ATTORNEY'S FEES IN CIVIL RIGHTS LITIGATION
42 U.S.C. §§1983, 1988

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Introduction

Standards for awarding attorney's fees under 42 U.S.C. § 1988 are "generally applicable in all cases in which Congress has authorized an award of fees to a `prevailing party.'" ***Hensley v. Eckerhart,*** 461 U.S. 424, 433 n. 7, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983)

The purpose of §1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances HR Rep No. 94-1558, p 1(1976). Accordingly, a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'" S Rep No 94-1011, p 4 (1976) (quoting ***Newman v. Piggie Park Enterprise***s, 390 US 400, 402, 19 L Ed 2d 1263, 88 S Ct 964 (1968)); ***Brewster v. Dukakis*** 3 F.3d 488 (1st Cir. 1993) ("Notwithstanding that 42 U.S.C. § 1988(b) provides that the district court "may" award reasonable fees to a prevailing party "in its discretion," the Supreme Court has ruled that attorneys' fees must be awarded thereunder to a successful plaintiff "unless special circumstances would render such an award unjust." ***Blanchard v. Bergeron,*** 489 U.S. 87, 89 n. 1, 109 S.Ct. 939, 942 n. 1, 103 L.Ed.2d 67 (1989); see also ***de Jesus v. Banco Popular***, 918 F.2d 232, 234 (1st Cir.1990) (discussing operation of section 1988).")

I. Right

A. Must first determine if suit can be brought via §1983. (Not an exhaustive discussion of §1983 jurisdiction.)

B. For there to be liability under §1983 there must be a violation of a federal rights, not merely a violation of federal law. ***Golden State Transit Corp. v. Los Angeles*** 493 U.S. 103, 106 (1989). In ***Blessing v. Freestone, et al***. 520 U.S. 329 (1997) the Court discussed the elements needed for a finding of a violation of a federal right: "First, Congress must have intended the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. [citations omitted] ***Blessing*** 520 U.S. at 340, 341

Gonzaga University v. Doe 536 U.S. 273, 285-286; 122 S.Ct 2268; 153 L.Ed.2d 309 (2002). Chief Justice Rehnquist wrote:

> A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Compare *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107-108, n. 4, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) ("[A] claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in the particular plaintiff "), with *Cannon*, supra, at 690, n. 13, 99 S.Ct. 1946 (statute is enforceable under implied right only where Congress "explicitly conferred a right directly on a class of persons that included the plaintiff in the case"). Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries. Compare *Wright*, 479 U.S., at 423, 107 S.Ct. 766 (statute must be "intended to rise to the level of an

enforceable right"), with *Alexander v. Sandoval*, supra, at 289, 121 S.Ct. 1511 (statute must evince "congressional intent to create new rights"); and *California v. Sierra Club*, supra, at 294, 101 S.Ct. 1775 ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries" (citing *Cannon*, supra, at 690-693, n. 13, 99 S.Ct. 1946)). Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under §1983 or under an implied right of action.

Most recently in ***Fitzgerald, et vir, v. Barnstable School Committee et al***. 129 S.Ct. 788 (2009) Justice Alito, writing for the Court in a case involving Title IX and the Equal Protection Clause held:

The statute's only express enforcement mechanism, § 1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance. ...

These remedies-withdrawal of federal funds and an implied cause of action-stand in stark contrast to the "unusually elaborate," "carefully tailored," and "restrictive" enforcement schemes of the statutes at issue in *Sea Clammers, Smith*, and *Rancho Palos Verdes*. Unlike those statutes, Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court, *Cannon, supra*, at 717, 99 S.Ct. 1946, and can obtain the full range of remedies, see *Franklin, supra*, at72, 112 S.Ct. 1028 (concluding that "Congress did not intend to limit the remedies available in a suit brought under Title IX"). As a result, parallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies.

II. Prevailing Party

A. A prevailing party is one who succeeds on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit...." ***Texas State Teachers Ass'n v. Garland Independent School Dist***., 489 U.S. 782, 788 (1989), quoting ***Nadeau v. Helgemoe***, 581 F.2d 275, 278-79 (1st Cir. 1978).

