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Calculation of a Reasonable Award of Attorneys' Fees under the Attorneys' Fees Awards Act of 1976, 13 J. Marshall L. Rev. 331 (1980)

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COMMENTS

CALCULATION OF A REASONABLE AWARD OF ATTORNEYS' FEES UNDER THE ATTORNEYS' FEES AWARDS ACT OF 1976

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INTRODUCTION

The Civil Rights Act of 1964 was the first in a series of modern congressional enactments designed to provide citizens an effective means of vindicating their civil rights in the courts.¹ At the time of its passage, Congress was concerned that certain provisions of the Act would prove difficult to enforce.² In an effort to encourage private citizens to aid in the enforcement of Titles II and VII of the Act, Congress included a "fee shifting" mechanism as an enforcement provision.³ The "fee shifting" mechanism grants courts power to reallocate or "shift" the liability for attorneys' fees incurred by a prevailing litigant to his unsuccessful adversary. It was hoped that these fee shifting provisions would remove the high cost of litigation barrier to the prosecution of meritorious Title II and Title VII claims.⁴

In the early 1970's, federal courts began to assert an equitable power to award attorneys' fees to successful civil rights litigants.⁵ The courts based these awards on what was termed the "private attorney general" doctrine, because they were granted to parties who had acted in the capacity of private attorneys

1. Now codified at 42 U.S.C. §§ 1981-2000h (1978).

2. The United States Supreme Court, in reviewing the legislative history of the Act, observed, "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman v. Piggie Park Ent.*, 390 U.S. 400, 401 (1968).

3. The sections of the Civil Rights Act of 1964 which provide for awards of attorneys' fees are 42 U.S.C. § 2000a-3(b) (1978) (Title II, housing discrimination) and 42 U.S.C. § 2000e-5(k) (1978) (Title VII, employment discrimination). The clauses which permit fee shifting under Title II and Title VII of the Civil Rights Act of 1964 are identical. Those sections provide that in any action brought under those Titles, "the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-3(b) (1978) (Title II); 42 U.S.C. § 2000e-5(k) (1978) (Title VII).

4. When explaining an amendment which added a "fee shifting" provision to Title VII of the Civil Rights Act of 1964, Senator Humphrey noted that such provision "should make it easier for a plaintiff of limited means to bring a meritorious suit [under Title VII]." 110 CONG. REC. 12,724 (1964).

5. The Fourth Circuit was apparently the first court of appeals to sanction such awards. *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972) (parties who successfully prosecuted school desegregation case held entitled to award of fees from defendant school board).

general in vindicating the public interest.⁶ The private attorney

6. The use of the private attorney general doctrine arose as an extension of the "equitable fund doctrine." The courts have traditionally been empowered under this doctrine to grant an award of attorneys' fees to successful parties in certain limited situations. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939). One of these situations, known as the "common fund doctrine," became operative when a litigant, through prosecution of his private lawsuit, established a "common fund" to which an identifiable class of beneficiaries was entitled. The theory underlying this doctrine was that those who were to share the benefits of a private party's litigation should also share in the costs incident to the creation of the fund. *Id.* at 166.

This doctrine was extended by the United States Supreme Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Mills* involved a stockholders derivative action to set aside a corporate merger. In *Mills*, the Court awarded the prevailing plaintiffs an allowance for attorneys' fees, to be paid out of corporate funds. This award was made notwithstanding the Court's recognition that the suit had not produced the type of "common fund" from which fees were traditionally recovered. *Id.* at 392. Rather, the *Mills* Court held that the stockholders had received a "substantial benefit" through the plaintiff's efforts to set aside the corporate merger. Such "benefit" was held to be appropriate grounds for the taxation of attorneys' fees against the stockholder "beneficiaries" of the corporation. The Court stated:

To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit. *Id.* at 396-97. Thus, the "common fund" doctrine was transformed into what has been termed the "common benefit doctrine." See generally Dawson, *Lawyers and Involuntary Clients In Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

The "private attorney general" fee shifting doctrine arose as an extension of the *Mills* reasoning. The doctrine had its origin in private civil rights litigation lodged against governmental defendants. *Brewer v. School Bd.*, 456 F.2d 943, 945 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972). Federal courts reasoned that because prosecution of civil rights litigation "vindicated a policy that Congress considered of the highest priority," *Newman v. Piggie Park Ent.*, 390 U.S. 400, 402 (1968), and because liability for the fee taxed against the school board would eventually be borne by the parties who had "benefited" from the litigation (to wit, local citizens who can benefit from an integrated school system), a fee award was appropriate. See also *Natural Res. Defense Council, Inc. v. E.P.A.*, 484 F.2d 1331 (1st Cir. 1973) (fees awarded under private attorney general doctrine to plaintiffs who forced the EPA to comply with its obligations under the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857c-5 *et seq.*).

Although this reasoning was criticized from the onset, see *Brewer v. School Bd.*, 456 F.2d at 945 (Winter, J., specially concurring), the doctrine was expanded to authorize awards of attorneys' fees to be paid by *private* defendants, where the plaintiff's lawsuit successfully vindicated important congressional and public policies. *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). By 1975, most federal circuits had recognized or applied the private attorney general doctrine in order to encourage enforcement of civil rights statutes. See, e.g., *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974) (42 U.S.C. § 1983 (1978)); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974) (42 U.S.C. § 1983 (1978)); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972) (42 U.S.C. § 1983 (1978)); *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972) (school desegregation); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972) (42 U.S.C. § 1982 (1978)); *Rodriguez v. Trainor*, 67 F.R.D. 437 (N.D. Ill. 1975) (So-

general doctrine first arose as a law of standing, involving the right of private parties to initiate suit on behalf of the "public's" interest.⁷ The doctrine's extended application as a fee shifting device enabled parties to bring suit to vindicate important public policies expressed by Congress and to recover litigation costs from their unsuccessful adversaries.⁸

The private attorney general doctrine complemented the Civil Rights Act of 1964 and supplementary legislation permitting judicial fee shifting under selected civil rights statutes.⁹ The comprehensive availability of "fee shifting," whether by statute or through the private attorney general doctrine, helped remove financial barriers which had formerly hindered private vindication of civil rights.¹⁰

cial Security Act); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972) (42 U.S.C. § 1983 (1978)); *Gaddis v. Wyman*, 336 F. Supp. 1225 (S.D.N.Y. 1972) (Social Security Act).

7. The use of the private attorney general doctrine as a rule of standing became settled in the 1940's. The Second Circuit held that Congress can confer authority on private parties to enforce federal statutes, even though those parties could not demonstrate that they were "aggrieved" by the infirmity they sought to correct by private litigation. The court stated:

Congress can constitutionally enact a statute conferring on any non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, . . . there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). Similarly, a party who brought suit under a title in the Civil Rights Act of 1964 would have "congressional authority" to act as a "private attorney general," for purposes of standing. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.05 (1958).

8. Courts held that fees should ordinarily be granted to parties under the private attorney general doctrine, unless special circumstances would render such an award unjust. *Brewer v. School Bd.*, 456 F.2d 943, 954 (4th Cir.) *cert. denied*, 406 U.S. 933 (1972). Subsequent cases dealing with the question stated this principle in even stronger terms. One circuit stated: "[W]hen a litigant qualifies as a 'private attorney general' the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public minded suits . . . , and to carry out congressional policy," *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974) (citing *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972)).

9. These enactments included: Education Amendments of 1972, 20 U.S.C. § 1617 (1976); Equal Credit Opportunity Act, 15 U.S.C. § 1691(e) (1976); Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1973); Voting Rights Amendment of 1975, 42 U.S.C. § 1973 l(e) (1978).

10. The statutes cited in note 9 *supra* did not establish "fee shifting" as a comprehensive enforcement device in the bulk of the existing civil rights laws. The private attorney general doctrine made this remedy available in many of the important civil rights statutes, such as 42 U.S.C. §§ 1981, 1983, 1985, 1986 (1978), where the remedy was not provided for by statute.

In 1975, however, the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹¹ abolished the use of the private attorney general doctrine as a fee shifting mechanism.¹² *Alyeska* reiterated the established American rule prohibiting courts from allocating the cost of attorneys' fees among parties, in the absence of congressional approval.¹³ The *Alyeska* Court noted that congressional utilization of fee shifting provisions in specific civil rights statutes did not grant the judiciary authority to "jettison the traditional rule against non-statutory allowances [of attorneys' fees] to the prevailing party."¹⁴ Thus, after *Alyeska*, fee shifting was available only under civil rights statutes which expressly authorized the procedure.¹⁵

It was in response to the *Alyeska* decision, and to the desire of Congress "to achieve consistency in our civil rights laws,"¹⁶ that the Attorneys' Fees Awards Act of 1976 was enacted. This Act amended title 42 U.S.C. section 1988 by adding the following provision:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C.S. §§ 1981-1983, 1985, 1986], title IX of Public Law 92318 [20 U.S.C.S. §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf

11. 421 U.S. 240 (1975).

12. The *Alyeska* decision did not affect the use of the private attorney general doctrine as a concept of standing. Indeed, the Supreme Court had recently affirmed the use of the private attorney general standing doctrine, according broad standing to persons injured under the Federal Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1973). *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

13. The traditional rule in American jurisdictions was that courts were not permitted to shift liability for attorneys' fees between parties to litigation, absent congressional approval. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). Congress has granted courts the authority to assess limited costs among parties through the Fees and Costs statute, codified at 28 U.S.C. § 1920 (1977). The costs assessable under the statute do not include liability for attorneys' fees.

The rationale behind the "American Rule," was that parties "should not be penalized for merely defending or prosecuting a lawsuit," and that routine taxation of attorneys' fees in litigation would unjustly discourage the poor "from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel." *Fleischmann Distill. Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

14. 421 U.S. at 263.

15. Those statutes comprised Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-3(b), 2000e-5(k) (1978), and the statutes cited in note 9 *supra*.

16. The Senate Report on section 1988 declared: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws." S. REP. NO. 1011, 94th Cong., 2d Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5908.

of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 U.S.C.S. §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C.S. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.¹⁷

Section 1988, as amended, permits the judiciary to exercise the type of discretion they utilized under the private attorney general doctrine to relieve parties who bring private suit to enforce the civil rights laws, of the financial burden of litigation.¹⁸

17. The Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, is codified at 42 U.S.C. § 1988 (1978).

18. Indeed, the standard which governs a court's discretion in granting fee awards to successful civil rights litigants under section 1988 is identical to the standard utilized under the private attorney general doctrine. The Senate Report on section 1988 stated:

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

S. REP. NO. 1011, 94th Cong., 2d Sess. 4, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912.

The *Newman* Court, in construing Title II lawsuits, noted that one who had secured injunctive relief under that title "does so not for himself alone, but also as a private attorney general, vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402. Because Title II plaintiffs were furthering the public interest through their private lawsuit, the *Newman* Court concluded that the fee award remedy under that title should be liberally applied:

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Id. Compare this standard with the standards utilized by courts which applied the private attorney general doctrine, *see note 8 supra*.

"Circumstances" under which a court may deny an award of attorneys' fees to prevailing plaintiffs under section 1988 fall under three broad categories. The first category includes those cases where the reprehensible conduct of the plaintiff, in connection with the litigation, led a court to deny the fee request for equitable reasons. In *Brown v. Stackler*, 460 F. Supp. 446 (N.D. Ill. 1978), *aff'd*, No. 78-2503 (7th Cir. Jan. 21, 1980), the district judge declined to award fees entirely after the plaintiff submitted a fee request which exaggerated the hours counsel spent on the case by 800%. That court noted, however, that if the fee award request had been only "moderately excessive," an award, based on reduced hours as determined by the judge, may have been granted. 460 F. Supp. at 447. For cases which follow the latter approach, *see notes 61-65 and accompanying text infra*. *See also Castleberry v. Langford*, 428 F. Supp. 676 (N.D. Tex. 1977) (where plaintiff's "abrasive and surly" character and the unreasonable nature in which he presented his grievances to his employer led to his being fired, albeit in violation of 42 U.S.C. § 1983 (1978)); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (union, which was real party in interest in Title VII

Nonprofit legal services organizations, as well as attorneys in private practice, are entitled to awards of reasonable attorney

litigation, was refused reimbursement for legal services provided individual plaintiffs in private suit, where the object of the suit was to circumvent a valid agreement between the union and the defendant airline).

The second category of cases in which a judge, in his discretion, may decline to award fees to prevailing plaintiffs under section 1988 are those where the right vindicated by the prevailing plaintiff was insignificant. Thus, in *Naprstek v. City of Norwich*, 433 F. Supp. 1369 (N.D.N.Y. 1977), plaintiff was denied section 1988 fees after he successfully overturned an ancient, seldom enforced local curfew ordinance. Noting that the relief obtained in the suit did not "rise to the level of national priority or constitutional dimension which warranted the award of fees in *Newman*," the court declined to award fees to plaintiff. *Id.* at 1370. Similarly, in *Zarcone v. Perry*, 438 F. Supp. 788 (E.D.N.Y. 1977), *aff'd*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 843 (1979), the district court declined to award counsel fees under section 1988 where plaintiff's lawsuit did not vindicate the interests of the public or an identifiable class, 438 F. Supp. at 791, and the plaintiff's claim was merely a tort claim couched in terms of due process violations. *Id.* at 790. The Court of Appeals for the Second Circuit affirmed, noting that the *Newman* rule was "not to be applied woodenly without consideration of the underlying factors which generated it." 581 F.2d at 1044. The Second Circuit observed:

[T]he principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights [under section 1988] without an assurance that his attorneys' fees would be paid if he were successful.

Id. The Second Circuit believed that the petitioner in *Newman*, who had brought suit for injunctive relief under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (1978), had met this standard. 581 F.2d at 1044. In contrast, the court observed that the petitioner in *Zarcone* had sought and obtained \$141,000 in damages, including \$61,000 in punitive damages; and the injury sued for was in the nature of a private one unlikely to recur. *Id.* Under these facts, the Second Circuit held that the district court did not abuse its discretion in denying a section 1988 fee award to petitioner. *Id.* at 1045; *accord*, *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979).

A third category of cases in which courts have denied section 1988 fee requests arises where the civil rights violation arose from the good faith efforts of the defendants to comply with a "murky" area of the law, rather than from intentional racial or sex discrimination. *See Henderson v. Fort Worth Ind. School Dist.*, 574 F.2d 1210 (5th Cir.), *aff'd by an equally divided court en banc, opinion vacated*, 584 F.2d 115 (5th Cir. 1978). In *Henderson*, a school district "qualified voter" requirement, which did not discriminate on the basis of race or sex, was mandated by state law. The defendants had no power to alter the procedure. Even though the plaintiffs successfully overturned the statute, the court declined to award fees to the plaintiff because of the factors listed above and because the financial burden of the fee award would fall on "people who had participated in no discriminatory act." 574 F.2d at 1213. *See also Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976) (fee request in Title VII suit denied where defendant-employer's actions were mandated by state law, defendant lacked power to alter his conduct, defendant had no economic incentive to discriminate, fee award would injure innocent benefits-plan participants, and defendant quickly corrected the constitutional infirmity once the law was clarified). *Contra*, *Criterion Club of Albany v. Board of Comm'rs*, 594 F.2d 118, 120 (5th Cir. 1979) (held improper to deny section 1988 fees to successful petitioner on grounds that burden of fee award would fall upon innocent taxpayers who

neys' fees under section 1988. The legislative history of section 1988¹⁹ and the overwhelming weight of judicial authority construing it²⁰ indicate that prevailing plaintiffs are entitled to an award of attorneys' fees even though their counsel did not exact a fee or was employed by a legal services organization.²¹ However, the extent of the entitlement of counsel to fees, and the

did not institute the discriminatory election system enacted 20 years before suit was brought).

Cf. Northcross v. Board of Educ., 611 F.2d 624, 635 (6th Cir. 1979) (§ 1988). In *Northcross*, the Sixth Circuit Court of Appeals noted in dicta that "[i]n some circumstances, it would be unfair to award fees against defendants who entered the suit principally as amici curiae to give the court another perspective on the issues involved." 611 F.2d at 635. The court did not delineate the circumstances under which such an award against amici would be "unfair."

19. The House Report of section 1988 stated in a footnote that "a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization." H. R. REP. NO. 1558, 94th Cong., 2d Sess. 8 n.16 (1976). That passage in the report approvingly cited *Torres v. Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976). *Torres*, a Voting Rights Act case (42 U.S.C. § 1973 l(e) (1978), upheld an award of counsel fees to a prevailing plaintiff who had been represented by a federally funded legal services organization.

20. *See, e.g.*, *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978) (federally funded legal services organization entitled to section 1988 award); *Mid-Hudson Legal Serv., Inc. v. G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978) (federally funded legal services organization entitled to section 1988 award); *McManama v. Lukhard*, 464 F. Supp. 38 (W.D. Va. 1978) (federally funded legal services organization entitled to section 1988 award); *NAACP v. Bell*, 448 F. Supp. 1164 (D.D.C. 1978) (plaintiff civil rights organization entitled to section 1988 award); *White v. Beal*, 447 F. Supp. 788 (E.D. Pa. 1978) (publicly funded legal services organization entitled to section 1988 award); *Alsager v. District Ct. of Polk County*, 447 F. Supp. 572 (S.D. Iowa 1977) (ACLU affiliate counsel entitled to section 1988 award); *Card v. Dempsey*, 445 F. Supp. 942 (E.D. Mich. 1978) (federally funded legal services organization entitled to section 1988 award); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393 (D. Colo. 1977) (public interest litigation group attorney, working on *pro bono publico* basis, entitled to section 1988 award); *Schmidt v. Schubert*, 433 F. Supp. 1115 (E.D. Wis. 1977) (legal service organization entitled to section 1988 award). *See also* *Miller v. Carson*, 563 F.2d 741, 756 (5th Cir. 1977) (approved section 1988 fee to court appointed counsel).

21. *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974), *cited with approval* in H. R. REP. NO. 1558, 94th Cong., 2d Sess. 8 n.16 (1976). The *Fairley* court stated in no uncertain terms that "allowable fees and expenses may not be reduced because [plaintiff's] attorney was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee." 493 F.2d at 606. As a cautionary note, however, it must be observed that this language does not necessarily indicate that a fee award to organizational counsel may *never* be *less* than an award to private counsel. The issue before the *Fairley* court was whether an award to organizational counsel could be *arbitrarily* reduced in amount solely on the basis of the organizational status of counsel. *Id.* *Fairley* does not hold that a reasonable fee to organizational counsel which happens to be smaller than a fee granted to large private firms would be prohibited. *See* notes 318-35 *infra* for a discussion of all cases cited in the Senate and House Reports of section 1988 which address the entitlement of organizational counsel to judicial awards of attorneys' fees.

manner in which such awards should be determined, are far from settled.²²

This article will examine the procedures employed by courts in determining the *size* of a "reasonable" award of attorneys' fees under section 1988. Thus, it will be assumed for purposes of this comment that the party seeking the award is a plaintiff,²³ that such party has prevailed in the overall litigation,²⁴ that doctrines of immunity do not bar the award of fees

22. Compare *NAACP v. Bell*, 448 F. Supp. 1164 (D.D.C. 1978) (NAACP staff counsel awarded fee of \$100 per hour) with *Alsager v. District Ct. of Polk County*, 447 F. Supp. 572 (S.D. Iowa 1977) (fee awarded legal services organization staff counsel keyed to their salaries, resulting in hourly rate of \$35 per hour). The fee award rates at which private attorneys are compensated are similarly diverse. Compare *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979) (§ 1988 case, lead counsel awarded \$137.50 per hour for in-court work, \$82.50 per hour for out-of-court work) with *Meisel v. Kremens*, 80 F.R.D. 419 (E.D. Pa. 1978) (§ 1988 case, lead counsel awarded \$60 per hour overall for his litigation work). See note 234 *infra* for a table listing fee recovery rates in 56 civil rights cases dating from 1974 to the present.

23. Successful plaintiffs should "ordinarily" recover an award of attorneys' fees under section 1988, "unless special circumstances would render such an award unjust." S. REP. NO. 1011, 94th Cong., 2d Sess. 4, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912 (quoting *Newman v. Piggie Park Ent.*, 390 U.S. 400, 402 (1968)). See note 18 *supra* for a discussion of this standard.

In contrast, defendants who prevail under section 1988 receive attorneys' fees awards only when the plaintiff's lawsuit "was frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so." *Lopez v. Aransas County Ind. School Dist.*, 570 F.2d 541, 545 (5th Cir. 1978) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (Title VII)). Such awards to prevailing defendants serve to "discourage baseless or frivolous actions" under section 1988, *Carrion v. Yeshiva University*, 535 F.2d 722, 727 (2d Cir. 1976) (Title VII), and are not necessarily designed to make prevailing defendants whole. *Id.* at 728. Consequently, the procedures and factors utilized by courts to set the size of a reasonable award of attorneys' fees to prevailing plaintiffs are not always observed by courts awarding fees to prevailing defendants. See generally Lipson, *Beyond Alyeska—Judicial Response To The Civil Rights Attorneys' Fees Act*, 22 ST. LOUIS U. L.J. 243, 253-58 (1978). The scope of this article is limited to a discussion of standards governing fee awards to plaintiffs, with the caveat that such standards may or may not be considered by courts awarding fees to prevailing defendants.

24. Section 1988 provides that prevailing litigants may be entitled to an award of attorneys' fees under that section. 42 U.S.C. § 1988 (1978). The actual receipt of a favorable judgment, however, is not an essential prerequisite to such an award. The Senate Report on section 1988 provides that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. REP. NO. 1011, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912. Some courts note that if a plaintiff obtains through settlement "some of the benefits" for which suit was brought, such plaintiff will be considered a prevailing party for purposes of section 1988 if the suit "would have survived a motion to dismiss." *Mental Patient Civil Lib. v. Hospital Staff Civil Rights Comm.*, 444 F. Supp. 981 (E.D. Pa. 1977). The Fourth Circuit has suggested that courts should take a pragmatic "factual/legal" approach to determine whether the "plaintiff-fee claimant's ef-

against the defendant;²⁵ and that section 1988 can be applied to the substantive litigation giving rise to the fee award request.²⁶

forts contributed in a significant way" to the outcome of the settlement. *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979).

Although a plaintiff may recover a section 1988 award if he succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978), some federal circuits hold that such parties may only receive compensation for work done on issues on which the plaintiff "prevailed." *Id.* at 279; *accord*, *Jones v. Diamond*, 594 F.2d 997, 1027 (5th Cir. 1979).

Another line of cases holds that partially successful plaintiffs should receive section 1988 fees for work done on any issues "reasonably calculated to advance a client's interests," notwithstanding the fact that such claims "did not provide the precise basis for the relief granted." *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978). The Sixth Circuit recently noted:

The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.

