In order for the court to determine whether time spent on an activity was reasonable and necessary, multiple services performed cannot be "lumped" under one time entry. The time must be segregated by project. Each time of service should be listed with the corresponding specific time element, rate, and total cost.

Compensation may be withheld wherein fee application services are lumped together into one general category with a single charge, since it is impossible in such a case for the court to determine how much time to allocate to those services which are properly compensable. If any item included in an aggregate or "lump" time entry is disallowed as insufficiently descriptive or unacceptable for another reason and the time spent on the item is not delineated, the court may disallow the entire entry.

12. Clerical Services

The court may disallow compensation for clerical services, such as "reviewed files," "organize materials for oral arguments," and "reviewed file at clerk's office." It will be necessary for the applicant to show that such services are not merely clerical services performed as part of the overhead of the law firm. Therefore the court may disallow compensation for clerical services whether performed by a secretary, paralegal, or attorney.

13. Travel Time

The court will allow professional travel time at one-half the professional's normal hour rate unless otherwise justified. This is because the time spent traveling generally is unproductive or, if productive, rarely is spent solely on the case for which the professional is traveling. If the applicant wishes to charge a greater

rate for traveling, the professional must justify this explicitly in the application.

14. Photocopying Expense

An applicant has the burden of establishing that its expenses are both actual and necessary. Therefore it must identify the particular documents copies and number of copies and the actual cost per copy. This court will allow $.10 per copy for photocopying expenses unless a higher per page charge is justified in the application. If a large number of copies are made, it may well be less expensive to have them done by a professional copying service (at less than $.10 a page). On the other hand, if only one or two pages are copied, it may well be that the time expended in this endeavor would justify a higher per page reimbursement.

15. Facsimile Transmission Charges

This court will require an applicant to justify a charge for facsimile transmissions. In particular, the applicant must state why the use of first-class mail was impractical. By way of illustration, the statement that an outgoing facsimile transmission was necessary because a court pleading was due the next day is insufficient to justify the charge. The applicant must indicate the specific conditions that prevented the mailing of the pleading at an earlier date by first-class mail. The applicant must also state the particular document sent by facsimile transmission and the party to whom the documents were sent.

16. Messenger and Overnight Delivery Services

This court will allow reimbursement for charges of messenger and overnight delivery services, if they were reasonably incurred. Charges for messengers and overnight mail, however, should be minimized wherever possible and should be used only when first-class mail is impractical. The court will require the applicant to justify any charges for messenger service and overnight mail, including why the use of first-class mail was impractical.

Now that I have outlined most (if not all) of the onerous requirements of a professional's fee application, I would mitigate against this burden somewhat by pointing out that the amount requested in the fee application does have some impact on the

court's requirements of both form and substance for the application. If only several hundred dollars are being requested, the primary interest of the court is to learn of the necessity for the work and what the result was. Thus, common sense dictates that a modest request for fees and reimbursement of expenses should be less complex and perhaps limited to two or three pages to illustrate what was done, why it was necessary, and what the result was. It is not the intent of the court to require more work in preparing the fee application than was involved in the original project, not even on a comparative basis. The purpose of this court's requirements is to provide sufficient information to the court for it to properly perform its duty to make a factual determination that the work was necessary and the fee is reasonable.

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