1. Need not succeed on "central issue" or achieve "primary relief sought" to be deemed prevailing party. *Id.* at 786-87. But must be a *material alteration* of the legal relationship of the parties. *Id.* at 792-793. *See also*, ***Domegan v. Ponte,*** 972 F.2d 401 (1st Cir. 1992). May be compensated for claims which lost, if losing claims included a "common core of facts' or were 'based on related legal theories' linking them to the successful claim." ***Garrity v. Sununu,*** 752 F.2d 727, 734 (1st Cir. 1984). But *see*, ***Phetosomphone v. Allison Reed Group, Inc. ,*** 984 F.2d 4, 7 (1st Cir. 1993) ("But it does not follow that the district court is *prevented* from eliminating hours attributable to state-law claims where, as here, the court reasonably concludes that there is not a complete overlap and separation is proper."); ***Parker v. Town of***

Swansea, 310 F.Supp.2d 376, 394 (D.Mass.2004) (" '[I]f unsuccessful claims are unconnected to, and easily severable from, the successful claims, hours spent on them will not be compensable' ") (quoting ***Martinez v. Hodgson***, 265 F.Supp.2d at 141).

2. May succeed by negotiated settlement without obtaining a ruling on the merits. ***Maher v. Gagne*** 448 U.S. 122, 129 (1980). Accepting a Rule 68 offer of settlement may entitle a party to attorney fees. ***Stefan V. Laurenitis*** 889 F.2d 363 (1st Cir. 1989). But should get court approval of settlement.

3. Lawsuit being a catalyst for sought after change does not entitle Plaintiff to fee award in most situations. ***Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources***, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) ("A 'prevailing party' is one who has been awarded some relief by a court. See, e.g., ***Hanrahan v. Hampton***, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670. Both judgments on the merits and court-ordered consent decrees create a material alteration of the parties' legal relationship and thus permit an award. The "catalyst theory," however, allows an award where there is no judicially sanctioned change in the parties' legal relationship. A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change."). ***Aronov v. Napolitano*** 562 F.3d 84, (1st Cir. Apr. 13, 2009) (Must be: 1) court ordered change in legal relationship; 2) judicial approval of the relief vis-à-vis the merits of the case; and 3) judicial oversight and ability to enforce the obligations imposed on the parties). ***Hutchinson v. Patrick*** --- F.Supp.2d ----, 2010 WL 450914 (D.Mass. 2/8/10) Ponsor, J has a good discussion of the ***Aronov*** criteria.

   a. *But see*, ***Iverson v. Braintree Property Associates, L.P.*** 2008 WL 552652 (D. Mass. 2008 Gertner. J.) (Settlement Agreement provided for continued court jurisdiction. Court refused to continue jurisdiction as a waste of judicial resources as both parties stated the only reason continued jurisdiction was included was so Plaintiff could obtain fees. Court held that Settlement Agreement was an enforceable contract sufficient under ***Buckhannon***. Court specifically disagrees with ***Buckhannon*** dicta which 'suggests' it is not.); ***Wildlands CPR v. U.S. Forest Service***, 558 F. Supp 2d 1096 (D. Mont. 2008) (The OPEN Government Act, which amended FOIA, ... thus restated the ***Buckhannon*** analysis on the consent-decree issue, and revived the catalyst theory, i.e., where a complainant obtains relief via a voluntary or unilateral change in position by the agency, the complainant has substantially prevailed and is eligible for attorney fees.)

b. *Also,* ***Homier Distributing Co. v. City of New Bedford*** 188 F.2d 33 (D. Mass 2002) (Declaratory Judgment sought, prior to trial city rescinded challenged ordinance and offered to refund disputed fee. Declaratory relief request meant repeal did not render case moot - City never conceded that Ordinance violated Constitution. Fees awarded); ***Roland v. Romney*** 292 F.Supp. 2d 268 (D. Mass 2003) (***Buckhannon*** does not prohibit fees for monitoring compliance with Court approved settlement. However if enforcement action filed it must be successful for fees to be awarded.); ***Antonio*** *by and through his* ***Mother v. Boston Public Schools*** 314 F.Supp 2d 95 (D. Mass. 2004) (Child prevailing at administrative hearing under Individuals with Disabilities Education Act (IDEA) entitled to fees