Northcross v. Board of Educ., 611 F.2d 624, 636 (6th Cir. 1979) (§ 1988). The United States Supreme Court has yet to resolve this issue. In any event, the issue of whether a litigant is a "prevailing party" may affect the gross size of an attorney's fee award. But such considerations are not relevant to the determination of a "reasonable" hourly rate to be awarded an attorney under section 1988. Therefore, this area of controversy in section 1988 litigation will not be discussed further in this article. For authority which discusses the issue in greater depth, see *Lipson, supra* note 23, at 258-61.

25. Most courts have rejected eleventh amendment challenges to awards of section 1988 fees levied against state governmental units. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978). *See generally* *Lipson, supra* note 23, at 261-69. However, some states still attempt to challenge such fee awards. *See Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 44 (1979) (certiorari granted to determine whether a federal court which enters judgment for plaintiff on state statutory ground while abstaining on federal constitutional issues under 42 U.S.C. § 1983 (1978), is barred by eleventh amendment from awarding a section 1988 fee to plaintiff, to be paid out of funds in state treasury). This eleventh amendment issue is addressed to *entitlement* to section 1988 fees—not to the determination of the reasonable size of such fees. Therefore, this issue will not receive further discussion herein.

26. A party must bring suit under certain substantive federal laws to be entitled to a section 1988 fee. These substantive laws include 42 U.S.C. §§ 1981-1983, 1985, 1986, 2000d *et seq.* (1976); 20 U.S.C. §§ 1681 *et seq.* (1976); and 26 U.S.C. §§ 1 *et seq.* (1974). For a more detailed description of the coverage of section 1988, *see generally* *Lipson, supra* note 23, at 245-46. Additionally, a question may arise with regard to whether section 1988 can be applied to litigation commenced prior to passage of that Act. Generally, section 1988 applies retroactively to all cases pending on the date it was enacted. *See Northcross v. Board of Educ.*, 611 F.2d 624, 635 (6th Cir. 1979) (section 1988 applied to litigation dating from 1968, when the case became active following a United States Supreme Court decision); *Bond v. Stanton*, 555 F.2d 172, 173 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Thus, the issue of retroactivity has not been presented in recently commenced litigation. For a discussion of the applicability of section 1988 to pending cases, *see generally* *Lipson, supra* note 23, at 250-53.

The issues discussed above involve the *entitlement* of a litigant to sec-

Assuming that these preliminary matters are disposed of, this comment should aid the practitioner in the final, and perhaps most complex step of the fee determination process: litigation of the size of the financial recovery by prevailing counsel, and the corresponding liability of the unsuccessful litigant for a judicial award of attorneys' fees under section 1988.

REASONABLE ATTORNEYS' FEE AWARDS

In general, a judicial award of "reasonable" attorneys' fees under section 1988 should be "adequate to attract competent counsel," without producing "windfalls to attorneys."²⁷ The legislative history of section 1988 does not specify how large such awards should be. Congress left that determination to the discretion of the courts.²⁸ Congress did, however, provide some guidance with regard to the procedure by which a court should determine the size of a "reasonable" fee. Both the House and Senate reports on section 1988 cite the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*²⁹ as a case applying "appropriate standards" to the determination of a judicial award of attorneys' fees.³⁰

At the time of the passage of section 1988, the *Johnson* case had already become a landmark decision in the law governing attorneys' fee awards. Prior to *Johnson*, district courts had not made a practice of elucidating the basis for their attorneys' fee award determinations.³¹ The Court of Appeals for the Fifth Circuit reviewed such a fee award determination in *Johnson*.³²

The district court, without explanation, had awarded plain-

tion 1988 fees, as opposed to the reasonable size of such fee awards. Thus, further discussion of these issues is beyond the scope of this article.

27. See H.R. REP. NO. 1558, 94th Cong., 2d Sess. 6 (1976).

28. Section 1988 provides that a court, *in its discretion* may award prevailing parties with awards of counsel fees. 42 U.S.C. § 1988 (1978). Accordingly, Congress did not delineate any payment scales for such awards, as was done under the Criminal Justice Act, 18 U.S.C. § 3006A(d) (1979).

29. 488 F.2d 714 (5th Cir. 1974) (42 U.S.C. § 2000e-5(k) (1978), Title VII litigation).

30. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 (1976); S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913.

31. One commentator surveyed the district court opinions in volumes 384-94 of the *Federal Supplement* (1974-75). Of the 28 reported cases involving a fee determination, thirteen cases contained "absolutely no articulated reason for the amount [of attorneys' fees] awarded." See Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

32. The plaintiff's counsel in *Johnson* had successfully prosecuted a Title VII class action and claimed fees under 42 U.S.C. § 2000e-5(k) (1978) of that title. 488 F.2d at 715.

tiff's counsel less than half the attorneys' fees requested.³³ It discounted a significant number of the hours claimed to have been expended in the litigation. The remaining hours were compensated at an hourly rate well below local market levels.³⁴

On appeal, the Fifth Circuit noted that the lower court's failure to set forth in the record its reasons for awarding a reduced fee effectively precluded meaningful appellate review of the adequacy of the fee awarded.³⁵ The court did not express an opinion as to whether the actual fee awarded by the district court was appropriate.³⁶ Instead, the court of appeals enunciated a series of twelve factors and remanded the cause, instructing the district court to reconsider its fee award in light of those factors.³⁷ The factors included: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.³⁸

Eight of the twelve factors listed in the *Johnson* opinion were drawn *verbatim* from the American Bar Association Code of Professional Responsibility.³⁹ In effect, the court of appeals ordered the district court to consider the same general stan-

33. Plaintiff's counsel requested a total fee of \$30,145.50, for the rendition of 659.9 hours of legal services. The district court set the size of the fee award at \$13,500, less than half the amount requested. 488 F.2d at 715.

34. The court of appeals noted that the fee rate awarded counsel by the district court, of between \$28 and \$33 per hour, was below the minimum fee scales for that jurisdiction. *Id.* at 717.

35. *Id.*

36. *Id.* at 720.

37. *Id.*

38. *Id.* at 717-19.

39. After setting forth the twelve factors, the court of appeals noted that they "were consistent" with those recommended by the A.B.A. rules. In fact, many of the twelve factors are *identical* to the guidelines set forth by the A.B.A. Those guidelines provide:

A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- 2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

dards which influence the size of attorneys' fees billed by private practitioners in the open market.⁴⁰ It did not intend that these factors be used to "reduce the calculation of a reasonable fee to mathematical precision."⁴¹ The factors were presented to aid district courts in their efforts to award fees adequate to encourage private enforcement of Title VII, without producing a windfall to the successful attorney.⁴²

The court of appeals also outlined procedural rules to accompany utilization of the twelve *Johnson* factors. Initially, the court noted that it is plaintiff's counsel who bears the burden of establishing his entitlement to an award of attorneys' fees.⁴³ Attorneys are obligated to submit detailed time records to the district court, delineating the time expended on specific tasks in the litigation.⁴⁴ Without such information, the trial judge has no evidentiary basis on which to apply the *Johnson* factors.⁴⁵

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- 3) The fee customarily charged in the locality for similar legal services.
 - 4) The amount involved and the results obtained.
 - 5) The time limitations imposed by the client or by the circumstances.
 - 6) The nature and length of the professional relationship with the client.
 - 7) Whether the fee is fixed or contingent.

ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, Ethical Consideration 2-18, Disciplinary Rule 2-106 (B). The Fifth Circuit in *Johnson* added but two considerations to this list. The twelfth factor, "awards in similar cases" can be encompassed by the third A.B.A. factor, "the customary fee." The tenth *Johnson* factor, "the undesirability of the case," is not mentioned in the A.B.A. rules.

40. To the extent that private attorneys follow the American Bar Association guidelines set forth in note 39 *supra*, a trial court would consider the same factors and utilize the same weighing process as private attorneys should do, when they set their fees in the open market.

41. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974).

42. The *Johnson* court noted that "courts do not have a mandate under [Title VII] to make the prevailing counsel rich." *Id.* at 719. Additionally, the court of appeals recognized that Title VII fee awards should not be "implemented in such a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general." *Id.*

43. The *Johnson* court noted that "the plaintiff has the burden of proving his entitlement to an award for attorneys' fees just as he would bear the burden of proving a claim for any other money judgment." *Id.* at 720.

44. The fee seeking attorney bears the burden of establishing his entitlement to an award of attorneys' fees. Accordingly, courts have held that prevailing counsel must specifically establish the total time expended on various litigation tasks. See *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Lockheed Min. Sol. Coal. v. Lockheed Missiles & Space Co.*, 406 F. Supp. 828, 832 (N.D. Cal. 1976) (Title VII).

45. The courts require such information, because they determine the gross amount of a fee award by attaching a dollar/hour value to the services rendered by an attorney, which is then multiplied by the total number of compensable *hours* expended on the litigation. A court cannot make this calculation without information, submitted by the attorney, regarding the

In addition, a number of procedural requirements govern consideration of the *Johnson* factors by district courts. Although the issue was not before the Fifth Circuit in *Johnson*, other decisions have required lower courts to hold evidentiary hearings on the applicability of the *Johnson* factors to an individual case.⁴⁶ These hearings permit litigants to state their views on the applicability of each *Johnson* factor to their own performance in the litigation thereby preserving their views in the record.⁴⁷

In addition, trial courts are required to elucidate of record their findings of fact on each individual *Johnson* factor.⁴⁸ This requirement assures a reviewing court that the trial judge has "considered" the individual factors in his fee award determination.⁴⁹ These procedures provide the basis on which appellate courts review the factual findings of a trial judge. A trial court's failure to adhere to these procedures constitutes an abuse of discretion.⁵⁰

All federal circuits have applied the twelve *Johnson* factors when determining judicial fee awards under section 1988.⁵¹ In

time spent in litigating the case. See *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978), *vacated*, 48 U.S.L.W. 2017 (D.C. Cir. June 29, 1979) (rehearing *en banc* granted).

46. The district court in *Johnson* did hold such a hearing on the question of attorneys' fees, thus, the issue was not before the court of appeals in *Johnson*. Nonetheless, such hearings should be provided by district courts. The United States Supreme Court in *Perkins v. Standard Oil Co.*, suggested that "[t]he amount of [an award of attorneys' fees] for such services should, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." 399 U.S. 222, 223 (1970) (antitrust action under the Clayton Act, 15 U.S.C. § 15 (1975)); *accord*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974); *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974), *rev'd on other grounds sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Lindy Bros. Bldrs., Inc. v. American Rad. & Std. San. Corp.*, 487 F.2d 161, 170 (3d Cir. 1973).

47. The issue of entitlement to an award of attorneys' fees is generally briefed by the parties. Courts of appeals, as well as the trial court, have the benefit of these briefs in their fee award determinations.

48. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720. See also cases cited in note 247 *infra*.

49. *Id.* See also *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

50. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

51. Section 1988 cases citing the *Johnson* factors include: *Hampton v. Hanrahan*, 600 F.2d 600, 643 (7th Cir. 1979); *Francia v. White*, 594 F.2d 778, 782 (10th Cir. 1979); *Brown v. Bathke*, 588 F.2d 634, 638 (8th Cir. 1978); *Fountila v. Carter*, 571 F.2d 487, 496 (9th Cir. 1978); *Rainey v. Jackson State College*, 551 F.2d 672, 676 (5th Cir. 1977); *Johnson v. Snyder*, 470 F. Supp. 972, 974 (N.D. Ohio 1979); *Palmigiano v. Garrahy*, 466 F. Supp. 732, 735 (D.R.I. 1979); *Gunther v. Iowa State Men's Reformatory*, 466 F. Supp. 367, 368 (N.D. Iowa 1979); *Pugh v. Rainwater*, 465 F. Supp. 41, 43 (S.D. Fla. 1979); *McManama v.*

addition, *Johnson* continues to be the leading case governing other statutory and equitable mechanisms permitting federal courts to award attorneys' fees to successful litigants.⁵² Despite its universal acceptance, however, the manner in which *Johnson* has been applied seems to vary among judges. The differing *pro-*

Lukhard, 464 F. Supp. 38, 43 (W.D. Va. 1978); *Armstrong v. Reed*, 462 F. Supp. 496, 502 (N.D. Miss. 1978); *Preston v. Mandeville*, 451 F. Supp. 617, 620 (S.D. Ala. 1978); *NAACP v. Bell*, 448 F. Supp. 1164, 1168 (D.D.C. 1978); *White v. Beal*, 447 F. Supp. 788, 796 (E.D. Pa. 1978); *Kulkarni v. Nyquist*, 446 F. Supp. 1274, 1281 (N.D.N.Y. 1977); *Hartmann v. Gaffney*, 446 F. Supp. 809, 813 (D. Minn. 1977).

52. *Johnson* involved a fee award determination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k) (1978)). For other Title VII cases following *Johnson*, see, e.g., *Firefighters Inst. v. City of St. Louis*, 588 F.2d 235, 242 (8th Cir. 1978); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187 (D.C. Cir. 1974); *Morehead v. Lewis*, 432 F. Supp. 674, 680 (N.D. Ill. 1977); *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 690 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 791 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977); *Lockheed Min. Sol. Coal. v. Lockheed Missiles & Space Co.*, 406 F. Supp. 828, 831 (N.D. Cal. 1976); *Barth v. Bayou Candy Co.*, 379 F. Supp. 1201, 1203 (E.D. La. 1974); *Davis v. City of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974).

Courts which have followed *Johnson* while awarding fees under various federal statutes include: *Marshall v. Edwards*, 582 F.2d 927, 938 (5th Cir. 1978), *opinion after remand from*, *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (42 U.S.C. § 1973 l(e) (1978), Voting Rights Act); *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1281 n.10 (5th Cir. 1978) (33 U.S.C.S. § 928 (Supp. 1979), Longshoreman's & Harbor Workers Comp. Act); *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 725 n.6 (8th Cir. 1978) (15 U.S.C. § 1989 (1976), Motor Vehicle Information & Cost Savings Act); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) (15 U.S.C. § 1640(a)(3) (1976), Truth In Lending Act); *Walston v. School Bd. of City of Suffolk*, 566 F.2d 1201, 1204 (4th Cir. 1977) (20 U.S.C. § 1617 (1976), Em. School Aid Act); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (29 U.S.C. § 529, § 501(b) (1975), Labor Management Reporting & Disclosure Act); *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978) (29 U.S.C. § 626(b) (1975), Age Discrimination In Employment Act of 1967); *Smith v. Chapman*, 436 F. Supp. 58, 66 (W.D. Tex. 1977) (15 U.S.C. § 1640(a)(3) (1976), Truth In Lending Act); *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1349 (S.D. Tex. 1976) (15 U.S.C. § 15 (1975), Antitrust); *Norwood v. Harrison*, 410 F. Supp. 133, 141-42 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978) (20 U.S.C. § 1617 (1976)); *Wynn Oil Co. v. Purolator Chem. Corp.*, 391 F. Supp. 522, 524 (M.D. Fla. 1974) (15 U.S.C. § 15 (1975), Clayton Act); *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (20 U.S.C. § 1617 (1976)).

Courts which have awarded counsel fees under equitable doctrines include: *Central Soya Co. v. Cox Towing Corp.*, 431 F. Supp. 502, 506 (N.D. Miss. 1977) (maritime lien); *Matter of Imperial '400' Nat'l, Inc.*, 431 F. Supp. 155, 160 (D.N.J. 1977) (Chapter X reorganization proceeding).

Cases employing the private attorney general doctrine as a fee shifting mechanism, which cited *Johnson*, included: *Fairley v. Patterson*, 493 F.2d 598, 607 (5th Cir. 1974); *Wade v. Mississippi Coop. Ext. Serv.*, 378 F. Supp. 1251, 1255 (N.D. Miss. 1974), *rev'd on other grounds*, 528 F.2d 508, 520 (5th Cir. 1976).

cedural approaches to the *Johnson* factors present but one problem currently being grappled with.⁵³ Initially, it should be noted that the courts have construed the *nature* of the individual *Johnson* factors in differing, and often irreconcilable, ways.

The *Johnson* factors have been utilized by the courts whenever a statute or the court's equitable powers have permitted them to grant attorneys' fees to successful litigants.⁵⁴ Accordingly, a great deal of case law has developed construing each factor. Use of the factors must pertain specifically to the *individual attorney* claiming fees.⁵⁵ The underlying cause of action, be it bankruptcy, antitrust, multidistrict class actions, or civil rights litigation, should not affect the manner in which the *Johnson* factors are interpreted and applied.⁵⁶ Thus, the extensive body of law pertaining to the use of the *Johnson* factors will be set forth.

SYNTHESIS OF THE *JOHNSON* FACTORS

Time and Labor Required

The starting point for determining a reasonable fee under *Johnson* is an examination of the hours expended on the case by the successful attorney.⁵⁷ The trial judge should weigh the hours claimed by prevailing counsel "against his own knowledge, experience and expertise of the time required to complete similar activities."⁵⁸ This weighing process should separate claimed hours validly spent in litigation, from time unnecessarily, duplicitously, or excessively claimed.⁵⁹ In this undertaking, a judge need not rely on independent testimony.⁶⁰

Initially, a trial judge will trim from a time claim what he believes to be excessive hours. Some trial courts have disallowed up to half the hours claimed by an attorney when the litigation involved relatively simple issues, the case was not

53. See the section of this article entitled "PROCEDURAL APPLICATIONS OF THE *JOHNSON* FACTORS," beginning on page 376 *infra*.

54. See notes 51-52 *supra*.

55. These factors remain constant regardless of the underlying statutory provision upon which suit is brought.

56. See note 52 *supra*.

57. *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 690 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (Title VII).

58. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974).

59. *Id.*

60. Trial judges are considered experts on the issue of determining the amount of time which should reasonably be expended on a lawsuit. See, e.g., *Davis v. Board of Comm'rs of Mobile County*, 526 F.2d 865, 868 (5th Cir. 1976) (20 U.S.C. § 1617 (1976), Em. School Aid Act); *Morehead v. Lewis*, 432 F. Supp. 674, 680 (N.D. Ill. 1977) (Title VII).

complex, and the governing law was clear.⁶¹ Other courts, unsure of the exact number of excessive hours claimed, have simply reduced the *final fee award* on an arbitrary, percentage basis.⁶² When hourly claims are "incredibly" excessive, courts have not hesitated to disallow a significant portion of the claimed hours.⁶³ Time claims which appear excessive when compared with fee claims of co-counsel have also been reduced by the courts.⁶⁴ Similarly, a fee claim may be reduced when it appears excessive in relation to similar claims in different lawsuits recently heard by that judge.⁶⁵

Another form of an "excessive" fee claim arises when a number of attorneys request fees for the performance of the same or similar services. The *Johnson* court cautioned that

61. *Gagne v. Maher*, 455 F. Supp. 1344, 1349 (D. Conn.), *rev'd on other grounds*, 594 F.2d 336 (2d Cir. 1978), *cert. granted*, 100 S. Ct. 44 (1979) (50% reduction in hours claimed in § 1983 class action challenging manner in which A.F.D.C. benefits were calculated in violation of A.F.D.C. regulations); *Pace v. Califano*, 14 Empl. Prac. Dec. ¶ 7547 (D.D.C. 1977) (Title VII) (99 hours spent on memo in opposition to motion to dismiss and 52.25 hours spent on memo in opposition to renewed motion to dismiss were excessive; court disallowed compensation for 50% of those hours).

62. *Barrett v. Kalinowski*, 458 F. Supp. 689 (M.D. Pa. 1978). In *Barrett*, the court heard evidence that work done by plaintiff's counsel could have been accomplished in 2/3 of the time claimed. *Id.* at 706. Because the record did not disclose the specific degree of excessiveness, the court reduced the final fee award by 25%. *Id.* at 708.

63. *Cole v. Tuttle*, 462 F. Supp. 1016 (N.D. Miss. 1978). In *Cole*, the court held that 200 hours expended in preparation for a one-day trial was clearly excessive. The court disallowed 50% of the out-of-court hours. *Id.* at 1020. *See also* *Miller v. Mackey Int'l, Inc.*, 70 F.R.D. 533 (S.D. Fla. 1976) (class securities litigation; award of fees made under equitable fund doctrine) (claim of 280 hours for reviewing record at pre-trial stage, briefing and arguing interlocutory matter, held excessive; fee reduced to 15% of recovery, from 33% request; total recovery being \$425,000, and total hours claimed being 1,845).

64. *Love v. Pullman*, 19 Empl. Prac. Dec. ¶ 9167 (D. Colo. 1979) (Title VII). In *Love*, the district court poignantly noted:

Leftwich's application seeks an award for nearly 4,500 hours spent on the case. In view of the fact that McClearn, who worked on this case for more than twice as many years as Leftwich, who represented the class, and who was involved in handling the more difficult and novel aspects of the litigation before the Supreme Court, claims only 1,800 hours, I must approach the Leftwich application with some degree of incredulity.

19 Empl. Prac. Dec. ¶ 9167, at 7052. The attorney claiming 4,500 hours received fees at an hourly rate equivalent to 23% of that received by lead counsel. *Id.* at 7053. *See also* *Barnett v. Pritzker*, 73 F.R.D. 430 (S.D.N.Y. 1977) (settlement of derivative and class actions; recovery under equitable fund doctrine). In *Barnett*, law firm "A" claimed 40 hours for time spent on fee application, having spent 276.5 hours litigating the case in chief. Law firm "B" claimed only 36.5 hours on its own application, having spent 2169.5 hours litigating the case in chief. The court allowed 15 of the 40 hours claimed by firm "A." *Id.* at 433.

65. *Boe v. Colello*, 447 F. Supp. 607, 610 (S.D.N.Y. 1978).

when a party is represented by more than one attorney, "the possibility of duplication of effort along with the proper utilization of time should be scrutinized."⁶⁶ The basis for this rule was succinctly stated by the Second Circuit: "Undoubtedly, parties to a litigation may fashion it according to their purse and indulge themselves and their attorneys, but they may not foist their extravagances upon their unsuccessful adversaries."⁶⁷ Thus, when several attorneys for a party engage in duplicative tasks, such as *en masse* attendance of conferences with defense counsel,⁶⁸ participation in oral arguments,⁶⁹ and attendance at depositions,⁷⁰ or when the prosecution of the entire litigation reflects multiplicity of effort,⁷¹ courts have reduced the final fee award. Most courts have refused to award fees to attorneys who

66. 488 F.2d at 717; *accord*, Preston v. Mandeville, 451 F. Supp. 617, 621 (S.D. Ala. 1978).

67. Blank v. Talley Indus., Inc., 390 F. Supp. 1, 4 (S.D.N.Y. 1975) (securities fraud class action (quoting Farmer v. Arabian Oil Co., 31 F.R.D. 191, 193 (S.D.N.Y. 1962), *rev'd*, 324 F.2d 359 (2d Cir. 1963), *rev'd*, 379 U.S. 227 (1964)); *see* Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339 (S.D. Tex. 1976) (Clayton Act). In *Blair*, the court reduced the base fee award by 10% to account for duplication of effort caused by plaintiff's substitution of counsel. *Id.* at 1350. *But see* Stastney v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314 (W.D.N.C. 1978). In *Stastney*, the court refused to reduce the fee award on grounds of duplication of effort caused by the mid-trial hospitalization of one of plaintiff's attorneys. The court noted that "[i]n a trial of this magnitude . . . and of this duration it is neither unusual, unexpected nor unreasonable that different attorneys will appear for a party, and that some duplication of effort is necessary." *Id.* at 319.

68. Preston v. Mandeville, 451 F. Supp. 617, 621 (S.D. Ala. 1978) (§ 1988 award reduced where two or more co-counsel attended conferences with one defense counsel).

69. Love v. Pullman, 19 Empl. Prac. Dec. ¶ 9167, at 7050 (D. Colo. 1979) (Title VII) (court disallowed time claim by associated attorney for "watching oral argument"); Jordan v. Fusari, 422 F. Supp. 1179, 1185 (D. Conn. 1975) (civil rights class action, recovery under "private attorney general" doctrine). In *Jordan*, the plaintiff was represented by seven attorneys. Three made oral arguments before the court of appeals in an earlier stage of the litigation, and the court found that two or more attorneys would regularly appear when the presence of one attorney would have sufficed. *Id.*

70. *See* Bachman v. Pertschuk, 19 Empl. Prac. Dec. ¶ 9043, at 6509 (D.D.C. 1979) (Title VII) (disallowed hours for multiple attendance at depositions); Palmigiano v. Garrahy, 466 F. Supp. 732, 744 (D.R.I. 1979) (permitted only one attorney to be compensated for attendance at depositions or for a prison tour).

71. Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII). The *Younger* court noted that "where plaintiffs were generally represented by no less than four attorneys throughout . . . the defendant company, which was adequately represented, never had more than two attorneys present." 418 F. Supp. at 793. After considering the other *Johnson* factors, the court awarded plaintiff \$40,000. An award of \$121,568 was initially sought. *Id.* at 795. In *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974) (Title VII), the court reduced the fee award by \$1000 dollars, viewing the multiple attendance of plaintiff's counsel at trial and at depositions as "unnecessary duplication of effort." *Id.* at 5048. *Davis* was

merely "back stopped"⁷² or provided "moral support" for co-counsel.⁷³

One district court, without authority, compensated attorneys who merely appeared in court while lead counsel argued various motions.⁷⁴ The justification advanced by that court for its award to the non-participating attorneys was that they provided "ideas and information" to lead counsel.⁷⁵ This holding invites law firms to pack courtrooms with non-participating attorneys so as to enhance gross recoveries of attorneys' fees. It also permits firms to provide courtroom experience for their junior attorneys at the expense of section 1988 defendants.⁷⁶ This opinion runs against the weight of authority previously discussed.⁷⁷ Because the district court opinion did not cite authority for its award of fees to "back stopping" counsel, the case does not, and should not, have significant precedential impact.

Counsel fee claims for certain activities have been routinely disallowed. Requests are never granted for time spent prosecuting frivolous or meritless issues within the litigation.⁷⁸ In addition, courts strive to avoid a "double payment" to the plaintiff's counsel where it appears that he rendered similar legal services

favorably cited in the Senate Report on section 1988. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913.

72. *Blank v. Talley Indus., Inc.*, 390 F. Supp. 1 (S.D.N.Y. 1975) (equitable fund doctrine). The *Blank* court criticized the use of multiple attorneys in simple matters which presented no unusual problems such as where attorneys simply acted as a "back stop" for lead counsel. *Id.* at 4; *accord*, *Thompson v. School Bd. of City of Newport News*, 363 F. Supp. 458 (E.D. Va. 1973), *aff'd*, 498 F.2d 195 (4th Cir. 1974) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (disfavored multiplying efforts with two or more attorneys where one attorney did essentially all the work, hours disallowed).

73. *Clanton v. Allied Chem. Corp.*, 416 F. Supp. 39 (E.D. Va. 1976) (Title VII). The *Clanton* court stated that "[w]hile attorneys should not be penalized for providing full and exhaustive services for their clients, the awarding of fees to attorneys for supplying moral support, or because of their own enthusiasm, is not warranted." *Id.* at 43.

74. *Areizaga v. Quern*, No. 77 C 276 (N.D. Ill. June 8, 1979).

75. *Id.* Compensation was granted to attorneys who were merely present at a motion for a temporary restraining order and the appeal of that order.

76. By this statement, it is not to be inferred that counsel in *Areizaga* entertained these motives. However, the possibilities for abusing such rules in order to reap windfall fees should not be ignored by the courts.

77. See cases cited in notes 68-74 *supra*.

78. Time spent on issues "which are clearly frivolous," or "manufactured" do not represent time which has been "reasonably expended on a matter," and the time claimed for prosecution of such issues may be disregarded by the court. *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978). See also *Donaldson v. O'Connor*, 454 F. Supp. 311, 316 n.3 (N.D. Fla. 1978); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 792 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII) (disallowed hours spent in plaintiff's persistent efforts to introduce evidence pertaining to individuals ruled to be outside scope of class).

in *separate* lawsuits, for which he seeks multiple fee recovery.⁷⁹ A third category of activity which may not be charged to an unsuccessful defendant is time spent by plaintiff's counsel attending continuing legal education seminars on topics related to the litigation.⁸⁰ Evidently, section 1988 does not require a defendant to pay for the legal education of his adversary's counsel.

Segregation of Reduced Rate Activities

Another duty of a trial court in this stage of the *Johnson* analysis is to segregate the hours spent on certain tasks which command reduced hourly rates.⁸¹ These activities may be grouped into four broad categories: informal communications, travel time, out-of-court legal work, and non-legal work performed by attorneys.

—Informal Communications

Informal communications can be subdivided into two categories. The first involves communication with the public. One federal district court permitted section 1988 recovery for time spent by counsel communicating with the public regarding school desegregation class action litigation.⁸² In that case, class counsel was compensated for time spent in "communication with the class in a *meaningful* way," such as attendance at com-

79. *Lockheed Min. Sol. Coal. v. Lockheed Missiles & Space Co.*, 406 F. Supp. 828, 832 (N.D. Cal. 1976) (Title VII) (counsel limited to one fee for preparing set of interrogatories used against defendant in three separate lawsuits). See also *McManama v. Lukhard*, 464 F. Supp. 38, 43 (W.D. Va. 1978) (identical jurisdictional challenge raised in separate lawsuits and fully billed to each; one-half of hours spent on challenge disallowed compensation); *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978) (Title VII) (*Prandini II*). The *Prandini* court stated in dicta that if it could be demonstrated that time charged in one case was charged for in a separate case for the "exact same work," a district court would not abuse its discretion by prorating the hours between the two cases. *Id.* at 51; see prior opinion, 557 F.2d 1015, 1019 n.3 (3d Cir. 1977) (*Prandini I*).

80. *Love v. Pullman Co.*, 19 Empl. Prac. Dec. ¶ 9166, at 7052 (D. Colo. 1979) (Title VII) (disallowed all claimed hours for attending NAACP lecture); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 410 (D. Colo. 1977).

81. The *Johnson* court noted:

It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

488 F.2d at 717. The Sixth Circuit recently observed "that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service provided." *Northcross v. Board of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979) (§ 1988).

82. *Keyes v. School Dist. No. 1*, 439 F. Supp. 393 (D. Colo. 1977)

munity meetings and in press relations.⁸³

The second subdivision involves communication between counsel and other attorneys, parties, and witnesses involved with the litigation. Courts have disallowed significant numbers of hours claimed for conferences between junior and senior attorneys.⁸⁴ Excessive hours claimed for attorney/client conferences have been disallowed.⁸⁵ Courts routinely reject all *undocumented* claims for time spent in conference or in telephone communication with parties, witnesses, or attorneys.⁸⁶ In any event, a court will determine the total amount of logged conference time, because such time is normally compensated at reduced hourly rates.⁸⁷

83. *Id.* at 408. Thus, 17 of 46 hours claimed in press relations were allowed, because they permitted communication between class counsel and the hispanic community. In contrast, time spent in interviews with reporters from out-of-state newspapers were disallowed as unnecessary for the prosecution of the suit. *Id.* Hours spent by class counsel at community meetings concerning the nature of the lawsuit and proposed desegregation plans were generally allowed. *Id.* at 409. (85 of 92 hours allowed).

However, the court disallowed all hours (27) claimed for attendance at school board meetings. Those hours were disallowed because the information obtained at those meetings, though "helpful to counsel," was not "necessary to the proper progression of the lawsuit." *Id.* at 408.

84. One district court stated that it did not "believe that defendant should have to pay the double hourly rates for conferences between the senior and junior attorneys." *Parker v. Matthews*, 411 F. Supp. 1059, 1067 (D.D.C. 1976), *aff'd sub nom. Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977) (Title VII). Total hours claimed for such conferences were reduced 20%. *Id.*

85. *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875 (D.D.C. 1979) (Title VII) (30 hours spent in 15 conferences with client held excessive).

86. *See Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 155 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 2869 (Title VII) (full 100 hours claimed for undocumented "miscellaneous" conferences disallowed); *Dowell v. Board of Educ. of Ind. School Dist. No. 89*, 71 F.R.D. 49, 60 (W.D. Okla. 1976) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (undocumented claim for time spent in conference with witnesses and principals entirely disallowed); *cf. Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc.*, 493 F.2d 76, 80 (7th Cir. 1974) (interpleader action, fees sought under "equitable fund doctrine"; entire 38 hours claim for undocumented telephone communications disallowed).

87. *See Cruz v. Beto*, 453 F. Supp. 905, 910 (S.D. Tex. 1977) (court awarded a rate of \$90 per hour for pre-trial work and \$35 per hour for time spent in informal communications); *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (Title VII) (time logged in telephone and conference communications awarded rate of \$35 per hour, reduced from \$100 per hour claimed); *Norwood v. Harrison*, 410 F. Supp. 133 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (reduced rate from \$35 to \$20 per hour for logged conference hours).

Of course, a court may also disallow hours claimed in *documented* telephone or conference communications by counsel, to the extent the court deems such hours to be excessive. *See Pete v. United Mine Workers of Am. Welfare & Relief Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) (equitable fund doctrine) (held: given district court's familiarity with the litigation, it was

—Travel Time

Attorneys sometimes request fees for time spent commuting to court, attending depositions outside the locality, or other legal tasks requiring travel. A few courts disallow hours claimed for travel time entirely.⁸⁸ Other courts have awarded reduced rates of recovery for such claims.⁸⁹ The calculation of a reasonable fee for travel time is accomplished through a "two-step" analysis. First, a court determines whether *any* of the claimed hours are compensable; then the court will determine the rate of compensation to be awarded for such time.⁹⁰ Whether *any* travel time hours are compensable depends on whether the expenditure of time was reasonably necessary for the prosecution of the lawsuit.⁹¹

—Out of Court Legal Work

Time spent out of court by attorneys on legal matters may be segregated and compensated for at lower rates than "in court" time. At least one federal court has assigned a lower rate of compensation for such tasks as research, drafting of documents, and preparation for trial.⁹²

not an abuse of discretion to disallow logged telephone and conference time).

88. See *NAACP v. Bell*, 448 F. Supp. 1164, 1168 (D.D.C. 1978) (all travel time hours disallowed); *Norwood v. Harrison*, 410 F. Supp. 133, 142 n.10 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (all travel time hours disallowed).

89. See *McPherson v. School Dist. No. 186*, 465 F. Supp. 749 (S.D. Ill. 1978) (travel time of \$40 per hour awarded attorneys requesting \$100 per hour; and \$25 per hour to attorneys requesting \$75 per hour); *Dean v. Gladney*, 451 F. Supp. 1313, 1324 (S.D. Tex. 1978) (court awarded counsel \$40 per hour for trial work, \$25 per hour for pre-trial work, and \$5 per hour for travel time); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393 (D. Colo. 1977) (court reduced compensable hours from 140 to 96, assigned one-half normal rate of compensation for remaining hours).

90. *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 758 (S.D. Ill. 1978).

91. *Id.*; *accord*, *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 409 (D. Colo. 1977). In *McPherson*, the court found that the hiring of out-of-state NAACP counsel was reasonable, even though the commuting time involved was 8 hours per appearance—notwithstanding affidavits to the effect that local counsel would have been ready and able to represent the plaintiff in the litigation. 465 F. Supp. at 758. In *Keyes*, the court allowed compensation for some travel time because the litigation was complex, and the class counsel needed to collaborate with out-of-state experts. 439 F. Supp. at 409.

92. See *Palmigiano v. Garrahy*, 466 F. Supp. 732, 741 (D.R.I. 1979) (court awarded \$75 per hour for trial work and \$70 per hour for pre-trial work); *McManama v. Lukhard*, 464 F. Supp. 38, 43 (W.D. Va. 1978) (opinion recognizes that out-of-court hours should be compensated at reduced rates—but it does not disclose the actual fee rates awarded); *Dean v. Gladney*, 451 F. Supp. 1313, 1324 (S.D. Tex. 1978) (court awarded \$40 per hour for trial work and \$25 per hour for pre-trial work).

—Non Legal Tasks Performed by Attorneys

Under *Johnson*, an attorney should not be compensated at his normal hourly billing rates for the performance of non-legal tasks.⁹³ Federal court rulings on section 1988 fee requests have refused to compensate attorneys for the performance of paralegal tasks,⁹⁴ or award fees to paralegals.⁹⁵ One federal court has compensated attorneys at reduced rates for the performance of tasks which could have been performed by paralegals.⁹⁶

Hours Spent Seeking an Award of Attorneys' Fees

Federal courts are currently in conflict on the issue of whether hours spent seeking an award of attorneys' fees under section 1988 are compensable. The issue of whether an attorney could be compensated for time spent seeking fees first arose in cases involving the "equitable fund doctrine."⁹⁷ This doctrine is similar in operation to an action in *quantum meruit*. Fees are awarded to parties who, through their private litigation, created, increased, protected, or preserved a "fund" which inured to the benefit of a class of beneficiaries.⁹⁸ The award of counsel fees

93. The table in note 234 *infra* lists cases following this practice.

94. *Keyes v. School Dist. No. 1*, 439 F. Supp. 393 (D. Colo. 1977) (disallowed all 25 hours claimed by attorneys for filing pleadings and picking up orders).

95. *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978). The *Scheriff* court stated:

The last item is \$198 requested for reimbursement for expenses incurred in connection with the work of law clerks. The court has consistently distinguished between the work of attorneys and law clerks. The fee award statute refers only to attorney fees. It does not include any mention of fees for law clerks or expenses connected with secretaries or other office overhead. Under the civil rights fees statutes the court cannot award any sums for the work of law clerks or paralegal assistants.

Id. at 1261; *cf.* *Love v. Pullman Co.*, 19 Empl. Prac. Dec. ¶ 9167, at page 7050 (D. Colo. 1979) (Title VII) (court refused to compensate an attorney for clerical expenses). *Contra*, *Aumiller v. University of Del.*, 455 F. Supp. 676, 682 (D. Del. 1978) (§ 1988) (court awarded \$25 per hour fee to law school graduate, and \$20 per hour fee to paralegal); *Jordan v. Fusari*, 422 F. Supp. 1179, 1186 (D. Conn. 1975) (private attorney general doctrine) (court allowed \$3 per hour fee for services of paralegal; plaintiff had requested \$10 per hour).

96. *Palmigiano v. Garrahy*, 466 F. Supp. 732, 742-43 (D.R.I. 1979) (court awarded less than half the in-court fee rate for hours spent scanning prison and municipal records for evidence).

97. The origin and history of the "equitable fund doctrine," or "common fund doctrine," is set forth at note 6 *supra*. See generally Dawson, *Lawyers and Involuntary Clients In Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

98. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975); *Lindy Bros. Bldrs., Inc. v. American Rad. & Std. San. Corp.*, 540 F.2d 102 (3d Cir. 1976).

under this doctrine is drawn from the "fund" created by the litigation. Thus, when an attorney seeks fees under the equitable fund doctrine, he is acting on his own behalf, adversely to the interests of the benefited class.⁹⁹ Because the objective of a fee-seeking attorney is to *diminish* the "fund," an overwhelming majority of federal courts refuse to compensate attorneys under the equitable fund doctrine for their efforts to obtain an award of attorneys' fees.¹⁰⁰

In the context of section 1988 litigation, some courts compensate an attorney for the time he expends seeking a section 1988 fee.¹⁰¹ Some courts disallow such time claims entirely.¹⁰² Courts declining to compensate attorneys for time spent seeking section 1988 awards have done so on authority of the "equitable fund doctrine" precedents.¹⁰³ These courts express the belief that section 1988 fee awards, like those under the equitable fund doctrine, should compensate an attorney only for time expended in prosecuting his client's civil rights claim. Accordingly, these courts refuse to compensate attorneys for time spent litigating their *own* entitlement to fees, because the legal services rendered do not inure to the benefit of the client.¹⁰⁴

Courts which do award attorneys' fees under section 1988 for services rendered in connection with a fee application have

99. See *Lindy Bros. Bldrs., Inc. v. American Rad. & Std. San. Corp.*, 540 F.2d 102, 111 (3d Cir. 1976).

100. *Id.*; *Pete v. United Mine Workers of Am. Welfare & Relief Fund of 1950*, 517 F.2d 1275, 1290 (D.C. Cir. 1975); *Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc.*, 493 F.2d 76, 80 (7th Cir. 1974); *In re Equity Funding Corp. of Am. Sec.*, 438 F. Supp. 1303, 1330 n.36 (C.D. Cal. 1977); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 374 (E.D. Pa. 1976); *Kiser v. Miller*, 364 F. Supp. 1311, 1318 (D.D.C. 1973). *Contra*, *Barnett v. Pritzker*, 73 F.R.D. 430, 433 (S.D.N.Y. 1977) (derivative class action; court allowed 15 of 40 hours claimed on fee application, without citation of authority).

101. See cases cited in notes 105-08 *infra*.

102. See cases cited in note 103 *infra*.

103. See *Diaz v. Quern*, No. 76 C 3349 (N.D. Ill. May 2, 1979) (summary disallowance of time spent seeking a fee award); *Keown v. Storti*, 456 F. Supp. 232 (E.D. Pa. 1978) (after careful analysis of cases permitting and disallowing such hours, court denied recovery of fees for time spent seeking fees, holding that only those legal services directly benefiting client are compensable under § 1988); *Boe v. Colello*, 447 F. Supp. 607, 610 (S.D.N.Y. 1978) (follows equitable fund doctrine cases); *Kulkarni v. Nyquist*, 446 F. Supp. 1274, 1281 (N.D.N.Y. 1977) (summary disallowance of hours claimed for seeking fees); *Pennsylvania v. O'Neill*, 431 F. Supp. 700, 705 (E.D. Pa. 1977), *aff'd mem.*, 573 F.2d 1301 (3d Cir. 1978) (follows equitable fund doctrine cases); *cf.* *Pace v. Califano*, 14 Empl. Prac. Dec. ¶ 7547, at 4712 (D.D.C. 1977) (Title VII); *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1350 (S.D. Tex. 1976) (15 U.S.C. § 15 (1975), Clayton Act); *Davis v. Reed*, 72 F.R.D. 644, 647 (N.D. Miss. 1976) (20 U.S.C. § 1617, (1976), Em. School Aid Act); *Clanton v. Allied Chem. Corp.*, 416 F. Supp. 39, 43 (E.D. Va. 1976) (Title VII); *Latham v. Chandler*, 406 F. Supp. 754, 757 n.2 (N.D. Miss. 1976) (42 U.S.C. § 1973 l(e) (1978), Voting Rights Act).

104. See *Keown v. Storti*, 456 F. Supp. 232 (E.D. Pa. 1978).

done so on three grounds. First, they distinguish the equitable fund doctrine cases as inapplicable to section 1988 litigation, because those fees are collected from the *defendant*, not from the attorney's client or a class of beneficiaries.¹⁰⁵ Second, these courts hold that the denial of compensation for an attorney's efforts to obtain a fee would defeat the policy goal of section 1988, which is to encourage private attorneys to represent civil rights litigants. These courts assert that the denial of such fees would give defendants an incentive to regularly appeal the issue of fee entitlement, thus dissipating the net award of fees granted to plaintiff's counsel.¹⁰⁶

The third justification for such an award is drawn from the legislative history of section 1988. The House Report discussion of the standards governing the award of fees favorably cited one Title VII case permitting an award for time spent seeking compensation.¹⁰⁷ At least two federal circuits have drawn upon this legislative history to justify such an award.¹⁰⁸

The law on this issue is unsettled, and the number of *case* holdings on each side of the issue is roughly equivalent.¹⁰⁹ The fact that the majority of *circuit courts of appeals* have permitted compensation for time expended seeking section 1988 fees may place the weight of authority with the courts permitting com-

105. See *Gagne v. Maher*, 594 F.2d 336, 343 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 44 (1979); *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir. 1979), *cert. denied*, 100 S. Ct. 170 (1979); *Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977); *Rote v. Hall*, No. C-76-228 (E.D. Wash., filed May 14, 1979); *Mental Patient Civil Lib. Project v. Hospital Staff Civil Rights Comm.*, 444 F. Supp. 981, 986 (E.D. Pa. 1977); *cf. Prandini v. National Tea Co.*, 585 F.2d 47, 54 (3d Cir. 1978) (Title VII); *Bachman v. Pertschuk*, 19 Empl. Prac. Dec. ¶ 9044, at 6504 (D.D.C. 1979) (Title VII); *Richardson v. Civil Serv. Comm.*, 449 F. Supp. 10, 12 (S.D.N.Y. 1978) (Title VII).

106. One court decided to permit compensation for time spent seeking section 1988 fees, stating that "[t]o hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals." *Lackey v. Bowling*, No. 78 C 1980 (N.D. Ill. Apr. 6, 1979) (quoting *Souza v. Southworth*, 564 F.2d 609, 614 (2d Cir. 1977)). See also *Richardson v. Civil Serv. Comm.*, 449 F. Supp. 10, 12 (S.D.N.Y. 1978) (Title VII).

107. *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683-84 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), *favorably cited* in H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 n.16 (1976).

108. *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 44 (1979); *Aumiller v. University of Del.*, 455 F. Supp. 676, 681 (D. Del. 1978).

109. See section 1988 cases cited in note 103 *supra* (six district court opinions deny § 1988 recovery on time spent litigating issue of fee entitlement), and section 1988 cases cited in notes 105-06 *supra* (three court of appeals decisions and three district court opinions permitting § 1988 recovery for time expended litigating entitlement to award).

pensation.¹¹⁰ Nonetheless, policy justifications support both lines of cases.