4. Intervenor may be prevailing party. Fees will be awarded if intervenors' efforts not duplicative of original party's and if intervenor prevails on civil rights claim. ***Wilder v. Bernstein*** 965 F.2d 1196, 1205 (2nd Cir. 1992); ***Morgan v. McDonough*** 511 F.Supp 408 (D. Mass 1981); ***Baird v. Bellotti*** 616 F.Supp. 6 (D.Mass.,1984)

5. Fees may be awarded in a §1983 case when punitive damages but no compensatory damages awarded. But the amount of the fee award may depend on the degree of success obtained. ***De Jesus Nazario v. Rodriguez, et al.*** 554 F.3d 196 (1st Cir. 2009)

B. When **defendant** is prevailing party, s/he can recover fees only if plaintiff's action was "frivolous, unreasonable, or without foundation, even though it was not brought in subjective bad faith." ***Christiansburg Garment Co. V. EEOC*** 434 U.S. 412, 421 (1978) (Title VII), made applicable to §1988 fees in ***Hughes v. Rowe*** 449 U.S. 5, 14-15 (1980). *See also,* ***Hensley,*** 461 U.S. at 429 n.2 (1983); ***Rounseville v. Zahl***, 13 F.3d 625 (2nd Cir. 1994). However a Defendant prevailing on a counterclaim can be a prevailing party. ***The Real Estate Bar Assoc. for Mass. v. National Real Estate Information Services, et al.*** 642 F.Supp.2d 58 (D. Mass 2009)(Discussion of hourly rates – $625 approved for partner)

C. Must prevail on merits of a substantive issue, not just on purely evidentiary or procedural matters. ***Hanrahan v. Hampton*** 446 U.S. 754, 758-59 (1980) (obtaining reversal of judgment directing verdict against plaintiffs is not prevailing on the merits). Obtaining Preliminary Injunction, even though interlocutory relief, may be substantial enough for an attorneys fee claim. ***CBHN v. King*** 691 F.2d 597 (1st Cir. 1982). ***Sole v. Wyner*** 551 U.S. 74, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007) ("§1988 prevailing party status does not attend achievement of preliminary injunction that is reversed, dissolved, or otherwise undone by final decision in same case.") ***Tri-City Community Action Program Inc. et. al v. City of Malden, et. al*** –F.Supp.2d ---, 2010 WL 271430 (D. Mass Jan 22, 2010) Grant of Preliminary Injunction rendering case moot prevailing for purposes of §1988 fees.

D. To be considered a prevailing party, must "receive at least some relief on the merits" or establish entitlement to receive relief. ***Hewitt v. Helms,*** 482 U.S. 755, 760 (1987). "...[T]he extent of a plaintiff's success in a civil rights suit is a practical question, involving a qualitative, as well as quantitative judgment." ***Aubin v. Fudala***, 782 F.2d 287, 290 (1st Cir 1986). Nominal damages of $1 are enough. ***Farrar v. Hobby,*** 113 S.Ct. 566, 573 (1992); ***Domegan v. Ponte,*** 972 F.2d 401 (1st Cir. 1992). But see discussion below about amount of fees in such cases.

E. Court has very limited discretion to deny any fee award to a prevailing plaintiff. ***Smith v. Robinson,*** 468 U.S. 992, 1006 (1984) (prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"); ***New York Gaslight Club, Inc. v. Carey,*** 447 U.S. 54, 68 (1980). However, where award of damages is the primary relief sought and only nominal damages are awarded, prevailing party in civil rights suit may be denied fee. ***Farrar,*** 113 S.Ct. 566, 575 (1992) (civil rights plaintiff who recovered nominal damages of one dollar on claim for 17 million dollars not entitled to award of fees).

F. May be prevailing party if succeed on non-fee claim (such as a non-fee federal statutory claim or a pendent state claim) where there is substantial unaddressed claim under 42 U.S.C. § 1983 (or, by analogy, under another federal fee statute), where both claims arise out of a "common nucleus of operative facts," ***Maher,*** 448 U.S. at 132, and where the unaddressed fee claim "provides an alternative, but reasonably related, basis for the plaintiff's ultimate relief." ***Smith v. Robinson,*** 468 U.S. at 1007 n. 10 (1984); ***Exeter- West Greenwich Regional Sch. v. Pontarelli,*** 788 F.2d 47 (1st Cir. 1986). ***Johnson v. Commissioner Department of Public Welfare,*** 419 Mass. 185, 643 N.E.2d 444 (Decision based solely on State Regulation although §1983 violation was pled. ("Thus, because the Federal statute and Federal regulation provide the plaintiff with a right to the same benefits provided by State law (AFDC) in the circumstances of this case, it follows that it is at least fairly arguable that a cause of action exists under § 1983. We need not decide whether the plaintiff would have prevailed on her Federal claim. We are satisfied that her Federal claim arises out of the same nucleus of facts as her State claim and is at least 'substantial.' Therefore an award of reasonable attorneys' fees is appropriate.")