The reasoning of the courts permitting compensation for efforts to obtain section 1988 fees is subject to question. The asserted fear that the denial of compensation for time spent seeking fees would result in "automatic appeals" by defendants is to an extent unfounded.¹¹¹ Courts have traditionally possessed equitable power to punish parties who litigate claims "in bad faith, vexatiously, wantonly, or for oppressive reasons."¹¹² If defendants "automatically" appeal an award of attorneys' fees in order to diminish the successful attorney's net recovery, or if a successful plaintiff's attorney "automatically" appeals the issue of fees to *increase* his recovery, courts can employ their equitable powers to punish these litigants and deter others from taking a similar course of action.¹¹³

The support drawn from public policy considerations is similarly suspect. It is not unusual for an attorney to expend nearly as much time establishing his right to fees as on the prosecution of the underlying action.¹¹⁴ It is one thing to compensate an attorney in full for his vigorous efforts to prosecute the civil rights claim of his client. It is another thing entirely for a court to compensate that attorney, at full market rates, for a vigorous effort to establish *his own claim*. In the latter case, the attorney is no longer litigating civil rights, but is pursuing his own pecuniary interests, like any other creditor of the defendant.¹¹⁵

Technically the attorney litigates the issue of fees on behalf of his client. Substantively, however, efforts to obtain section 1988 fees inure only to the attorney's pecuniary benefit. The rule expressed by the United States Supreme Court in *Alyeska*¹¹⁶

110. See note 109 *supra*.

111. The courts have merely asserted this rationale, without providing evidentiary support for its validity. See cases cited in note 106 *supra*.

112. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). See generally Dawson, *Lawyers And Involuntary Clients In Public Interest Litigation*, 88 HARV. L. REV. 849 (1975) (complete discussion of the development and use of the equitable "bad faith" awards doctrine).

113. The "bad faith" doctrine can be applied to any party who has demonstrated reprehensible conduct in connection with the litigation. Thus, this doctrine would serve to deter either plaintiffs or defendants from taking frivolous appeals to financially injure opponents.

114. See, e.g., *McManama v. Lukhard*, 464 F. Supp. 38 (W.D. Va. 1978) (attorney expended 26 hours on case-in-chief, and up to 14 additional hours on question of fee award entitlement).

115. The courts ordinarily order unsuccessful defendants to pay the attorneys' fee award directly to counsel for the plaintiff. See note 167 *infra*. Thus, although a fee award proceeding may be ancillary to the civil rights claim of the plaintiff, the award of attorneys' fees itself does not necessarily inure to the benefit of the plaintiff.

116. See cases cited in note 13 *supra*.

precludes the *nonstatutory* shifting of attorneys' fee liability among parties. This rule has been superseded by statutes such as section 1988 which permit a prevailing civil rights litigant to be reimbursed for the cost of prosecuting *his civil rights claim*. Whether section 1988 permits an *attorney* to be compensated for his efforts to establish his *own* claim to fees is a policy question which remains to be authoritatively settled by the federal courts. In any event, time unnecessarily expended in seeking an award of attorneys' fees may be disallowed or compensated at reduced hourly rates.¹¹⁷

Constructions of the Remaining Johnson Factors

Novelty and Difficulty of the Questions

The *Johnson* court included the "novelty and difficulty" factor in its analysis, in recognition of the greater expenditure of time required to research and prosecute a case of first impression.¹¹⁸ Its underlying rationale is that attorneys "should be appropriately compensated for accepting the challenge" of a novel case.¹¹⁹ Accordingly, the courts have indicated that attorneys should be compensated at increased rates where the underlying litigation creates "new law"¹²⁰ or involves complex questions of law or fact.¹²¹

The "novelty" of a case is determined subjectively by the trial court¹²² from the standpoint of the lawsuit when it was ini-

117. See *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 759 (S.D. Ill. 1978) (excessive time spent seeking fees disallowed); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 410 (D. Colo. 1977) (excessive hours expended on fee issue disallowed; remaining hours awarded reduced rates of compensation because fee entitlement issue was neither difficult nor complex).

118. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

119. *Id.*

120. See *Pugh v. Rainwater*, 465 F. Supp. 41 (S.D. Fla. 1979) (novel due process challenge to pre-trial detention procedures); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 403 (D. Colo. 1977) (first case to establish *de jure* school segregation in a northern city). *Keyes* was a case which was novel from both a legal and a factual standpoint. See also *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 66 F.R.D. 483, 485 (W.D.N.C. 1975) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (first school busing case).

121. See, e.g., *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 403 (D. Colo. 1977); *Armstrong v. Reed*, 462 F. Supp. 496 (N.D. Miss. 1978). The *Armstrong* court recognized that the case involved "complicated and complex" questions of law "not ordinarily or usually handled by an attorney in the general practice of law." 462 F. Supp. at 502.

122. *Rubenstein v. Republic Nat'l Life Ins. Co.*, 74 F.R.D. 337, 351 (N.D. Tex. 1976) (class securities litigation; elements of novelty and difficulty of case can be evaluated by court which has closely supervised and observed progress of case).

tiated.¹²³ This reflects the greater degree of preparation required to prosecute a case of first impression. In addition, a court's assessment of novelty and difficulty should be made regarding the issues involved in the litigation, regardless of the personal experience and skill of counsel.¹²⁴

This factor will not apply to a case which is not novel or does not present "unusually difficult legal questions."¹²⁵ The mere fact that a case takes a long time to prosecute is not a proper reason for increasing the hourly rate under this factor.¹²⁶ Nor does the presence of "tedious, but uncomplicated tasks" within the litigation make it "novel" or "difficult."¹²⁷

Skill Requisite to Perform the Legal Service Properly

Under the "skill" factor, a trial court "should closely observe the attorney's work product, his preparation, and general ability before the court."¹²⁸ The rendition of exceptionally skillful legal services should cause a court to increase the attorney's basic recovery rate.¹²⁹ Where an attorney does not display any "special skill,"¹³⁰ or where the litigation did not call for the demon-

123. *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 793 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII).

124. *Marshall v. Edwards*, 582 F.2d 927, 938 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 2820 (1979) (42 U.S.C. § 1973 l(e) (1978), Voting Rights Act).

125. See *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875 (D.D.C. 1979) (Title VII) (case was not one of first impression and did not present unusually difficult legal questions); *Preston v. Mandeville*, 451 F. Supp. 617, 621 (S.D. Ala. 1978) (factor held inapplicable to case which was not one of first impression); *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1934 (1975) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (questions involved were not novel).

126. *Barnett v. Kalinowski*, 458 F. Supp. 689, 703 (M.D. Pa. 1978).

127. *Rubenstein v. Republic Nat'l Life Ins. Co.*, 74 F.R.D. 337, 351 (N.D. Tex. 1976) (class securities litigation).

128. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

129. See *Pugh v. Rainwater*, 465 F. Supp. 41, 44 (S.D. Fla. 1979) ("capable and talented lawyer" handled case "in finest lawyer-like manner;" final award after consideration of other factors set at \$90 per hour); *Armstrong v. Reed*, 462 F. Supp. 496, 502 (N.D. Miss. 1978) (case handled "expertly with dispatch"—\$40 per hour rate awarded); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 404 (D. Colo. 1977) ("excellent work product;" all attorneys "performed in a thorough dedicated and professional way").

130. See *Love v. Pullman Co.*, 19 Empl. Prac. Dec. ¶ 9167, at 7051 (D. Colo. 1979) (Title VII) (initial initiative demonstrated by counsel was offset by counsel's sluggish performance in bringing lawsuit to a close; litigation was counsel's first civil rights case; and counsel did not bring any particular expertise into the case; skill factor apparently operated in neutral fashion); *Pollard v. United States*, 69 F.R.D. 646, 649 (M.D. Ala. 1976) (equitable fund doctrine) (where counsel performed "with that degree of competence which the Court expects of all counsel practicing" at bar, held that "no spe-

stration of "special skills,"¹³¹ this factor should operate in a neutral fashion; it should neither increase nor decrease the rate of recovery. A poor performance by counsel, however, may result in a decrease in the overall rate of recovery assigned by the court.¹³²

Preclusion of Other Employment

This factor permits a court to increase the recovery rate of an attorney whose participation in the instant lawsuit precluded him from engaging in *otherwise available* business. Such preclusion can arise as a result of a conflict of interest or from sheer time demands imposed by litigation which disrupts an attorney's normal practice.¹³³

Courts have taken varying approaches to the preclusion factor. One district court considered this factor as increasing the fee to be awarded notwithstanding the fact that no evidence had been adduced that prevailing counsel had been precluded from engaging in contemporaneous litigation.¹³⁴ Other courts do not apply the factor absent a showing by counsel of preclusion of other business.¹³⁵ Most courts will increase a fee award where it is demonstrated that considerable time and effort was expended on the litigation.¹³⁶ Nonetheless, where it is shown that prevail-

cial skill was demonstrated which would warrant increasing an otherwise reasonable fee").

131. See *Sonnenburg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5617 (D.D.C. 1979) (Title VII); *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (42 U.S.C. § 1617 (1976), Em. School Aid Act).

132. In *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII), the tendency of counsel to complete tasks at the "last minute," which delayed the prosecution of the litigation, was held to justify a decrease in the recovery rate of that attorney. 418 F. Supp. at 794.

133. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

134. *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 794 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII) (court explained that it increased award under this factor "so as not to penalize the attorneys involved" for accepting lengthy, time consuming case).

135. See *Love v. Pullman Co.*, 19 Empl. Prac. Dec. ¶ 9167, at 7051 (D. Colo. 1979) (court declined to apply factor in absence of affidavit or testimony demonstrating preclusion—even though claiming attorney expended 1300 hours throughout litigation); *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5618 (D.D.C. 1979) (Title VII) (factor not considered in absence of claim by attorney); *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (court did not consider factor in absence of showing of preclusion).

136. See *Stasny v. Southern Bell Tel. & Tel. Co.*, 458 F. Supp. 314, 319 (W.D.N.C. 1978) (Title VII) (court indicated that four attorneys expending

ing counsel engaged in other contemporaneous litigation, many courts decline to increase a fee award under the preclusion factor.¹³⁷

In considering this factor, the courts generally weigh the disruptive financial and procedural effects which lengthy, contingent civil rights litigation may have on an attorney's private practice.¹³⁸ A specialized civil rights firm does not suffer the kind of "disruption" encountered by general practice firms which are neither structured to engage in lengthy, complex civil rights litigation nor accustomed to the contingent fee basis on which section 1988 cases are often litigated.¹³⁹ Courts have accordingly held that attorneys who specialize in civil rights litigation are not entitled under the preclusion factor to higher than normal rates for their services.¹⁴⁰ It should be noted that the rate of recovery awarded civil rights specialists should generally be greater than awards to general practice attorneys, to reflect other factors such as the greater skill,¹⁴¹ experience,¹⁴² and re-

2500 hours in litigation lasting one year would be entitled to increased fee under preclusion factor); *Sherrill v. J. P. Stevens & Co.*, 441 F. Supp. 846, 848 (W.D.N.C. 1977) (court indicated that attorney expending 1300 hours on litigation over a period of 4.5 years would be entitled to increased fees under preclusion factor); *Miller v. Carson*, 401 F. Supp. 835, 858 (M.D. Fla. 1975), *modified on other grounds*, 563 F.2d 741 (5th Cir. 1977) (common benefit doctrine) (court indicated that attorney who devoted "a large portion of his practice . . . exclusively to this particular lawsuit" would be entitled to increased fee under preclusion factor).

137. *Vant Hul v. City of Dell Rapids*, 465 F. Supp. 1231, 1232 (D.S.D. 1979) (Title VII) (preclusion factor not applied where plaintiff's attorneys accepted other employment during instant litigation); *Rubenstein v. Republic Nat'l Life Ins. Co.*, 74 F.R.D. 337, 351 (N.D. Tex. 1976) (class securities litigation); *Norwood v. Harrison*, 410 F. Supp. 133, 142 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978) (20 U.S.C. § 1617 (1976), Em. School Aid Act). *See also* *Bachman v. Pertschuk*, 19 Empl. Prac. Dec. ¶ 9044, at 6508 (D.D.C. 1979) (Title VII) (unemployed attorney who expended 19 hours per week in instant litigation held not entitled to increased fees under preclusion factor).

138. *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 762 (S.D. Ill. 1978); *Aumiller v. University of Del.*, 455 F. Supp. 676, 683 (D. Del. 1978) (§ 1988) (increased fee, after noting that prosecution of lawsuit on contingent fee basis created "cash flow problems" for counsel's small firm). *See also* *Pugh v. Rainwater*, 465 F. Supp. 41, 44 (S.D. Fla. 1979) (law professor who maintained limited civil rights practice held not entitled to higher hourly rate under preclusion factor).

139. *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 762 (S.D. Ill. 1978).

140. *Neely v. City of Grenada*, 77 F.R.D. 484 (N.D. Miss. 1978) (Title VII). When addressing the preclusion factor, the *Neely* court noted:

This factor does not weigh heavily in the eyes of the court since plaintiff's counsel emphasize, if they do not indeed specialize in, civil rights litigation. Their success in this action, and the enhancement of their reputation as a natural result thereof, will benefit, rather than hamper, the practice of these attorneys.

77 F.R.D. at 486.

141. *See* notes 128-32 and accompanying text *supra* for a discussion of

sults obtained¹⁴³ by experienced civil rights attorneys. Thus, an increased award to a seasoned civil rights specialist under the "preclusion" factor is not needed to award a reasonable fee.

In *Lund v. Affleck*,¹⁴⁴ a district court indicated that staff counsel employed by a federally funded legal services organization are entitled to an increased fee award under the preclusion factor. The *Lund* court recognized that the legal services organization attorneys were not "precluded" from engaging in "more lucrative" work.¹⁴⁵ Nonetheless, the court justified its award on the ground that it would aid the legal services organization (to which the fee would inure) to expand its capacity to provide legal services to the poor.¹⁴⁶ This holding is rather anomalous in light of the fact that these federally funded organizations are precluded by federal regulations from actively engaging in fee-generating cases.¹⁴⁷

The *Lund* approach to the preclusion factor cannot be justified under *Johnson*, because the prosecution of a civil rights case cannot be said to preclude the organization from engaging

the effects of an attorney's skillful performance on the size of an attorneys' fee award.

142. See notes 208-12 and accompanying text *infra* for a discussion of the influence of the experience of an attorney as a factor increasing or decreasing the size of an attorneys' fee award.

143. See notes 202-07 *infra* for a discussion of the extent to which favorable results obtained by an attorney for his client influence the size of an award of attorneys' fees granted such counsel under section 1988.

144. 442 F. Supp. 1109 (D.R.I. 1977), *aff'd*, 587 F.2d 75 (1st Cir. 1978).

145. *Id.* at 1116.

146. *Id.*

147. Recipient organizations under the Legal Services Corporation Act, such as the organization in *Lund*, are extremely restricted in their capacity to litigate actions which are likely to generate fees for that organization. The relevant regulations are codified at 45 C.F.R. § 1609 (1978). These regulations provide:

§ 1609.1 Purpose

This part is designed to insure that recipients do not compete with private attorneys and, at the same time, to guarantee that eligible clients are able to obtain appropriate and effective legal assistance.

§ 1609.2 Definition

"Fee-generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.

§ 1609.3 Prohibition

No recipient shall use funds received from the Corporation to provide legal assistance in a fee-generating case unless other adequate representation is unavailable. All recipients shall establish procedures for the referral of fee-generating cases.

§ 1609.4 Authorized representation in a fee-generating case

Other adequate representation is deemed to be unavailable when

in "otherwise available business."¹⁴⁸ Similarly, not-for-profit legal services organizations, not dependent on attorneys' fees for their continued operation, can hardly be said to be financially "disrupted" by engaging in section 1988 litigation.¹⁴⁹ It would be ludicrous to suggest that *private* law firms should be granted windfall fees under the preclusion factor, in the hope that they would hire additional associates, paralegals, and clerks for handling civil rights claims. Yet, the increased fee award in *Lund* reflects just such a rationale.

The fallacy of the court's reasoning is its apparent assumption that section 1988 was meant to provide a funding mechanism through which federal courts support local legal services organizations. The legislative history of section 1988 does not

(a) The recipient has determined that free referral is not possible because:

(1) The case has been rejected by the local lawyer referral service, or by two private attorneys; or

(2) Neither the referral service nor any lawyer will consider the case without payment of a consultation fee; or

(3) The case is of the type that private attorneys in the area ordinarily do not accept, or do not accept without prepayment of a fee; or

(4) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate, and consistent with professional responsibility, referral will be attempted at a later time; or

(b) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other non-pecuniary relief; or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims; or

(c) A court appoints a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(d) An eligible client is seeking benefits under Title II of the Social Security Act, 42 U.S.C. 401, *et seq.*, Federal Old Age, Survivors, and Disability Insurance Benefits; or Title XVI of the Social Security Act, 42 U.S.C. 1381, *et seq.*, Supplemental Security Income for Aged, Blind, and Disabled.

148. This statement presumes that the *Johnson* court referred to "otherwise available *business*" in connection with the preclusion factor, in the logical sense of the term: as *remunerative* business. 488 F.2d at 718.

149. It should be noted that the regulations cited in note 147 *supra* merely prohibit federally funded legal services organizations from expending *federal funds* to solicit and engage in "fee-generating cases." See 45 C.F.R. § 1609.3 (1978). Thus, if a legal services organization decided to open a branch clinic with *non-federal* funds, on a fee paying basis, the operations of that branch could conceivably be entitled to an increased fee award under the "preclusion factor." Accordingly, if a legal services organization can demonstrate that it was precluded from other fee-generating business as a result of the litigation, they may, like any other private practitioner, be entitled to increased recovery under this factor. See *Palmer v. Rogers*, 10 Empl. Prac. Dec. ¶ 10,449 at 6131 (D.D.C. 1975) (Title VII) (small public interest law firm which operated on fee-paying basis held entitled to increased fee award under preclusion factor).

evidence such an intent. Indeed, it is the duty of Congress, under the Legal Services Corporation Act of 1964,¹⁵⁰ to fund these organizations.¹⁵¹ The judiciary should refrain from construing the *Johnson* factors merely to provide legal services organizations more than *reasonable* section 1988 fees. At least one federal court has expressly recognized that section 1988 "was not intended to subsidize public interest organizations."¹⁵² Other courts addressing the issue have declined opportunities to apply the preclusion factor to increase an award of fees to counsel employed by legal services organizations.¹⁵³

Overall, an attorney seeking an increased award under the "preclusion factor," should submit a *request* for such compensation. Additionally, he should be prepared to support his request with evidence documenting the disruptive effects prosecution of the civil rights claim had on his practice.

The Customary Fee

The "customary fee" factor directs a court's attention to fees charged in the community for similar work, as a measure of an appropriate hourly rate to be awarded attorneys for engaging in specific types of litigation.¹⁵⁴ In no case should the base rate awarded be lower than the \$20 per hour out-of-court rate prescribed by the Criminal Justice Act.¹⁵⁵ A court may determine the prevailing community rates for civil rights litigation on the basis of affidavits of disinterested parties¹⁵⁶ or its own judicial knowledge of such rates.¹⁵⁷

150. 42 U.S.C. §§ 2996 *et seq.* (Supp. 1979).

151. Appropriations under that Act have climbed to 300 million dollars for fiscal 1980. *See* note 313 *infra*.

152. *Page v. Preisser*, 468 F. Supp. 399, 403 (S.D. Iowa 1979).

153. *Armstrong v. Reed*, 462 F. Supp. 496, 502 n.5 (N.D. Miss. 1976) (plaintiff was represented by staff attorney for civil rights organization who was not dependent upon his private practice for his livelihood, and was not precluded from acceptance of other employment); *Cole v. Tuttle*, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978) (court cryptically noted that preclusion factor had no application to the case *sub judice*; counsel for plaintiffs were staff attorneys employed by legal services organization).

154. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

155. *Id.*; *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 691 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (Title VII).

156. *Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979) (court utilized affidavits of experienced local civil rights attorneys); *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5618 (D.D.C. 1979) (Title VII) (affidavit of disinterested attorney utilized).

157. *Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979) (court took judicial notice of prevailing rates); *Central Soya Co. v. Cox Towing Corp.*, 431 F. Supp. 502, 505 (N.D. Miss. 1977) (because courts regularly come into contact with reasonable fee questions, they are considered experts on is-

Courts have construed this *Johnson* factor to require an attorney to submit *his own* customary billing schedule as a guide. They use this information as a starting point in fee calculations, reasoning that the "value of an attorney's time generally is reflected in his normal billing rates."¹⁵⁸ Other courts place primary emphasis on local billing rates as determinative of a reasonable fee rate.¹⁵⁹ Out-of-state counsel will generally be awarded a fee reflecting local community rates, regardless of their normal billing schedule; unless the plaintiff can demonstrate that he was unable "through diligent, good faith efforts to retain local counsel."¹⁶⁰ Overall, the courts are often wary of an attorney's asserted "customary" fee rate. Although the "customary" billing rates of an attorney are thought to reflect the quality of his work, the quality of the legal services rendered in the instant litigation should primarily govern the "reasonable" fee to be taxed to unsuccessful litigants under section 1988.¹⁶¹

Whether the Fee Is Fixed or Contingent

The "contingency" factor, as stated by the *Johnson* court, was meant to focus judicial scrutiny on any contract for attorneys' fees which may have been executed between the plaintiff and his attorney.¹⁶² The contract, whether based on a fixed hourly rate or a percentage of recovery, provides a court with an indication of what that attorney considered a "reasonable fee" when he entered into litigation.¹⁶³ Accordingly, some courts de-

sue); *Payne v. Travenol Laboratories, Inc.*, 74 F.R.D. 19, 22 (N.D. Miss. 1976) (Title VII) (court took judicial notice of rates it had awarded in prior cases).

158. *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 473 (2d Cir. 1974) (equitable fund doctrine); *Preston v. Mandeville*, 451 F. Supp. 617, 621 (S.D. Ala. 1978).

159. *Hartmann v. Gaffney*, 446 F. Supp. 809, 813 (D. Minn. 1977) (counsel requested rate of \$75 per hour but was awarded \$60 per hour which was normal fee requested in community for that type of litigation, if fee was charged at all).

160. *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978).

161. One court aptly noted:

Just as time alone cannot dictate the amount of the award, neither can the attorneys' customary fee control. The customary fee is but one factor in the ultimate equation determining a reasonable attorney fee. In the final analysis, what is reasonable depends on the quality of the work performed, not on the quantity of work performed multiplied by a very generous customary fee.

Love v. Pullman Co., 19 Empl. Prac. Dec. ¶ 9167, at 7049 (D. Colo. 1979) (Title VII).

162. The *Johnson* court noted that "[t]he fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case." 488 F.2d at 718.

163. *Id.* Indeed, the court noted that when such a contract was existent, the litigant should *not* "be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." *Id.*

cline to consider the contingency factor when no contract for fees has been executed.¹⁶⁴

Other courts, however, have expanded this factor by considering the contingent nature of recovery under section 1988¹⁶⁵ as justifying increased hourly rate awards absent contractual fee arrangements between the parties.¹⁶⁶ It is questionable whether an "agreement" between attorney and client limiting fee recovery to an amount obtained pursuant to section 1988 can be construed to be a contract. When an attorney accepts a case on this fee basis, courts have traditionally ordered defendants to pay any award of attorneys' fees directly to counsel.¹⁶⁷ Thus, it is difficult to find legal consideration which would raise such "agreements" to the level of a contract.

But disregarding this contract law question, these "contingency" awards find support in both the *Johnson* opinion and the underlying policy goals of section 1988. First, an attorney who

164. *Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979); *Dean v. Gladney*, 451 F. Supp. 1313, 1323 (S.D. Tex. 1978).

165. A party must "prevail," or win on the merits, before he is entitled to an award of attorneys' fees. 42 U.S.C. § 1988 (1978). See note 24 *supra*.

166. See *Preston v. Mandeville*, 451 F. Supp. 617, 621 (S.D. Ala. 1978) (compensation was entirely contingent on award of fees under the Act); *cf. Barth v. Bayou Candy Co.*, 379 F. Supp. 1201, 1204 (E.D. La. 1974) (Title VII) (compensation contingent on prevailing under the Act); *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (20 U.S.C. § 1617 (1976), Em. School Aid Act) (substantial fee contingent on prevailing on merits).

167. When an attorney has litigated a case on a *pro bono publico* basis, the courts have always ordered the unsuccessful defendant to pay any award of attorneys' fees *directly to counsel*. See *Rote v. Hall*, No. C-76-228 (E.D. Wash., filed May 14, 1979). The *Rote* court stated that "[i]n accordance with prevailing practice, these fees are awarded to the legal services organization directly rather than to the named plaintiffs themselves. This procedure prevents any windfall to plaintiffs who were not charged for attorney services." (Note: this opinion can be obtained from the National Clearinghouse For Legal Services; case No. 26,850); *Stephenson v. Simon*, 448 F. Supp. 708, 710 (D.D.C. 1978) (Title VII) (order entered requiring defendant to pay fee award to counsel for plaintiff); *Alsager v. District Ct. of Polk County*, 447 F. Supp. 572, 580 (S.D. Iowa 1977) (entered order that plaintiff's counsel was entitled to fee); *cf. Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (29 U.S.C. § 626(b), § 216(b) (1975), ADEA) (awarded fee to counsel to avoid windfall to plaintiff); *Hairston v. R. & R. Apts.*, 510 F.2d 1090, 1093 (7th Cir. 1975) (42 U.S.C. § 3612(c) (1973), Fair Housing Act) (awarded fee to organization to avoid windfall to client); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974) (private attorney general doctrine) (awarded fee to organization to avoid windfall to plaintiff).

Thus, except in those cases where a prevailing party has paid his attorney to prosecute the action, the "prevailing party" never comes into possession of the fee award. In light of this case law, it is difficult to determine just what legal *consideration* is promised an attorney by a client under an agreement which specifies that compensation for legal services will be pursuant to section 1988, if at all.

undertakes representation on a contingent fee basis generally commands a recovery rate greater than would be likely under a non-contingent hourly rate basis.¹⁶⁸ If prevailing rates are higher for legal services rendered on a contingent basis, it would seem that the *Johnson* "customary fee" factor already takes this into account.¹⁶⁹ Hence, it appears that the courts have dealt with the effects of "contingency" under the wrong *Johnson* factor. This "error" will remain one of form, not substance, as long as the "contingency" is examined *somewhere* in a court's attorneys' fee award determinations.

Support for the utilization of a mere "contingency" factor in fee award determinations can also be drawn by reference to the broad policy goals underlying section 1988.¹⁷⁰ Section 1988 was designed to encourage private enforcement of civil rights laws.¹⁷¹ It has been and should be construed liberally to achieve its remedial purpose.¹⁷² If rates in the legal community are reasonably increased to reflect contingency, the courts should consider this factor in their efforts to award a *reasonable* fee to the claiming attorney. The higher rate granted an attorney who litigates on a contingent basis permits that attorney to absorb inevitable losses incurred in other, unsuccessfully pursued

168. One court aptly stated: "[N]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Pollard v. United States*, 69 F.R.D. 646, 648 (M.D. Ala. 1976); *accord*, *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875 (D.D.C. 1979) (Title VII); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 375 (E.D. Pa. 1976); *Lindy Bros. Bldrs., Inc. v. American Rad. & Std. San. Corp.*, 540 F.2d 102, 117 (3d Cir. 1976); *cf.* Code of Professional Responsibility of the American Bar Association, Canon 2, Disciplinary Rule 2-106 (B)-(8) (1969).

169. If contingent fee increases are "customary" in the locality, it would seem that the *Johnson* "customary fee" factor, discussed at notes 154-61 *supra*, would encompass such considerations.

170. Some support for this practice can be found in the legislative history of section 1988. Two cases cited in the Senate Report, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975), appear to sanction "mere contingency" increases in judicial awards of attorneys' fees. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913. The House Report on section 1988, however, cites only to *Johnson* when discussing the appropriate factors to be considered by a court in determining reasonable fee awards. Rather than engage in extended and perhaps fruitless discussion of whether *Johnson* or the cases cited in the Senate Report should control on this point, it is better to examine the broad purpose of section 1988 itself for resolution of this issue.

171. The House Report on section 1988 clearly confirms this purpose. That Report states: "In authorizing an award of reasonable attorneys' fees, [section 1988] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976).

172. *See Mid-Hudson Legal Servs., Inc. v. G & U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978); *Seals v. Quarterly County Ct.*, 562 F.2d 390, 393 (6th Cir. 1977).

contingent fee actions.¹⁷³ In addition, attorneys are encouraged to litigate cases on a contingent fee basis, thereby removing financial barriers to the prosecution of civil rights claims of indigents.¹⁷⁴ At least one court has observed that a "failure to make contingency calculations in determining fee awards . . . would discourage many attorneys from accepting *pro bono publico* cases by presenting them with the financially unacceptable risk of wasting hours of work, overhead and expenses over a course of successful and unsuccessful civil actions."¹⁷⁵ Such a result would circumvent the policy rationale which prompted Congress to enact section 1988.

Accepting the proposition that contingency is a factor which should be considered by a court in its ascertainment of a reasonable fee, the procedures affecting this factor become important. The size of a contingent fee, whether negotiated between parties or judicially imposed, is related to the strength of the case: the stronger the case, the smaller the attorney's share.¹⁷⁶ A development arising within or without the litigation which *increases* the likelihood of success on the merits will influence a court to *decrease* the contingency award for services subsequently rendered. Thus, a settlement as to liability, in whole or in part, if it is accomplished early in the litigation will diminish any contingency award for time spent on remaining issues or in ancillary

173. See, e.g., *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

174. The availability of attorneys who work on a contingent fee basis is of particular benefit to the indigent, who can not afford to advance a retainer to an attorney.

175. *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

176. See *Love v. Pullman Co.*, 19 Empl. Prac. Dec. ¶ 9167, at 7049 (D. Colo. 1979) (Title VII). The *Love* court indicated that the contingency factor would be applied to determine the fee recovery of attorneys who handled an early stage of the litigation, prior to an appeal of a procedural issue to the United States Supreme Court. *Id.* The court went on to note, however, that the contingency factor would not apply so heavily to the fee applications of attorneys who entered the litigation *after* the complex procedural matter was settled by the court in plaintiff's favor. *Id.* In *Aumiller v. University of Del.*, 455 F. Supp. 676, 683 (D. Del. 1978) (§ 1988), the court viewed the "considerable additional risk" undertaken by counsel due to his investment of "several hundred hours with no promise of remuneration" in the case, as a factor increasing the section 1988 fee award.

The Third Circuit, when addressing the issue of contingency awards, noted that "[t]he contingency factor would be less where liability is easily proved than where it is questionable. Hence, the penalty fastened on the defendant would vary in inverse proportion to the strength of the case against him." *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977) (Title VII). See also *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

proceedings.¹⁷⁷ Independent litigation which establishes the liability of the defendant in one lawsuit vitiates any "risk of litigation," in subsequent, related litigation. Contingency awards in the later action will be minimal, if granted at all.¹⁷⁸ Similarly, an official investigation made prior to institution of suit may disclose evidence which reduces the contingency factor involved in prosecuting that action.¹⁷⁹

When an attorney's compensation does not depend on his successful prosecution of the lawsuit, the rules regarding "contingency awards will, as a general rule, be inapplicable."¹⁸⁰ However, there are exceptions to this general rule. When an attorney has received only nominal compensation for his efforts during the litigation,¹⁸¹ or when his recovery of a substantial fee depends on the outcome of the lawsuit,¹⁸² the courts will con-

177. See *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5618 (D.D.C. 1979) (Title VII) (early admission of culpability by defendant as to discrimination mitigates contingency); *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 762 (S.D. Ill. 1978) (early settlement on issue of constitutional violation mitigates contingency); *Lockheed Min. Sol. Coal. v. Lockheed Missles & Space Co.*, 406 F. Supp. 828, 834 (N.D. Cal. 1976) (Title VII) (defendant's early statement of intent to settle substantially reduced contingency of failure and accordingly, the effect of the contingency factor).

Additionally, the *Lockheed* court noted that uncertainty regarding the amount of legal fees which may be awarded by the court does not justify a "contingency" recovery for time spent litigating the issue of fees. *Id.* This holding reflects the nature of contingency awards as being justified only where the attorney faces "the stark alternative of victory or defeat (with the attendant threat of no payment at all)." *Id.*

178. See *Lindy Bros. Bldrs., Inc. v. American Rad. & Std. San. Corp.*, 487 F.2d 161 (3d Cir. 1973) (Lindy I). *Lindy* involved civil antitrust litigation under the Clayton Act, 15 U.S.C. § 15 (1975). The *Lindy* court noted that the defendants had been indicted under the criminal provisions of the Clayton Act prior to commencement of the civil action. Those defendants who had pleaded not guilty had been convicted before serious settlement negotiations in the civil actions had commenced. The court observed that the district court could find on remand "that the contingency was so slight . . . that an increased allowance for the contingent nature of the fee would be minimal." *Id.* at 168; *accord*, *Lockheed Min. Sol. Coal. v. Lockheed Missles & Space Co.*, 406 F. Supp. 828, 384 (N.D. Cal. 1976) (Title VII).

179. *Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 375 (E.D. Pa. 1976) (contingency factor in multidistrict securities litigation pursuant to financial collapse of Pennsylvania Central Co. was minimized by independent S.E.C. investigation which detailed malfeasance and nonfeasance of defendants).

180. See cases cited in note 168 *supra*.

181. *McPherson v. School Dist. No. 186*, 465 F. Supp. 762 (S.D. Ill. 1978) (attorney was nominally reimbursed for some of his expenses and per diems by NAACP Legal Defense & Educ. Fund; court recognized that fee approaching his normal rates was contingent on success).

182. *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (attorney was guaranteed expenses and minimal fee, but substantial fee was contingent on success on merits).

sider these differing degrees of compensation when making a contingency award.

In *Lund v. Affleck*,¹⁸³ a district court which awarded fees under section 1988 held that attorneys whose efforts were entirely funded by a federally funded legal services organization were entitled to increased recovery under the contingency doctrine.¹⁸⁴ This result is rather disturbing, considering the origin and history of the contingency factor. The justification supporting its use was that an attorney should be compensated for the risk of non-compensation undertaken in representing his client on a contingent fee basis, and that the failure to compensate an attorney under this factor would discourage him from representing future clients on a contingent fee basis.¹⁸⁵

In contrast, it is difficult to determine what, if anything, was risked by the legal services organization counsel who represented the plaintiffs in *Lund*. The individual counsel did not "risk" personal time and resources, as they engaged in nothing more than their usual employment.¹⁸⁶ Nor could the legal services organization in *Lund* be said to have "risked" any resources, as it was a recipient of federal funds under the Legal Services Corporation Act.¹⁸⁷ As such, it was prohibited from representing fee-paying clients.¹⁸⁸ If an organization is not permitted to charge its clients for its services, and if it is extremely restricted in its capacity to undertake cases which result in fee awards, what does that organization *risk* in undertaking representation in one of the few types of cases which permit recovery

183. 442 F. Supp. 1109, 1117 (D.R.I. 1977), *aff'd*, 587 F.2d 75 (1st Cir. 1978).

184. *Id.* The legal services organization in *Lund* did not enter into a contract for fees with the plaintiff.

The contingency doctrine, as distinguished from the contingency *factor* listed in *Johnson*, was enunciated in precedents previously discussed. See notes 176-82 and accompanying text *supra* for leading cases on the contingency doctrine.

185. *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 686 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); see *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979) (§ 1988), where the court noted:

An attorney's regular hourly billing is based upon an expectation of payment, win, lose or draw. If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk the attorney is accepting of not being paid at all.

611 F.2d at 638. In *Lund*, however, counsel was always assured that federal funding would subsidize the attorney's efforts, whether the litigation resulted in a "win, lose or draw" for the plaintiffs.

186. See 442 F. Supp. at 1114.

187. *Id.* at 1111. The Legal Services Corporation Act is codified at 42 U.S.C. § 2996 (1978).

188. See note 147 *supra* for the applicable regulations regarding federal restrictions on the ability of federally funded legal services organizations to engage in "fee-generating cases."

of a fee?¹⁸⁹

The *Lund* court refused to consider this question, apparently on the ground that the legislative history of the Awards Act indicated that legal services organizations were entitled to awards of "reasonable fees."¹⁹⁰ Although it does establish that legal services organizations are entitled to *reasonable* fees,¹⁹¹ nothing in the legislative history of section 1988 authorizes a federal court to ignore the policy considerations which underlie the twelve *Johnson* factors.¹⁹² At least four other federal courts have indicated that the concept of "contingency" has no application where the attorneys claiming fees under section 1988 are fully salaried by a legal services organization.¹⁹³ These decisions accurately reflect the policy rationale which justifies increased fee awards to counsel who, instead of exacting retainers, litigate a meritorious civil rights claim on a contingent fee basis. Blindly applying the contingency doctrine without regard for its underlying rationale will inevitably grant an undeserved windfall to an attorney. Because the courts, in awarding

189. 45 C.F.R. § 1609.4 (1978) permits a legal services organization to seek a fee under statutes such as section 1988, once the organization is drawn into the case by one of the regulatory conditions. The fact remains, however, that legal services organizations which receive federal funding may not solicit such cases from the public. Therefore, litigation which permits the collection of a fee by a federally funded legal services organization is actually the most lucrative type of litigation available to such organizations.

190. *Lund* cites to one of the cases cited in the House Report on section 1988 for the proposition that the "fact [that] a legal services organization is involved [in the litigation] is irrelevant." 442 F. Supp. at 1117. The district court in *Lund* does not accurately convey the actual holding of *Incarcerated Men*. That case held that the employment status of counsel, of itself, should not be arbitrarily considered as an independent ground on which to justify reduction of an otherwise reasonable fee. See notes 329-33 and accompanying text *infra*. *Incarcerated Men* did not instruct district courts to ignore the organizational status of plaintiff's counsel when applying the *Johnson* factors. Nothing in that case indicates that legal service organization counsel should receive increased fees under the contingency factor, notwithstanding that such organizations have steady, uninterrupted income levels which are not affected by their workload, and simply do not risk personal finances when litigating.

191. See H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 n.16 (1976) (House Report on section 1988).

192. *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974), which was cited in the Senate Report on section 1988, S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913, held that an attorneys' fee award to organizational counsel should be computed in the "traditional" manner. Nothing in *Davis* can be read to require a court to grant a contingency increase to a legal services organization counsel, when none of the "traditional" policy reasons which compel such additional awards are present.

193. See *Armstrong v. Reed*, 462 F. Supp. 496, 502 n.5 (N.D. Miss. 1978); *Cole v. Tuttle*, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978); *Barrett v. Kalinowski*, 458 F. Supp. 689, 707 (M.D. Pa. 1978); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 405 (D. Colo. 1977).

fees under section 1988, should avoid even the appearance of overcompensating attorneys,¹⁹⁴ the construction of the contingency factor adopted in *Lund* should not be followed by other federal courts.

Time Limitations Imposed by the Client or the Circumstances

The time limitations factor reflects the view that "[p]riority work that delays the lawyer's other legal work is entitled to some premium."¹⁹⁵ It has particular significance where an attorney is either called upon to litigate a case at a late stage in the proceedings or to prosecute an appeal.¹⁹⁶ It has equal application, however, whenever swift action requiring the full utilization of counsel's time is necessary to prevent further injury to his client.¹⁹⁷

As a general rule, the courts will not apply the time limitations factor in the absence of "extraordinary" time constraints imposed on an attorney's efforts.¹⁹⁸ When litigation proceeds at an orderly pace, and does not require that "priority" work be done, this factor has little, if any, application.¹⁹⁹ One court declined to consider the time limitation factor in the absence of a claim by counsel that "he was delayed on other work due to priority work with the [instant] case."²⁰⁰ Apparently, an attorney must claim and demonstrate the hardship he suffered due to priority work before he can expect a court to award a greater fee under this factor. An attorney should not expect to receive premiums under the time limitations factor when the "priority" action in the lawsuit is required due to counsel's own inaction and

194. *Fitzpatrick v. Bitzer*, 455 F. Supp. 1338, 1342 (D. Conn. 1978).

195. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

196. *Id.*

197. *Wynn Oil Co. v. Purolator Chem. Corp.*, 391 F. Supp. 522, 525 (M.D. Fla. 1974) (antitrust action; sudden near total take-over by defendants of plaintiff's product distribution system required immediate legal action).

198. *Neely v. City of Grenada*, 77 F.R.D. 484, 486 (N.D. Miss. 1978) (Title VII).

199. See *Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979) (case proceeded at orderly pace; "priority time premium" held not relevant to fee award determination); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 795 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII); *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394, 411 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (Em. School Aid Act).

200. *Sonnenburg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5618 (D.D.C. 1979) (Title VII). See also *Preston v. Mandeville*, 451 F. Supp. 617, 622 (S.D. Ala. 1978) (court ordered immediate formulation and implementation of constitutional jury selection plan and later declined to increase counsel's fee award under this factor because counsel had not submitted request for increased fee under the time limits factor).

delay.²⁰¹

The Amount Involved and the Results Obtained

The results factor was meant to focus a court's attention on the recovery obtained by an attorney as a measure of an appropriate fee award for his services. While the monetary relief obtained for a client may be considered in setting the reasonable size of an award of attorneys' fees,²⁰² the total amount of monetary damages recovered does not set the limit on an attorney's fee.²⁰³ The *Johnson* opinion stated that courts should consider not only the benefits produced for the plaintiff but also the effect of the litigation on the public interest.²⁰⁴ Accordingly, the results factor has been applied to increase the fee award to attorneys whose litigation significantly benefited the public interest, notwithstanding the fact that no monetary damages were sought or recovered in the suit.²⁰⁵

One court has employed the results factor to reward an attorney who, in prosecuting a class action suit, vigorously pressed the claims of his client without compromising the inter-

201. *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641 (N.D. Tex. 1978) (equitable fund doctrine). In *Clark*, the court had ordered plaintiff's attorneys to bring the litigation to a close. The court noted:

[T]he court did impose certain time limitations on the parties to bring this litigation to a close as it had been pending for a number of years. Contrary to the Plaintiffs' assertions, the court, in reviewing these time limitations, does not find them severe In a case which has progressed for 5 years and is one of the oldest cases on my docket, I do not feel persuaded that the court should award "some premium" for this effort, and though I do not ignore Plaintiff's efforts and take them into account in my decision, I don't feel they deserve an extra bonus as Plaintiff's suggest for any "hardship" suffered.

Id. at 656.

202. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

203. *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (settlement amount is not a limit on reasonable award of attorneys' fees).

204. 488 F.2d at 718. The court stated:

Although the Court should consider the amount of damages, or back pay awarded, that consideration should not obviate court scrutiny of the decision's effect on the law. If the decision corrects across-the-board discrimination affecting a large class of an employer's employees, the attorney's fee award should reflect the relief granted.

Id.

205. *Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979) (increased award where case changed state criminal procedure rules, instituting a magistrate system with both monetary and constitutional benefits; no money damages were sought); *Preston v. Mandeville*, 451 F. Supp. 617, 622 (S.D. Ala. 1978) (no damages sought, but increased award in case which implemented constitutional jury system in that jurisdiction).

ests of the class.²⁰⁶ Conversely, when a court finds that counsel compromised important rights of his clients in settling a lawsuit, it may decline to award an increased rate of recovery under this factor.²⁰⁷

The Experience, Reputation, and Ability of the Attorneys

The experience factor can serve to increase or decrease the size of an award of attorneys' fees under section 1988. The *Johnson* court recognized that experienced civil rights attorneys generally command higher compensation for services rendered in civil rights litigation.²⁰⁸ However, the overall fee to be granted under this factor may be reduced to reflect the inefficiency of inexperienced counsel.²⁰⁹ Yet the mere youth of an attorney does not justify a court in decreasing an award of attorneys' fees. Courts have stated that "[i]f a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar."²¹⁰ Courts accordingly award higher fees to attorneys whose trial work demonstrates the enhanced skill which accompanies experience, good reputation, and outstanding litigation ability.²¹¹ One court did not apply the experience factor when the performance of counsel, though deemed "adequate" by the court, was not of "such outstanding quality so as to require an increased fee."²¹²

206. *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 693 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (Title VII).

207. *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875 (D.D.C. 1979) (Title VII) (where plaintiff settled for retroactive promotion without back pay, court declined to increase fee award under results factor).

208. 488 F.2d at 719.

209. *See Barrett v. Kalinowski*, 458 F. Supp. 689, 707 (M.D. Pa. 1978). In *Barrett*, the court reduced the fee recovery by 25% to reflect both the inefficiency of counsel in their work product and their refusal to settle the case on reasonable terms advanced by the defendant early in the litigation. *Id.* *See also Miller v. Carson*, 401 F. Supp. 835, 859 (M.D. Fla. 1975), *modified on other grounds*, 563 F.2d 741 (5th Cir. 1977) (common benefit doctrine) (lower fee rate granted to inexperienced co-counsel).

210. *Rainey v. Jackson State College*, 551 F.2d 672, 677 (5th Cir. 1977); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974); *Palmigiano v. Garrahy*, 466 F. Supp. 732, 741 (D.R.I. 1979); *Vant Hul v. City of Dell Rapids*, 465 F. Supp. 1231, 1233 (D.S.D. 1979); *Preston v. Mandeville*, 451 F. Supp. 617, 622 (S.D. Ala. 1978).

211. *See Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979) (increased fee to skilled civil rights specialist); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 795 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII) (senior attorneys who possessed greater skill than their associates were awarded higher fees); *Wynn Oil Co. v. Purolator Chem. Corp.*, 391 F. Supp. 522, 525 (M.D. Fla. 1974) (antitrust) (counsel with extensive trial experience in antitrust field awarded commensurate rates).

212. *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5618 (D.D.C. 1979) (Title VII).

The Undesirability of a Case

The undesirability factor was included to permit a court to compensate an attorney for the possible economic loss suffered in his law practice because of community hostility toward the attorney's prosecution of his client's civil rights claim.²¹³ The economic impact of such "hostility" on a law practice may vary both as a function of geographic location and the passage of time.²¹⁴

Courts will not apply the undesirability factor to a fee award if an attorney is unable to demonstrate adverse economic impact on his practice due to community "hostility."²¹⁵ Even in jurisdictions where attorneys who champion civil rights causes are quite "unpopular," the undesirability factor should not result in increased fees if it appears that the attorney routinely handles civil rights litigation.²¹⁶ Indeed, championing an unpop-

213. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974); see *Vant Hul v. City of Dell Rapids*, 465 F. Supp. 1231, 1233 (D.S.D. 1979) (Title VII) (court indicated award would be increased under undesirability factor where it was recognized that attorneys' involvement in case "could have an adverse economic impact on their future practice"); *Aumiller v. University of Del.*, 455 F. Supp. 676, 683 (D. Del. 1978) (§ 1988) (court recognized that "the controversial and unpopular aspects of the case had the potential for an adverse economic impact on counsel's practice").

214. Such "hostility" undoubtedly injured the practice of the attorney who prosecuted the first school busing claim in the South. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 486 (W.D.N.C. 1975) (Em. School Aid Act). However, it was held in *Morton v. Charles County Bd. of Educ.*, 373 F. Supp. 394 (D. Md. 1975), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975), another school desegregation case decided a year before *Swann*, that no harmful effects would befall the Maryland attorneys who prosecuted the case. 373 F. Supp. at 412. In 1977, however, a court held that the prosecution of a school desegregation case in Denver, did indeed cause plaintiff's attorneys to be held in disfavor with the general public. *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 405 (D. Colo. 1977). Obviously, the operation of the "undesirability" factor will turn on the facts of each case.

215. See *Neely v. City of Grenada*, 77 F.R.D. 484, 487 (N.D. Miss. 1978) (Title VII) (although court recognized that litigation was "decidedly unpopular with some elements of the Grenada community," undesirability factor was not applied because plaintiff's attorneys were "unlikely to suffer professionally or otherwise as a result of hostility or ill feeling generated by this litigation."); *Miller v. Carson*, 401 F. Supp. 835, 859 (M.D. Fla. 1975), *modified on other grounds*, 563 F.2d 741 (5th Cir. 1977) (common benefit doctrine) (though community reaction to litigation was "unpleasant," undesirability factor was not applied because adverse economic impact on attorney's practice could not be ascertained).

216. See *Sonnenberg v. Adams*, 18 Empl. Prac. Dec. ¶ 8875, at 5618 (D.D.C. 1977) (Title VII) (attorney with Title VII litigation experience was unable to show that prosecution of Title VII action was harmful to his practice); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 795 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII) (civil rights lawyers, heavily involved in numerous civil rights actions, did not suffer harmful economic loss by prosecuting action).

ular civil rights cause may enhance the prestige and national prominence of the attorney as a civil rights advocate.²¹⁷

At least two federal courts have indicated that the undesirability factor does not apply when the plaintiff is represented by legal services organization counsel.²¹⁸ They apparently felt that attorneys who are obligated to represent indigents in "unpopular" civil rights actions do not risk damage to their reputations in the community.²¹⁹ This result stems from the fact that the applicability of the "undesirability" factor rests not on the popularity of a cause, but on the adverse impact which the prosecution of that cause may have had on an attorney's practice.

The Nature and Length of the Professional Relationship with the Client

The relationship factor recognizes that lawyers in private practice often vary their fees for services rendered to clients with whom they have an ongoing professional relationship.²²⁰ One court, noting that fees for regular clients are often lower, considered the *absence* of a professional relationship between plaintiff and his counsel as a factor in determining a reasonable

217. Two federal court cases illustrate this principle. In *Love v. Pullman Co.*, 19 Empl. Prac. Dec. ¶ 9167 (D. Colo. 1979) (Title VII), the court noted that the undesirability factor was "intended to address the 'adverse' publicity and social stigma which can often follow an attorney's decision to undertake civil rights litigation." *Id.* at 7049. Applying this principle to the facts of its case, the *Love* court noted that "what little publicity the instant lawsuit has generated has been positive." Plaintiff's counsel had in fact been engaged to litigate another Title VII action in that jurisdiction. *Id.* The *Love* court did not indicate that the fee awarded counsel was affected by the "undesirability" factor.

Norwood v. Harrison, 410 F. Supp. 133 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978) (Em. School Aid Act), presented a similar factual situation. In addressing the application of the undesirability factor to the case, the *Norwood* court noted:

Although the case was, to say the least, quite unpopular with the white citizenry of Mississippi, it seems unlikely that [the attorney's] participation in the suit cost him other clients or precluded other remunerative employment. Instead, his prestige as a successful advocate in the civil rights field was, in no small measure, enhanced by the successful outcome of this action.

410 F. Supp. at 142.

218. See *McManama v. Lukhard*, 464 F. Supp. 38, 43 (W.D. Va. 1978); *Cole v. Tuttle*, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978); *Armstrong v. Reed*, 462 F. Supp. 496, 502 n.5 (N.D. Miss. 1978).

219. See cases cited in note 218 *supra*. The same reasoning applies when a judge is considering this factor in conjunction with a fee request by private counsel. One court, convinced that plaintiff's counsel had suffered "no malevolent economic effect" as a result of the litigation, refused to apply this factor to increase the award of attorneys' fees. *Preston v. Mandeville*, 451 F. Supp. 617, 622 (S.D. Ala. 1978).

220. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

fee.²²¹ Other courts, however, have completely ignored this factor where no ongoing professional relationship existed between plaintiff and his counsel.²²²

Awards in Similar Cases

The awards factor simply focuses the attention of a court on fee awards which have been granted in similar cases, both within and outside its jurisdiction.²²³ In utilizing this factor, courts have noted that fee awards in similar cases are instructive rather than binding.²²⁴ The main purpose of a fee award is to enable litigants to obtain competent counsel in civil rights cases.²²⁵ The fee required to attract competent counsel in Chicago or New York would not necessarily be considered "reasonable" in other parts of the country. Because the determination of a reasonable fee must rest on the merits of each case,²²⁶ the significance of awards in similar cases should be kept in its proper perspective as a helpful, but not dispositive indication of a reasonable fee.

PROCEDURAL APPLICATION OF THE JOHNSON FACTORS

Present Procedures

The preceding discussion should illustrate that each *Johnson* factor has not been uniformly construed. Additionally, there is a divergence of opinion as to the procedural application of these factors. The majority of district courts follow the procedural approach of setting forth in the record their factual findings on the applicability of each factor.²²⁷ Then, without more than a hint as to the weight accorded each factor, these courts either conjure up a lump sum award or set an hourly rate at

221. *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 795 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII). The *Younger* court did not specify how it "considered" this factor. The opinion apparently inferred that the presence of such relation would cause an attorney to lower his fee rates; and therefore it should cause a court to decrease the size of an award of attorneys' fees.

222. *See Pugh v. Rainwater*, 465 F. Supp. 41, 45 (S.D. Fla. 1979); *Preston v. Mandeville*, 451 F. Supp. 617, 622 (S.D. Ala. 1978); *Neely v. City of Grenada*, 77 F.R.D. 484, 487 (N.D. Miss. 1978) (Title VII).

223. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

224. *Pugh v. Rainwater*, 465 F. Supp. 41, 46 (S.D. Fla. 1979).

225. *Id.*; *see Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

226. *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 412-13 (D. Colo. 1977).

227. *Id.*; *Stevenson v. International Paper Co.*, 432 F. Supp. 390 (W.D. La. 1977) (Title VII); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (Title VII).

which prevailing counsel will be compensated.²²⁸

A few courts have revealed the extent to which groups of related *Johnson* factors influence the gross size of the fee awarded.²²⁹ Yet no case has been decided in which the trial judge indicated the specific impact of each *Johnson* factor on the amount of attorneys' fees awarded. District courts have power to subjectively attach weight to each *Johnson* factor as they choose.²³⁰ Even the courts which announce the impact of groups of factors on the size of the fee they award do not disclose *why* they chose to assign that weight to those factors.²³¹ Because courts do not set forth their decisional process in the record, their fee award calculations remain largely subjective and are not readily susceptible to review.²³²

It should hardly be surprising to discover that the system under which courts presently determine attorneys' fee awards

228. The district court opinion in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975) (Em. School Aid Act), is typical. In *Swann*, the district court meticulously set forth a statement of the factual applicability of factors similar to those listed in *Johnson*. Counsel was apparently rated highly by the court in terms of his skill, experience, and the results obtained in the first "busing order" case in the South. Yet, at the close of the court's discussion, the judge summarily awarded \$175,000 in fees, for 2700 hours of legal services rendered, down from the \$204,237.50 sum requested. The only justification given by the court was that the court "preferred to err on the conservative side" when dealing with attorneys' fee questions, so as not to "contribute unnecessarily to the overpricing of litigation." *Id.* at 486.

229. *See, e.g., Stanford Daily v. Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978) (court considered amalgam of factors to reach base rate of \$50 per hour, for 750 hours; then awarded additional \$10,000 fee to reflect contingent fee basis on which case was undertaken, quality of services rendered, and results obtained by litigation).

230. The Fifth Circuit recently cited *Norwood v. Harrison*, 410 F. Supp. 133 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978), with approval in *Davis v. Fletcher*, 598 F.2d 469 (5th Cir. 1979). In *Norwood*, the district court gave no indication of the weight which it assigned to the various applicable *Johnson* factors. Apparently, the circuit which authored *Johnson* approves.

231. *See Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). The *Stanford* court noted that the case was litigated on a contingent basis, the quality of the legal services rendered was high, and the results obtained for the client were excellent. Accordingly, the court increased the fee award by ten thousand dollars. Nowhere did the *Stanford* court indicate how that figure was reached.

232. A district court decision regarding the adequacy of an award of attorneys' fees is given great deference by reviewing courts. As a general rule, if the district court "has applied the correct criteria to the facts of the case," the appellate courts "will defer to its exercise of discretion." *Lindy Bros. Bldrs., Inc. v. American Rad. & Std. San. Corp.*, 540 F.2d 102, 116 (3d Cir. 1976). Findings of fact on the applicability of different *Johnson* factors are reviewed under a "clearly erroneous" standard. *See Henry v. Clarksdale Mun. Separate School Dist.*, 579 F.2d 916, 918 (5th Cir. 1978); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).

can best be described as chaotic.²³³ An examination of civil rights cases decided between 1974 and 1979 reveals that the rate of compensation awarded civil rights attorneys varied by 685 percent.²³⁴ This variance cannot be fully explained by inflation.

233. Because the current procedures governing application of the *Johnson* factors do not require a court to disclose the weight attached to individual factors, it is difficult in some cases to demonstrate that the trial judge attached *any* weight to *any* of the factors.

234. A survey of 56 recent civil rights cases reveals that rates of recovery awarded by courts under various civil rights statutes have varied from \$137.50 per hour, to \$3 per hour. The following table groups these cases by dollar per hour rates of recovery awarded under section 1988, and similar civil rights statutes. The 685% variance figure was derived by comparison of the highest fee rate awarded (\$137.50 per hour) and the lowest fee rate (\$20 per hour) sustained on appeal.

* * * *

The monetized figure appearing in the first column of the table represents the *highest hourly* rate of recovery awarded to an attorney in a civil rights case. Thus, for example, if one of three plaintiff's attorneys received an hourly rate of \$75 per hour, that case will appear in the "\$75" column, notwithstanding the fact that other plaintiff's attorneys involved in that litigation may have been recompensed at lesser rates. The full citation of the case appears to the right of the first column, along with a parenthetical which identifies the fee shifting provision under which the fee award was granted. The actual fee rates granted appear beneath the citation. Each indented line represents the fee granted to *individual* attorneys. The first symbol in each line indicates the employment status of the attorney.

"(PA)" indicates that the attorney was in private practice.

"(LSO)" indicates that the attorney was employed by a legal services organization.

"(FF/LSO)" indicates that the attorney was employed by a legal services organization funded under the Legal Services Corporation Act, 42 U.S.C. § 2996 (Supp. 1979).

The following monetized figure represents the fee rate awarded for differentiated tasks within the litigation. Those "tasks" are indicated by the following symbols:

(in) indicates "in court" work.

(out) indicates "out-of-court" work.

(conf) indicates time spent in conference with other attorneys, witnesses, or the client.

(deps) indicates time spent taking depositions.

(App) indicates work done at the appellate level.

(travel) indicates compensation for travel time.

(inf.comm.) indicates time spent in informal communications with other attorneys, witnesses, or the client.

(non legal) indicates compensation for the performance of non-legal tasks.

(ov) indicates that the court assigned an overall rate of recovery to the attorney, which did not differentiate between the type of work rendered.

TABLE

\$140—101	Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979) (§ 1988).
	—(PA) \$137.50 (in), \$82.50 (out).
	—(PA) \$66 (ov).
	—(PA) \$44 (ov).

Nor can it be attributed to geographical disparities in market

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- \$100—89 NAACP v. Bell, 448 F. Supp. 1164 (D.D.C. 1978) (§ 1988).
—(LSO) \$100 (ov).
- \$90—81 Pugh v. Rainwater, 465 F. Supp. 41 (S.D. Fla. 1979) (§ 1988).
—(PA) \$90 (ov).
Cruz v. Beto, 453 F. Supp. 905 (S.D. Tex. 1977) (§ 1988)
—(PA) \$90 (in), \$75 (out), \$35 (inf. comm.), \$10 (travel).
—(PA) \$70 (in), \$60 (out).
—(PA) \$50 (in), \$40 (out), \$35 (inf. comm.), \$10 (travel).
—(LSO) \$60 (out), \$35 (inf. comm.).
- \$80—76 Palmigiano v. Garrahy, 466 F. Supp. 732 (D.R.I. 1979) (§ 1988).
—(LSO) \$80 (in), \$75 (out).
—(LSO) \$75 (in), \$70 (out).
—(LSO) \$70 (in) & (out), \$30 (non-legal).
—(LSO) \$60 (in) & (out), \$30 (non-legal).
- \$75—66 Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) (§ 1988).
—(PA) \$75 (ov).
—(PA) \$65 (ov).
Boe v. Colello, 447 F. Supp. 607 (S.D.N.Y. 1978) (§ 1988).
—(PA) \$75 (ov).
Drew v. Brierton, 443 F. Supp. 389 (N.D. Ill. 1978) (§ 1988).
—(PA) \$75 (ov).
Sherrill v. J.P. Stevens & Co., 441 F. Supp. 846 (W.D.N.C. 1977) (§ 1988).
—(PA) \$75 (ov).
—(PA) \$60 (ov).
—(PA) \$55 (ov).
- \$65—61 Preston v. Mandeville, 451 F. Supp. 617 (S.D. Ala. 1978) (§ 1988).
—(PA) \$65 (ov).
—(PA) \$35 (in), \$25 (out), \$15 (conf).
Phillips v. Moore, 441 F. Supp. 833 (W.D.N.C. 1977) (§ 1988).
—(PA) \$61 (ov).
Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974) (private attorney general doctrine), *affirmed* through retroactive application of § 1988, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).
—(PA) \$64 (ov).
- \$60—56 Lund v. Affleck, 587 F.2d 75 (1st Cir. 1979) (§ 1988).
—(FF/LSO) \$60 (ov).
—(FF/LSO) \$55 (ov).
Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977) (§ 1988).
—(PA) \$60 (ov), \$50 (App.).
Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) (§ 1988).
—(PA) \$60 (in), \$40 (out).
—(PA) \$30 (ov).
Lackey v. Bowling, No. 78 C 1980 (N.D. Ill., filed Apr. 9, 1979) (§ 1988).
—(FF/LSO) \$60 (ov).
—(FF/LSO) \$50 (ov).
—(FF/LSO) \$40 (ov).
Meisel v. Kremens, 80 F.R.D. 419 (E.D. Pa. 1978) (§ 1988).
—(PA) \$60 (ov) (work done after June, 1975), \$40 (ov) (work done prior to June, 1975).
Stephenson v. Simon, 448 F. Supp. 708 (D.D.C. 1978) (§ 1988).
—(LSO) \$60 (ov).

value rates.²³⁵

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- Hartmann v. Gaffney, 446 F. Supp. 809 (D. Minn. 1977) (§ 1988).
 —(PA) \$60 (ov).
- Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (Title VII).
 —(PA) \$60 (ov).
 —(PA) \$35 (ov).
 —(PA) \$30 (ov).
- Lockheed Min. Sol. Coal. v. Lockheed Missles & Space Co., 406 F. Supp. 828 (N.D. Cal. 1976) (Title VII).
 —(PA) \$60 (ov).
 —(PA) \$42 (ov).
- \$55—51 Cooper v. Curtis, 16 Empl. Prac. Dec. ¶ 809 (D.D.C. 1978) (Title VII).
 —(PA) \$55 (ov).
- McMullen v. Claytor, 15 Empl. Prac. Dec. ¶ 7970 (D.D.C. 1977) (Title VII).
 —(PA) \$52 (ov).
- Guerra v. Roma Ind. School Dist., 444 F. Supp. 812 (S.D. Tex. 1977) (§ 1988).
 —(PA) \$55 (in), \$40 (out).
- Pace v. Califano, 14 Empl. Prac. Dec. ¶ 7547 (D.D.C. 1977) (Title VII).
 —(PA) \$54 (ov).
 —(PA) \$52 (ov).
- \$50—46 Rote v. Hall, No. C-76-228 (E.D. Wash., filed May 14, 1979) (§ 1988).
 —(LSO) \$50 (ov).
 —(LSO) \$35 (ov).
- Vant Hul v. City of Dell Rapids, 465 F. Supp. 1231 (D.S.D. 1979) (Title VII).
 —(PA) \$50 (ov).
- Keown v. Storti, 456 F. Supp. 232 (E.D. Pa. 1978) (§ 1988).
 —(PA) \$50 (ov) (base rate award only, final fee subject to reduction for "reasonableness" at subsequent hearing).
- Willett v. Chester Water Auth., 447 F. Supp. 967 (E.D. Pa. 1978) (§ 1988).
 —(LSO) \$50 (ov).
 —(LSO) \$30 (ov).
- White v. Beal, 447 F. Supp. 788 (E.D. Pa. 1978) (§ 1988).
 —(FF/LSO) \$50 (ov).
 —(FF/LSO) \$40 (ov).
 —(FF/LSO) \$25 (ov).
- Stevenson v. International Paper Co., 432 F. Supp. 390 (W.D. La. 1977) (Title VII).
 —(PA) \$50 (ov).
- Norwood v. Harrison, 410 F. Supp. 133 (N.D. Miss. 1976), *aff'd*, 581 F.2d 518 (5th Cir. 1978) (Em. School Aid Act).
 —(PA) \$50 (App.), \$40 (in), \$35 (out), \$30 (deps), \$20 (conf.).
- \$45—41 Cole v. Tuttle, 462 F. Supp. 1016 (N.D. Miss. 1978) (§ 1988).
 —(LSO) \$43 (ov).
- Gagne v. Maher, 455 F. Supp. 1344 (D. Conn. 1978), *rev'd on other grounds*, 594 F.2d 336 (2d Cir. 1978), *cert. granted*, 100 S. Ct. 44 (1979) (§ 1988).
 —(FF/LSO) \$45 (ov).

Commentators have suggested that the inconsistent man-

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- Neely v. City of Grenanda, 77 F.R.D. 484 (N.D. Miss. 1978) (Title VII).
 —(PA) \$45 (in) & (out), \$30 (non-legal).
 —(PA) \$35 (in) & (out), \$30 (non-legal).
- Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D. Colo. 1977) (§ 1988).
 —(LSO) \$45 (in), \$35 (out).
 —(LSO) \$45 (ov).
 —(LSO) \$35 (ov).
 —(PA) \$35 (ov).
- Schmidt v. Schubert, 433 F. Supp. 1115 (E.D. Wis. 1977) (§ 1988).
 —(FF/LSO) \$45 (ov).
- \$40—36 Armstrong v. Reed, 462 F. Supp. 496 (N.D. Miss. 1978) (§ 1988).
 —(PA) \$40 (ov).
- Dean v. Gladney, 451 F. Supp. 1313 (S.D. Tex. 1978) (§ 1988).
 —(PA) \$40 (in), \$25 (out), \$5 (travel).
 —(PA) \$30 (in), \$20 (out), \$5 (travel).
- Kulkarni v. Nyquist, 446 F. Supp. 1274 (N.D.N.Y. 1977) (§ 1988).
 —(LSO) \$40 (ov).
- McCormick v. Attala County Bd. of Educ., 424 F. Supp. 1382 (N.D. Miss. 1976) (§ 1988).
 —(PA) \$40 (in), \$25 (out).
- Latham v. Chandler, 406 F. Supp. 754 (N.D. Miss. 1976) (42 U.S.C. § 1973 l(e) (1978), Voting Rights Act).
 —(PA) \$40 (in), \$20 (out).
- \$35—31 Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977) (§ 1988).
 —(PA) \$35 (in), \$17.50 (out). (Note: the *Rainey* court vacated an order of the district court awarding \$5.75 (in), \$2.87 (out). The fee rates noted above were rates imposed by the court of appeals).
- Gunther v. Iowa State Men's Ref., 466 F. Supp. 367 (N.D. Iowa 1979) (§ 1988).
 —(LSO) \$35 (ov).
- McManama v. Lukhard, 464 F. Supp. 38 (W.D. Va. 1978) (§ 1988).
 —(FF/LSO) \$31 (ov).
- Card v. Dempsey, 445 F. Supp. 942 (E.D. Mich. 1978) (§ 1988).
 —(FF/LSO) \$31 (ov).
- Wade v. Mississippi Coop. Ext. Serv., 378 F. Supp. 1251 (N.D. Miss. 1974), *rev'd on other grounds*, 528 F.2d 508 (5th Cir. 1976) (Title VII).
 —(LSO) \$35 (ov).
- \$30—26 Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977) (Title VII).
 —(PA) \$27 (ov).
- Barrett v. Kalinowski, 458 F. Supp. 689 (M.D. Pa. 1978) (§ 1988).
 —(LSO) \$30 (ov).
 —(LSO) \$22 (ov).
 —(LSO) \$16 (ov).
 —(PA) \$23 (ov).
- Thom v. Aggrey, 455 F. Supp. 1 (N.D. Ohio 1977), *appeal dismissed*, 595 F.2d 1225 (6th Cir. 1979) (§ 1988).
 —(LSO) \$30 (ov).

ner in which district courts determine attorneys' compensation under civil rights statutes may act as a disincentive to private representation of litigants under those statutes.²³⁶ A major policy goal of section 1988 is to encourage private attorneys to litigate the claims of individuals with limited monetary resources,²³⁷ thus removing financial barriers to the prosecution of meritorious civil rights claims.²³⁸ Yet, under the present sys-

\$25—21	Dilda v. Quern, No. 77 C 115 (N.D. Ill., filed Apr. 3, 1979) (§ 1988). —(FF/LSO) \$25 (ov). Davis v. Reed, 72 F.R.D. 644 (N.D. Miss. 1976) (Em. School Aid Act). —(PA) \$25 (out), \$20 (travel). Armstead v. Starkville Mun. Sep. School Dist., 395 F. Supp. 304 (N.D. Miss. 1975) (20 U.S.C. § 1617 (1976), Em. School Aid Act). —(LSO) \$24 (ov).
\$20—6	EEOC v. Enterprise Assoc. Steamfitters, Local 638, 542 F.2d 579 (2d Cir. 1976), <i>cert. denied</i> , 430 U.S. 911 (1977) (Title VII). —(FF/LSO) \$20 (ov).
\$5—1	Francia v. White, 594 F.2d 778 (10th Cir. 1979) (§ 1988) (CAUTION: the fee rate below was awarded by the district court. The <i>Francia</i> court held the award to be inadequate, vacated the fee award order, and remanded the cause for further proceedings). —(PA) \$2.9 (ov).
\$0.00	Greminger v. Seaborne, 584 F.2d 275 (8th Cir. 1978) (§ 1988) (CAUTION: the fee rate below was awarded by the district court. The <i>Greminger</i> court held the award to be inadequate, vacated the fee award order, and remanded the cause with instructions to award a minimum fee of \$7,500.00). —(PA) \$1.27 above litigation expenses (ov). Sum awarded by the district court below was \$1,250.00.

235. Inflation may account for some of the variance in rates awarded. It cannot, however, be said to be a significant contributing factor. Of the 56 cases cited in note 234 *supra*, the earliest reported decision, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), involved a fee award rate of \$50/hour. That rate would lie roughly in the middle of a bell curve which could be drawn from the fee awards in the other cases. The remaining 55 cases were decided between 1976 and 1979. Inflation could not have had a 685% effect on fee scales during that time. Additionally, it can be noted that the rates of recovery awarded do not appear to vary geographically to any significant extent.

236. See generally *Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

237. The House Report on section 1988 provided:

Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [section 1988] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976).

238. The Senate Report on section 1988 provides:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed

tem governing fee award determinations, the private attorney is not assured that he will be adequately compensated for his efforts. First, the attorney must successfully prosecute the cause of action in the trial court and maintain the favorable judgment through the appellate process before he is entitled to any attorneys' fees under section 1988.²³⁹ Then, the extent of his compensation may depend largely on the subjective whim of a trial judge, whose actual determination regarding the *size* of the fee award is never more than alluded to.²⁴⁰ Indeed, why would an attorney take time off from his lucrative, private practice in order to engage in civil rights litigation, where his fee recovery depends entirely on the subjective, and largely unreviewable, determinations of a district court judge?²⁴¹

Private attorney representation of section 1988 litigants is not aided by the fact that many district court judges are compelled on remand from appellate courts to set forth an explanation of their fee award determinations. In such cases, an attorney who is unsatisfied with the fee awarded by the district court must appeal. The total absence in the record of any explanation of the basis for the award of fees will result in a remand to the district court with instructions to apply the *Johnson* factors.²⁴² Thus, the claiming attorney must suffer the delays of litigating through the appellate process before he even receives a *record* on which to appeal the adequacy of the award itself. The possibility of such a scenario cannot "encourage" private attorneys to litigate section 1988 cases on a contingent fee basis. Unfortunately, this type of double appeal is not an isolated occurrence. A line of cases from the Fifth Circuit, which authored *Johnson*, reveals the reluctance of some district courts to follow its procedural requirements.

with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP. NO. 1011, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910.

239. Because section 1988 fees are granted to "prevailing parties" only, interim awards of attorneys' fees are granted upon the posting of bond by the successful litigant. *Howard v. Phelps*, 433 F. Supp. 374, 377 (E.D. La. 1978). Thus, the "prevailing party" is not assured that he may retain the award until he *finally prevails* following appellate review. See note 24 *supra*.

240. See note 228 and accompanying text *supra*.

241. Of course, many attorneys engage in *pro bono publico* representation of indigent clients in civil rights cases. Such *pro bono* efforts, however, had not met the needs of potential civil rights litigants prior to passage of section 1988. See H.R. REP. NO. 1558, 94th Cong., 2d Sess. 3 (1976).

242. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In *Davis v. Fletcher*,²⁴³ decided in 1979, the Fifth Circuit vacated a district court order on the issue of attorneys' fees. In a brief statement, the district court had asserted its familiarity with *Johnson* and indicated that it had considered the "requisite factors."²⁴⁴ Without further analysis, plaintiff's counsel was awarded the full amount of fees requested. In remanding the case, the Fifth Circuit held that determination of a reasonable fee under *Johnson* requires something more than "a meaningless exercise in parroting and answering each of *Johnson's* twelve criteria, but some assurance that the court has arrived at a just compensation based upon appropriate standards."²⁴⁵

The court cited nine of its prior decisions in holding that the district court's summary treatment of the *Johnson* factors constituted an abuse of discretion.²⁴⁶ In each one, an order setting the size of an award of attorneys' fees was vacated because the trial court failed to follow the procedural mandate of *Johnson*.²⁴⁷

It is difficult to determine why the Fifth Circuit has experienced continuous difficulties in achieving district court adherence to the procedural requirements of *Johnson*. It is conceivable that district courts, with hopelessly overburdened dockets, simply handle the issue of attorneys' fees in summary fashion in order to adjudicate pressing substantive cases and issues. If the parties choose to appeal the adequacy of the attorneys' fee award, the district court can award the same fee on remand, supported, of course, by the factual findings which *Johnson* demands. This hypothesis cannot be proved, because no case has been located in which a district court explained why it ignored the procedural requirements of *Johnson*. The fact remains, however, that the failure of district courts to comply with

243. *Davis v. Fletcher*, 598 F.2d 469 (5th Cir. 1979).

244. *Id.*

245. *Id.*

246. *Id.*

247. Two cases, *Evans v. Seaman*, 496 F.2d 1318 (5th Cir. 1974) and *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974), were decided by district courts prior to the issuance of the *Johnson* opinion. Those cases were remanded to the trial courts for reconsideration of the attorneys' fees issue in light of *Johnson*. In the remaining seven cases, however, the district courts had either ignored *Johnson*, or, like the trial court in *Davis*, gave cursory treatment to its procedural requirements.

The district courts in five of the decisions had failed to detail their findings of fact regarding the *Johnson* factors. Those cases included: *EEOC v. Eastex, Inc.*, 568 F.2d 403 (5th Cir. 1978); *Premier Corp. v. Serrano*, 565 F.2d 1353 (5th Cir. 1977); *Cook v. Ochsner Foundation Hosp.*, 559 F.2d 270 (5th Cir. 1977); *In re First Colonial Corp. of Am.*, 554 F.2d 1291 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977); *Mims v. Wilson*, 514 F.2d 106 (5th Cir. 1975).

The other two cases which gave summary treatment to the *Johnson* factors were *Sweeney v. Vindale Corp.*, 574 F.2d 1296 (5th Cir. 1978) and *Miller v. Mackey Int'l, Inc.*, 515 F.2d 241 (5th Cir. 1975).

these requirements continues to vex the Fifth Circuit,²⁴⁸ as well as other federal circuits.²⁴⁹

The present procedures governing judicial awards of attorneys' fees necessitates modification. Both commentators and a few courts have suggested that trial judges should look to the market rate in the locality for legal services as an objective starting point in their calculation of the value of an attorney's efforts.²⁵⁰ This approach, however, is less than satisfactory. The United States Supreme Court, in *Goldfarb v. Virginia State Bar*,²⁵¹ recently declared a county bar association's minimum fee schedule to be an antitrust violation. Thus, a reliable indicator of the "going rate" for legal services in a community is no longer available.

Of course, the courts are not precluded from considering the affidavits of local attorneys as to their billing rates.²⁵² However, the affidavits of a few, disinterested attorneys cannot possibly enable a court to form a rational opinion regarding market rates for legal services in populous communities. The courts have noted that the rate at which an attorney bills his clients depends on a wide assortment of considerations peculiar to the individual circumstances surrounding the attorney/client relationship and the nature of the litigation.²⁵³ The "normal billing rate" of an attorney can hardly be said to provide an objective indication

248. See *Fain v. Caddo Parish Police Jury*, 564 F.2d 707 (5th Cir. 1977); *Wolf v. Frank*, 555 F.2d 1213 (5th Cir. 1977); *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975).

249. See *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979); *Firefighters Inst. v. City of St. Louis*, 588 F.2d 235 (8th Cir. 1978); *Altman v. Central of Ga. Ry.*, 580 F.2d 659 (D.C. Cir. 1978); *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978); *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

250. See, e.g., *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). See generally Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?* 126 U. PA. L. REV. 281 (1977).

251. 421 U.S. 773 (1975).

252. It is currently the practice of the courts to collect such information by affidavit, as an aid to their determination of a reasonable fee award through use of the *Johnson* factors. See note 157 and accompanying text *supra*.

253. One federal court noted:

There is no standard rate in this community even as between lawyers of comparable ability and responsibility. Some lawyers take into account their reputation and level of past earnings. All are concerned with whether the work has distracted them from other obligations. Results always affect the client's receptivity to the fee suggested. The practices of immediate competitors and a feel for the clients' ability to pay must always be recognized.

National Council of Comm. Mental Health Centers v. Weinberger, 387 F. Supp. 991, 996 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

of the actual rate at which he will bill his clients.²⁵⁴ Furthermore, nothing prevents district court judges from subjectively forming irreconcilable conclusions as to going market rates for legal services in a locality. Thus, consideration of market rates can offer little objectivity to the procedures under which the size of an award of attorneys' fees is determined.

The Cost Plus Rationale

In 1978, the Court of Appeals for the District of Columbia Circuit issued an opinion in *Copeland v. Marshall*²⁵⁵ which advocated a novel approach to the determination of a reasonable award of attorneys' fees. In *Copeland*, the court of appeals reviewed the summary, unexplained action of a trial court which reduced the fee requested by plaintiff's counsel by 20 percent.²⁵⁶ The reviewing court noted that the law firm representing the plaintiff had failed to submit documentation, required by *Johnson*, differentiating between the time spent by individual attorneys on different tasks during the litigation.²⁵⁷ Accordingly, the *Copeland* court held that the fee granted by the district court was not based on a proper evidentiary foundation.²⁵⁸

In addition, the court stated that the district judge had failed to adequately set forth the basis for the award of \$160,000 in attorneys' fees. The trial court opinion had made only passing reference to the *Johnson* factors,²⁵⁹ so the appellate panel was

254. An affidavit disclosing an attorney's "usual billing schedule" is evidence of the rates that an attorney, in the average case, can charge his client. But as noted in *Weinberger*, a number of circumstances peculiar to the attorney/client relationship influence the size of the actual fee to be awarded. Similarly, section 1988 does not require courts to award successful litigants the "normal" or "average" billing rates of his counsel or average community rates. Rather, the fee awarded under section 1988 should be *reasonable*, in light of the circumstances of each case. *Drew v. Brierton*, 443 F. Supp. 389, 391 (N.D. Ill. 1978). Although information outlining the normal billing rates of an attorney is helpful in determining a reasonable fee for that attorney, *see* note 158 and accompanying text *supra*, such information should not form the foundation for an award to be paid by an involuntary and unwilling section 1988 defendant.

255. *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978), *vacated*, 48 U.S.L.W. 2017 (D.C. Cir. June 29, 1979) (rehearing *en banc* ordered).

256. 594 F.2d at 247.

257. *See* note 44 and accompanying text *supra* for a discussion of evidentiary burdens placed on fee claiming counsel under *Johnson*.

258. 594 F.2d at 254-55.

259. The trial court in *Copeland*, like the Fifth Circuit district court opinions cited in notes 247-48 *supra*, accorded cursory treatment to the *Johnson* factors. The applicability to the *Copeland* litigation of each factor was not discussed by the trial court. 594 F.2d at 256. Moreover, there are indications that the fee awarded, even considering the 20% reduction from the requested sum, was grossly excessive.

The *Copeland* litigation provided limited relief to a class of thirty-six

unable to meaningfully review the adequacy of the fee awarded.²⁶⁰ In remanding the case, the appellate court suggested a procedural format under which the district court could reach "a more solidly validated conclusion" in its fee award determination.²⁶¹ In effect, it was suggested that the district judge consider the *cost incurred by the attorneys in litigating the lawsuit* as an objective starting point in its fee award determination.

The court of appeals recognized that although attorneys typically assert "the value of [their] attorneys' work to the client . . . , [they] never reveal the value of the attorneys' work to the firm."²⁶² Yet, the court noted that considerations of the cost of engaging in litigation is "at the heart of the [law] firm's own accounting process as a business concern."²⁶³ It stated that this information "should also be considered by a court when called upon to exercise judgment in determining a reasonable attorneys' fee."²⁶⁴

In addition, the reviewing court specifically outlined the manner in which its cost plus formula should be utilized. Considerations of the expense incurred by the firm in prosecuting the litigation would enable a district court to *reimburse* the attorneys for their costs.²⁶⁵ Then, with reference to the factors listed in *Johnson*,²⁶⁶ a trial court could award the attorneys "a reasonable and controllable margin for profit."²⁶⁷

In applying this "cost plus profit" formula, a district court could calculate a reasonable attorneys' fee in the following manner. In reimbursing a law firm for the services of one of its associates, three sums would be considered. First, the firm would

female employees of HEW. Yet the \$160,000 fee actually awarded plaintiff's counsel was three times greater than any prior award for Title VII litigation in the District of Columbia Circuit. Brief for Appellant at 35, *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978).

260. *Copeland v. Marshall*, 594 F.2d 244, 260 (D.C. Cir. 1978), *vacated*, 48 U.S.L.W. 2017 (D.C. Cir. June 29, 1979) (rehearing *en banc* ordered).

261. 594 F.2d at 260.

262. *Id.* at 251.

263. *Id.*

264. *Id.*

265. *Id.*

266. The *Copeland* opinion does not cite directly to *Johnson*. However, it does cite *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974). The District of Columbia Circuit had embraced the *Johnson* factors and procedures in *Evans*. *Id.* at 188. Therefore, the citation by the *Copeland* panel to *Evans* is synonymous to a citation to the factors and procedures associated with *Johnson*.

267. 594 F.2d at 251. The *Copeland* panel did not define the limits of a "reasonable and controllable margin for profit." Rather, the panel expressed the belief that the use of this "cost plus" formula would result in the award of such a profit.

receive an amount commensurate with the salary paid to the associate during the litigation.²⁶⁸ Second, the firm would be reimbursed for its overhead costs, including rent, supplies, services, secretarial and paralegal help, incurred in maintaining the associate in the firm during the litigation.²⁶⁹ Third, the award would reflect a return of profit to the partnership.²⁷⁰ *Johnson* already requires attorneys to keep detailed records of the time they expend in the litigation.²⁷¹ The availability of such records would enable a court to allocate reimbursement for expenses and profit on an hourly or annual basis.²⁷² The overhead costs of a partner would be calculated in the same manner, although the *Copeland* court of appeals noted that these costs may be greater for a partner than for associates.²⁷³

The evidentiary and procedural requirements of the "cost plus" formula do not impose severe burdens on attorneys or district courts. The evidentiary information required by the formula should be readily available to conscientious attorneys. It has been noted that attorneys are required under prevailing practice to document the time they expend in litigation. In addition, those who calculate their income tax correctly should have access to information outlining overhead costs on an hourly or annual basis.²⁷⁴

Legal services organizations should be capable of fulfilling the evidentiary requisites of "cost plus." Federal income tax regulations require privately funded, tax exempt organizations, such as the NAACP, to maintain records of their overhead and expenditures.²⁷⁵ Legal services organizations which receive federal funding under the Legal Services Corporation Act must submit to bi-monthly itemized audits of their expenditures.²⁷⁶

268. *Id.*

269. *Id.* The *Copeland* panel opinion did not indicate that it meant this list of expenses to be exclusive. However, most reasonably incurred costs of providing legal services should be encompassed by categories of "rent, clerical, paralegal aid, supplies and services" costs.

270. *Id.*

271. See note 44 and accompanying text *supra*.

272. It would perhaps be easiest to calculate this sum on a *pro rata* annual basis. For example, if an attorney expends 400 hours on a case and expends 1600 billable hours during a year, a court should be able to reimburse that attorney for 25% of his annual overhead and profit expectations.

273. 594 F.2d at 251.

274. See Treas. Reg. § 1.6000-1 (1978) (requires taxpayers to keep permanent records sufficient to establish amount of gross income, business expense deductions, credits, etc.).

275. Treas. Reg. § 1.6033-2 (1978) (requires tax exempt organizations, such as legal services organizations, to maintain records of gross receipts and disbursements).

276. The Legal Services Corporation Act, 42 U.S.C. § 2996h(c)(1) (Supp. 1978), codified at 45 C.F.R. § 1602 (1978), requires recipient organizations to

In short, counsel, whether in private practice or employed by legal services organizations, should have access to the type of financial information required by the cost plus formula.

Cost plus would not impose significant *procedural* burdens on either district courts or attorneys. *Copeland* does not demand a line by line submission of each litigation expense item incurred by an attorney.²⁷⁷ The *Copeland* court noted, in a supplemental opinion on denial of rehearing, that “[i]t is the average overhead cost per attorney” which is to be considered by the district judge.²⁷⁸ The court further explained that a law firm could submit the required information by affidavit.²⁷⁹ Detailed accounting data would not be requested by a district court, unless the expenses claimed were “drastically out of line” with those of other firms.²⁸⁰

The *Copeland* court did not advance its cost plus formula to limit the fees awarded by district courts under civil rights statutes. Rather, it was indicated, on denial of rehearing, that “the cost plus reasonable profit formula should be looked upon as a formula for arriving at a *fair* market value standard for the work in Title VII cases. It is not necessarily something different from the market value standard.”²⁸¹

It is clear that the “cost plus” formula is a rational framework under which district courts can accurately determine reasonable awards of attorneys’ fees. Calculation of counsel’s base expense in litigating the action permits a court to determine the *lowest* possible fee which could be awarded in the case.²⁸² Consideration of market rates billed for the rendition of exemplary legal services permits a court to ascertain the *maximum* reason-

submit comprehensive financial information regarding their financial operation, as a condition to their receipt of federal funding. *The Legal Services Corporation: Audit and Accounting Guide For Recipients and Auditors*, published at 41 Fed. Reg. 29958, July 20, 1976, (ch. 5, § 1), requires such organizations to submit to bi-monthly audits of their receipts and disbursements.

277. See *Copeland v. Marshall*, 20 Empl. Prac. Dec. ¶ 30,038 (D.C. Cir. June 29, 1979) (supplemental opinion by original panel on denial of rehearing by that panel).

278. *Id.* at 11,219.

279. *Id.* at 11,221. Right of privacy infringement is thereby avoided.

280. *Id.*

281. *Id.* at 11,218.

282. *Id.* A trial court must necessarily make a finding as to this base sum, if it is following the *Copeland* procedures correctly. A trial court’s factual findings regarding the amount of expenses incurred by counsel would then be subject to the clearly erroneous standard of review, normally applied to any factual findings on the *Johnson* factors. See note 232 and accompanying text *supra*.

able fee which could be awarded in that case.²⁸³ The district court would then have an objectively established framework within which the *Johnson* factors could be subjectively applied in setting a "reasonable" fee.²⁸⁴ District courts would retain the flexibility required to fashion awards of attorneys' fees to the circumstances of an individual lawsuit.²⁸⁵ At the same time, however, cost plus would impose an objective check on a district court's discretion. In sum, the cost plus formula provides a rational procedure for the calculation of a judicial award of reasonable attorneys' fees. It should be adopted and applied by federal courts at least until a more desirable alternative is devised.

Cost Plus and Section 1988 Fee Awards

Nothing in the cost plus rationale precludes its application to other statutory and equitable mechanisms under which courts are currently empowered to award reasonable attorneys' fees.²⁸⁶ An examination of the legislative history of section 1988 reveals that the use of the cost plus formula under that section would not only be permissible, but perhaps required.

The Senate Report on section 1988 merely refers to *Johnson* as a case setting forth "appropriate standards" governing a judicial award of attorneys' fees.²⁸⁷ It cites three additional cases which, in the opinion of the Senate, applied the *Johnson* factors "correctly."²⁸⁸ Each one employed a somewhat different *proce-*

283. This information is currently available under existing *Johnson* procedures. See notes 156-57 and accompanying text *supra*.

284. Nothing in *Copeland* would preclude the award of a fee which exceeded the "highest" rates in a community, given exceptional skill, performance, and results obtained by counsel.

285. Because it can subjectively determine the return of profit to be awarded counsel, the court retains a great deal of discretion in determining the size of the fee to be awarded. However, cost plus would place definable boundaries on the manner in which a trial court exercises its discretion. Such constraints are absent in the *status quo*.

286. The *Copeland* panel recognized on rehearing that the cost plus formula could be applied in suits against *private* defendants, as well as in suits against the United States government. The panel noted:

Our previous opinion did not say that the formula should be applied in any case except those in which the Government is a defendant in a Title VII action, but the petitioners may be correct in claiming there is no sound reason why the formula should not apply when a private party is the defendant—except, as previously noted, there may be an understandable punitive element in awarding attorneys' fees in a case in which a private company has been guilty of racial or sex discrimination.

20 Empl. Prac. Dec. ¶ 30,038, at 11,221-22.

287. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913.

288. *Id.*

dural approach to the application of the *Johnson* factors.²⁸⁹ This may indicate that Congress did not intend to restrict the

289. The first case cited by the Senate Report, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975) (Em. School Aid Act), is indistinguishable from *Johnson* in its approach. The *Swann* court, like *Johnson*, merely stated a number of factors which could be used in determining a reasonable fee award. These factors included: (1) the results obtained; (2) the difficulty and novelty of the case; (3) fees paid to opposing counsel; (4) time and labor involved; (5) loss of other business; (6) fees customarily charged for similar services; (7) fixed or contingent fee; (8) reputation, experience, and ability of plaintiff's counsel; and (9) expenses and advancements. The *Swann* court applied these factors in the manner suggested by *Johnson*. *Id.*

The second case cited by the Senate Report, *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974) (Title VII), also cited a list of factors similar to those stated by *Johnson*. Thus, the approach of the *Davis* court was similar, though less detailed, than that taken in *Johnson* and *Swann*.

It is the third case, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd on other grounds*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978) (Title VII), which takes a recognizably different approach to the issue of reasonable fee determination. The *Stanford* court noted that *Johnson* offered "a useful catalogue of factors" to consider, but it did not "indicate . . . how a district court is to use the list . . . to attach a relative weight to the different factors in determining an award." 64 F.R.D. at 682.

To remedy this problem, the *Stanford* court borrowed a procedural structure which had been used in cases involving equitable fund doctrine awards and applied the *Johnson* factors within this framework. The first step called for a determination of the time spent on the case. Here, as in *Johnson*, the court examined the time records submitted by plaintiff's counsel and determined what hours to allow or disallow. Once the number of compensable hours was determined, the *Stanford* court attached a value to that time. It determined that value through consideration of a number of *Johnson* factors, including the attorney's normal billing rates, the usual rates in the locality, the skill demonstrated by the attorney, and his experience in civil rights litigation. *Id.* at 684-85. Once the court reached a base value for the attorney's services, expressed in dollar per hour form, the court considered two other factors which modified the base rate.

First, the court would increase the base rate if the attorney had litigated the case on a contingent fee basis. *Id.* at 685. Then the court would either increase or decrease the base rate to reflect the quality of the legal services rendered. Here, the *Stanford* court applied the *Johnson* factors dealing with the "novelty and difficulty of the questions" and "the amount involved and the results obtained." These factors, as expressed by both *Johnson* and *Stanford*, can operate to increase or decrease an award of fees. *Id.* at 686-87. Finally, the *Stanford* court simply multiplied the adjusted base rate by the hours allowed to reach the amount of the fee to be awarded. *Id.* at 687-88.

Stanford, like *Johnson*, did not delineate the effect of individual factors on the size of the fee awarded. The court simply "considered" the different factors, reached an hourly rate, and multiplied this rate by the hours allowed. Thus, in effect, *Stanford* did not depart from the substance of the *Johnson* holding. It merely applied the *Johnson* factors within a different procedural format. If an attorney understands how the *Johnson* factors are utilized, he can fashion his petition for fees to suit either those courts which simply follow *Johnson*, or those courts which prefer the more structured *Stanford* approach.

judiciary to any one rigid procedural format. Clearly, it suggests that *Johnson's* precedential impact is centered in the factors it delineated and not in the manner in which they are to be considered by a district court.

The difference between "cost plus" and traditional fee award determinations is simply one of procedure. Under existing law, district courts consider the *Johnson* factors collectively to reach the dollar per hour rate of recovery awarded an attorney.²⁹⁰ Under "cost plus," these factors would be used to calculate the *return of profit* to be awarded on an hourly basis. Under both procedures, judges may subjectively apply these factors within the limits of their discretion.²⁹¹ Thus, the use of "cost plus" would not be inconsistent with the legislative history of section 1988.

Additionally, it can be argued that the cost plus formula should be employed by the courts for the same reasons which prompted the judiciary to adopt the factors listed in *Johnson*. The *Johnson* factors originated in the A.B.A. Code of Professional Responsibility.²⁹² The Fifth Circuit instructed the lower court to consider those factors so that attention would be focused on the same considerations which influence the billing practices of private attorneys in the open market.²⁹³ Similarly, it is clear that consideration of the *cost* of providing legal services has some impact on these billing practices.

The ability of private practitioners to deduct items of business expense from their gross income, under the Federal Income Tax regulations, undoubtedly makes private attorneys *aware* of their expenses.²⁹⁴ Legal periodicals inform the private practitioner of practical ways to reduce overhead expenses.²⁹⁵ This abundance of current legal literature reflects the growing interest of private attorneys, as businessmen, in controlling and reducing their expenses.²⁹⁶ Books discussing the managerial as-

290. *Copeland v. Marshall*, 594 F.2d 244, 251 (D.C. Cir. 1978), *vacated*, 48 U.S.L.W. 2017 (D.C. Cir. June 29, 1979) (rehearing *en banc* granted).

291. As under the *status quo*, the factual findings regarding the *Johnson* factors and the calculation of the expense items of a fee claiming attorney would be reviewed under a "clearly erroneous" standard of review. See note 232 *supra*.

292. See note 39 and accompanying text *supra*.

293. See note 40 and accompanying text *supra*.

294. See Treas. Reg. § 1.62- (c)(1) (1978) (procedure for including items of business expense as deductions for federal income tax purposes).

295. See, e.g., Kelley, *How Much Does It Cost To Employ An Associate?*, 5 LEGAL ECON. 12 (Mar./Apr. 1979); Maskaleris, *National Law Firms*, 5 LEGAL ECON. 38 (July/Aug. 1979); Porter, *Watching Your Expenses*, 5 LEGAL ECON. 19 (July/Aug. 1979); Ulrich, *Managing An Effective Legal Assistant Program*, 5 LEGAL ECON. 35 (Jan./Feb. 1979).

296. See Brill, *The horrible truth is, you're running a business: Organiza-*

pects of maintaining a private practice contain sections which outline a "cost plus" method of calculating minimum billing rates.²⁹⁷ It cannot be denied that at least some attorneys currently employ a "cost plus" analysis in their billing determinations.

Moreover, it appears that current competitive trends affecting the practice of law may require the bar to undertake a "cost plus" analysis of their own practices. The number of attorneys in this country seems astronomical.²⁹⁸ The United States Supreme Court's decision in *Goldfarb v. Virginia State Bar* swept away anticompetitive restraints which had been imposed by minimum fee scales.²⁹⁹ *Bates v. State Bar of Arizona*,³⁰⁰ decided by the Court in 1977, eliminated a significant barrier to competition in the legal profession by extending first amendment protection to the attorney's right to advertise.³⁰¹ Attorneys currently appear on television screens, hawking cut rate fees for legal services.³⁰² This advertising has apparently increased consumer awareness of the cost of hiring an attorney.³⁰³ Lawyers may be forced to adjust their billing rates for certain legal services in order to remain competitive in the market.³⁰⁴ The determination of overhead costs and profit expectations will play an important role in an attorney's decision to adjust his rates to advertised levels.³⁰⁵

tion of the Law Office, 65 A.B.A.J. 2A (Mar. 1979) (special "pull-out" section of March issue).

297. See M. ALTMAN & R. WEIL, *HOW TO MANAGE YOUR LAW OFFICE* § 4.02 (1979); J. FOONBERG, *HOW TO START AND BUILD A LAW PRACTICE*, 69-70 (1976).

298. The legal profession is now the fastest growing profession, B.N.A., *Futurelaw*, at 5 (1979). One out of every 484 persons in the United States is a lawyer. *Id.* This development, coupled with the abandonment of minimum fee scales and the appearance of legal advertising, see notes 299-300 and accompanying text *infra*, should work to make the practice of law more competitive.

299. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

300. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

301. *Id.* The *Bates* opinion merely removed the blanket prohibition on advertising by lawyers. The *Bates* Court holding was that the plaintiffs had a first amendment right to truthfully advertise rates for the rendition of "routine legal services" in a newspaper. *Id.* at 384.

302. Attorneys across the country have taken to the television media to advertise the type of "routine legal services" mentioned in *Bates*. See Allison, *Advertising: Legal Clinics Have Found It Pays*, 5 LEGAL ECON. 35 (May/June 1979).

303. *Id.*

304. Lawyers will make such adjustments in their billing rates, if they engage in such "routine legal services."

305. It is mere common sense that an attorney will not undertake representation in a case, unless he believes that he can make a profit off time so expended.

There is evidence that even large corporate clients are becoming more aware of the costs of legal services.³⁰⁶ Thus, the reality of increased competition in the legal profession has had an effect on the largest law firms, as well as on the sole practitioner. Attorneys will be forced to bill their clients with an eye toward their future expenses, if they do not do so already.³⁰⁷

The belief that judicial awarding of fees should resemble private fee billing determinations prompted the Fifth Circuit to set forth the twelve *Johnson* factors.³⁰⁸ Courts, in their efforts to award reasonable fees, should similarly consider the costs incurred by that attorney; not merely because "cost plus" is a rational procedure for determining a reasonable fee, but because the formula, like the *Johnson* factors, is based on billing practices in the open market.

Cost Plus and Fee Awards to Organizational Counsel

Legal services organizations were quick to voice their opposition to the *Copeland* decision. Twenty-four legal services foundations filed briefs as *amici curiae* in support of the plaintiff's petition for rehearing and suggestion for rehearing *en banc*.³⁰⁹ The underlying apprehension of *amici* is that adoption

306. See M. ALTMAN & R. WEIL, HOW TO MANAGE YOUR LAW OFFICE § 4.03, page 4-13.3 (1979). Altman and Weil ran a survey of 150 large non-legal corporations in 1973. Of the 57 corporations responding, 51% preferred to be billed "entirely on the basis of time," by outside attorneys. 40% preferred to be billed on the basis of "time and results combined," and only 2% preferred to be billed "based on responsibility and results achieved." *Id.* The results of this survey indicate that large corporations who employ outside counsel are beginning to insist that attorneys utilize itemized billing procedures, as opposed to the lump sum billing which had been prevalent in the past.

307. Given the fact that attorneys collect expense information for purposes of reducing their gross income for federal tax purposes, see note 294 *supra*, it is difficult to believe that attorneys do not consider such information in their billing determinations.

308. See notes 39-40 *supra*.

309. The following legal services organizations filed briefs as *amici curiae* in *Copeland*:

National Lawyer's Committee For Civil Rights Under Law; Washington Lawyers' Committee; American Civil Liberties Union; Center For Auto Safety; Center For Law In The Public Interest; Center For Law and Social Policy; Children's Defense Fund; Citizens Communications Center; Council For Public Interest Law; Environmental Defense Fund; Equal Rights Advocates; Institute For Public Representation; Media Access Project; Mental Health Law Project; National Conference of Black Lawyers; National Employment Law Project; National Prison Project of the ACLU Foundation, Inc.; National Veterans Law Center; National Wildlife Federation; Public Advocates; Puerto Rican Legal Defense And Education Fund, Inc.; Sierra Club Legal Defense Fund, Inc.; Washington Council of Lawyers; Women's Legal Defense Fund.

Brief As *Amici Curiae* In Support of Plaintiffs-Appellees' Motion For Re-

of the cost plus formula could decrease the gross sums available to the legal services organization community under statutes such as section 1988, because their overhead and salary expenditures are less than those encountered by private practitioners.³¹⁰

The *Copeland* panel, on denial of rehearing, responded to this argument by stating:

They will be guaranteed a reasonable profit above their actual costs. We are not aware that public interest and civil rights firms usually receive more than this. However, the trial court could—and, in our view, *should*—evaluate the special skills which a public interest or civil rights firm may bring to bear among the other quality factors which the court applies to the actual cost plus reasonable profit figures.³¹¹

This statement underscores a crucial observation of the purpose of the fee shifting provisions of civil rights statutes such as section 1988. Legal services organizations, along with their counterparts in private practice, are not entitled to anything more than a reasonable fee under section 1988.³¹² The responsibility for providing monetary support for such organizations lies with Congress, not the judiciary.³¹³ Section 1988 was not enacted to provide funding for legal services organizations, and courts simply are not at liberty to bolster the resources of these organizations through excessive awards of section 1988 fees.³¹⁴ That statute was not passed to benefit attorneys, whether employed in private practice or by legal services organizations.³¹⁵

Additionally, the utilization of the cost plus formula would not necessarily reduce the total amount of attorneys' fees collected by the legal services organizational community. A prominent federally funded legal services organization based in Chicago currently encounters overhead and salary expenses which exceed \$30 per hour of attorney time.³¹⁶ An award of a 50

hearing And Suggestion For Rehearing *En Banc*, *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978), *vacated*, 48 U.S.L.W. 2017 (D.C. Cir. June 29, 1979) (rehearing *en banc* ordered).

310. See briefs cited in note 309 *supra*.

311. 20 Empl. Prac. Dec. ¶ 30,038, at 11,220 (D.C. Cir. June 29, 1979) (emphasis in original).

312. See note 25 and accompanying text *supra*.

313. Chicago Daily L. Bull., Aug. 21, 1979, at 3 (appropriations for fiscal 1980 toward funding of legal services organizations amounted to 300 million dollars).

314. Nothing in the legislative history indicates such an intent. See note 27 and accompanying text *supra*.

315. See *Page v. Preisser*, 468 F. Supp. 399, 403 (S.D. Iowa 1979).

316. Such information may be obtained through the Freedom of Information Act provisions of the Legal Services Corporation Act, 42 U.S.C. § 2996h (Supp. 1979), codified at 45 C.F.R. § 1602 (1978). Under these provisions, the audits required by *Legal Services Corporation: Audit and Accounting*

percent return of profit on these expenses would yield a rate of recovery of \$45 per hour. Such an award would be roughly equivalent to rates currently awarded legal services organizations under section 1988.³¹⁷

Even if it is assumed that attorneys' fee awards to organizational counsel would be smaller under cost plus than corresponding fee awards to attorneys in private practice, the legislative history of section 1988 does not preclude utilization of the formula. The Senate and House reports cite four cases dealing with the right of legal services organizations to judicial awards of attorneys' fees.³¹⁸ The case cited by the Senate Report, *Davis v. County of Los Angeles*,³¹⁹ indicated that courts should not reduce an otherwise reasonable award of attorneys' fees simply because counsel happened to be employed by a legal services organization.³²⁰ The *Davis* court went on to hold that the calculation of an award of attorneys' fees to organizational counsel would be "computed in the traditional manner."³²¹ This holding would not preclude judicial application of "cost plus" so long as that formula was similarly applied to determine the measure of fees awarded to private as well as organizational counsel.³²²

The House Report cites three cases dealing with awards of attorneys' fees to organizational counsel.³²³ *Fairley v. Patterson*³²⁴ is in accord with the *Davis* holding. In *Fairley*, the district court arbitrarily refused to grant attorneys' fees to prevailing counsel because the award would have accrued to a tax exempt foundation which funded plaintiff's counsel during the litigation.³²⁵ The court of appeals held that "allowable fees

Guide For Recipients And Auditors, 41 Fed. Reg. 29958, July 20, 1976, (ch. 5, § 1), can be obtained.

317. See fee rate table in note 234 *supra*.

318. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 n.16 (1976); S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913.

319. 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974).

320. *Id.* at 5047-48.

321. *Id.* In *Davis*, the court awarded a fee which was in excess of market levels for that locality. The fee was justified by the qualifications of the attorney and the excellent results obtained by the litigation. Nothing would preclude equivalent awards under the cost plus formula, provided the fee claiming attorney performed with the requisite skill and achieved similar results for his client.

322. *Davis* clearly warns against the use of such a double standard. Fees to organizational and private attorneys should be calculated under the same procedures. *Id.*

323. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 n.16 (1976).

324. 493 F.2d 598 (5th Cir. 1974).

325. The district court in *Fairley* declined to award fees to successful organizational counsel for the declared reason that "[a]ny award made . . .

and expenses may not be reduced because [the plaintiff's] attorney was employed or funded by a civil rights organization and/or tax exempt foundation."³²⁶ The *Fairley* court did not address the issue of the appropriate fee size to organizational counsel.³²⁷

The remaining cases cited by the House Report, *Torres v. Sachs*,³²⁸ and *Incarcerated Men of Allen County Jail v. Fair*,³²⁹ also held that the employment status of counsel for the plaintiff is not an appropriate factor to consider when determining an award of attorneys' fees.³³⁰ However, these two courts apparently reached conflicting conclusions on the issue of the reasonable size of the fee awarded to organizational counsel. In *Torres*, the Second Circuit implied that attorneys' fee awards to organizational counsel should be keyed to prevailing market rates.³³¹ The *Torres* court awarded organizational counsel a rate of \$75 per hour.³³² In *Incarcerated Men*, the Sixth Circuit affirmed an award of attorneys' fees to organizational counsel, without hinting that the \$15 per hour figure was inappropriate.³³³

The wide disparity in the rate of recovery approved by these two courts precludes reliable determination of legislative intent regarding the measure of "reasonable" fees to which organizational counsel are entitled. Congressional intent can be elicited only by reference to the common holding of the four cases. First, each case holds that organizational counsel are entitled to awards of attorneys' fees under section 1988.³³⁴ Second, all four opinions note that district courts may not arbitrarily reduce otherwise reasonable awards of attorneys' fees merely because counsel for the plaintiff happened to be employed by a legal

will be directly channelled into the coffers of the Ford Foundation which enjoys its own reward at public expense by its tax exemption status." *Id.* at 605.

326. *Id.* at 606.

327. This issue was not before the court of appeals because no award of fees had been granted by the district court.

328. 538 F.2d 10 (2d Cir. 1976).

329. 507 F.2d 281 (6th Cir. 1974).

330. See 538 F.2d at 13; 507 F.2d at 286.

331. The *Torres* court rejected the argument that the plaintiff's counsel were entitled to something "less than the going rates" for legal services because such counsel were employed by a publicly funded legal services organization. 538 F.2d at 11-12.

332. *Id.*

333. The lower court's opinion in *Incarcerated Men* was vacated by the Sixth Circuit on the issue of apportionment of the fee to be paid. The issue of whether the fee awarded was appropriate was not addressed.

334. *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 286 (6th Cir. 1974); *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974); *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444, at 5048-49 (C.D. Cal. 1974).

services organization.³³⁵ The cost plus formula is consistent with these rules.

Theoretically, a trial court employing "cost plus" should award identical returns of profit to similarly skilled private and organizational counsel.³³⁶ Requiring district courts to award identical *gross fees* to private and organizational counsel, notwithstanding the greater litigation expenses incurred by private counsel, would effectively award a higher return of profit to organizational counsel.³³⁷ Such a rule would lead a court to arbitrarily increase an otherwise reasonable award of attorneys' fees simply because plaintiff's counsel happened to be employed by a legal services organization.³³⁸ This outcome would be inconsistent with the spirit of "reasonableness" which is the heart of section 1988.

On balance, employment of the cost plus formula would be consistent with the legislative history and policy goals of section 1988. The objective framework it provides for attorneys' fee award calculations is certainly preferable to the subjective, unreviewable procedures currently in use.³³⁹ Cost plus guarantees that legal services organizations and private attorneys will receive reimbursement for their expenses, along with a reasonable return of profit. Legal services organizations should not and cannot reasonably expect more.

CONCLUSION

After viewing the differing constructions and applications of the *Johnson* factors, the need for adoption of the "cost plus" formula by federal courts should become apparent. The twelve

335. *Id.*

336. The gross fees awarded would be different. Nonetheless, a district court should, under cost plus, award similarly situated private and organizational counsel an identical rate of *profit return* on the costs expended.

337. If, in fact, the expenses of a legal services organization are less than those encountered in private practice, as those organizations appear to claim, *see* note 310 and accompanying text *supra*, then a standard which would require the award of equivalent gross fees to both private and organizational attorneys would, in actuality, award a higher rate of profit to the organization. If the expenses incurred by legal services organizations amount to \$30 per hour, *see* note 316 and accompanying text *supra*, and the corresponding expense to private practitioners is \$40 per hour, then an award of 50% profit to each under "cost plus" would yield gross awards of \$45 per hour and \$60 per hour accordingly. If a court was required to award \$60 per hour to organizational counsel, such counsel would receive a 100% return on their expenses—compared with the 50% profit return to the private practitioner.

338. This is simply the inverse of the holding of the four cases cited by the legislative history of section 1988. *See* note 334 and accompanying text *supra*.

339. *See* note 232 and accompanying text *supra*.

subjectively applied "factors" may mean something different to each particular judge. This system cannot provide a consistent, uniformly just manner of apportioning the cost of civil rights litigation.

Of course, subjective use of the *Johnson* factors will continue under the cost plus formula.³⁴⁰ But at least cost plus provides objective boundaries within which courts can rationally exercise their discretion in applying the *Johnson* factors. Cost plus should aid a district court judge in his efforts to award reasonable fees under section 1988. Controlling the discretionary awarding of fees is an *implicit* element of the cost plus formula. Under cost plus, an award of attorneys' fees which does not cover the documented expenses of the fee claiming attorney would be subject to effective review.³⁴¹ In addition, the reviewing courts could accord closer, more meaningful scrutiny to excessive fee awards.

Legal fees are set in the open market by arms-length attorney/client agreement, often with an eye toward maintaining an attorney/client relationship. A section 1988 fee, however, is imposed upon an individual who stands in an *adversarial* relationship with the fee-claiming attorney. Moral guidelines imposed by professional responsibility are apparently the only force which may induce a fee-claiming attorney to exercise billing judgment when seeking a section 1988 fee.³⁴²

As the cost of legal services skyrockets, the issue of the nature and limits of "reasonable" section 1988 fee awards has assumed growing importance in our legal system. The role of the court as an arbiter of attorneys' fee award requests is undoubt-

340. Courts may subjectively apply the *Johnson* factors to determine "return of profit" under the cost plus formula. See note 266 and accompanying text *supra*.

341. Under cost plus, the record of trial court proceedings would contain evidence of the fee claiming attorney's base expenses attributable to the litigation. Such record would permit effective appellate review of the adequacy of section 1988 fee awards which do not reimburse an attorney for his expenses or provide little profit compensation.

342. The original *Copeland* panel, on denial of rehearing, quoted the following passage from the memorandum of the Attorney General:

More refined analysis and consideration of alternatives are required. When representing a private client, attorneys must exercise billing judgment; they must consider the labor expended in view of the result to be achieved. This economic judgment is absent when the federal treasury is footing the bill. Other solutions must be explored. This is what the panel has wisely suggested.

20 Empl. Prac. Dec. ¶ 30,038, at 11,224. This observation has equal application to section 1988 fees imposed against *private* defendants with "deep pockets."

edly a "difficult and sometimes distasteful task."³⁴³ The fact remains, however, that the courts are bound to undertake this task and should strive to exercise their duties in a fair, rational manner.

If nothing else, *Copeland v. Marshall* spotlights the need for alteration of present procedures governing attorneys' fee award determinations. As noted by that court, when a law firm claims \$206,000 and is awarded \$160,000 on a case which yields \$31,343 in monetary benefits to the plaintiffs, "a *prima facie* case that *something* is wrong" with the *status quo* is formed.³⁴⁴ Cost plus may well inject a measure of rationality into present fee award determination procedures. The formula appears to be both logically and economically sound. As such, the cost plus formula should at least be *considered* by courts in their fee award determinations. In the interests of both plaintiffs and defendants, and the dignity of the legal profession, cost plus should be employed to remedy the unpredictable, unreviewable procedures which presently govern the determination of a "reasonable" section 1988 fee.

Bruce Charles Dopke

343. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974).

344. *Copeland v. Marshall*, 20 Empl. Prac. Dec. ¶ 30,038, at 11,222 (D.C. Cir. June 29, 1979) (on denial of rehearing, emphasis in original).