G. "Action or proceeding" for purposes of fee award under § 1988 is the **court** action in which the merits of the underlying claim are litigated and does not include independent suit seeking only recovery of fees after plaintiff's success in prior optional or mandatory **administrative** proceedings. ***North Carolina Dept. of Transportation v. Crest Street Community Council,*** 479 U.S. 6 (1986). However, ***Crest Street*** applies only to § 1988 fees and has been found inapplicable to other fee-shifting statutes. *See, e.g.*, ***Counsel v. Dow,*** 849 F.2d 731, 740-41 & n. 9 (2d Cir.), *cert. denied,* 488 U.S. 955 (1988) (independent suit may be prosecuted to recover fees for time spent in administrative proceedings under Individuals With Disabilities Education Act). ***Antonio*** *by and through his* ***Mother v.***

Boston Public Schools 314 F.Supp 2d 95 (D. Mass. 2004); ***Webb v. County Board of Education***, 471 U.S. 234, 241, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985) ("section 1983 does not require plaintiffs to exhaust administrative remedies prior to bringing civil rights suit and section 1988 provides attorneys' fees only for court related successes").

H. To be prevailing party on appeal, appellant must gain reversal on at least one significant legal claim. ***Barnes v. Bosley,*** 745 F.2d 501, 509 (8th Cir. 1984). Plaintiff-appellee prevails on appeal by successfully defending favorable merits judgment through affirmance, ***Williamsburg Fair Housing Committee Corp. Corp.,*** 599 F.Supp. 509, 518 (S.D.NY 1984), or through dismissal of the appeal, ***Hastings v. Maine-Endwell Central School Dist.*** 676 F.2d 893, 896-97 (2d Cir. 1982)

III. Calculating the "Lodestar"

Under ***Hensley,*** 461 U.S. 424 (1983), the starting point for determining the amount of a reasonable fee is reached by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. This figure is known as the "lodestar." *See,* ***Lipsett v. Blanco***, 975 F.2d 934 (1st Cir. 1992)

A. Calculating the number of compensable hours.

1. Attorneys must exercise reasonable billing judgment, and public interest attorneys must exercise the reasonable billing judgment used in the private sector. ***Hensley,*** 461 U.S. at 434. Outrageous lack of billing judgment may result in no fees. ***Lewis v. Kendrick***, 940 F.2d 25 (1st Cir. 1991). *See also,* ***Fair Housing Council v. Landow,*** 999 F.2d 92 (4th Cir. 1993). Must keep contemporaneous time records - reconstruction will result in substantial reduction or disallowance of fee. ***Grendel's Den, Inc. v. Larkin***, 742 F.2d. 945, 952 (1st Cir. 1984). ***Williams v. Town of Randolph*** 574 F.Supp.2d 250 (D.Mass. 2008)

   a. While time spent by several attorneys is compensable, hours billed by each attorney must not be duplicative of work performed by another attorney or work previously billed. ***Lipsett,*** 975 F.2d at 938-939. *But see,* ***Rosie D. v. Patrick***, 593 F.Supp.2d 325 (D. Mass 2009) (" One argument of Defendants for the thirty percent reduction-overstaffing the case-has a particularly hollow ring, for two reasons. First, Defendants committed a comparable number of staff to this difficult litigation. Second, in addition to voluntarily reducing hourly rates, Plaintiffs have voluntarily eliminated the hours contributed by eighty lawyers from WilmerHale and three additional public interest lawyers associated with the Center for Public Representation.... The number of attorneys comfortably matched the complexity of the litigation. Moreover, Plaintiffs made resourceful efforts to use their time efficiently by separating defined segments of legal research and factual development into

working groups headed by different attorneys. These efficiencies helped to lower the necessary hours.")

b. Hours billed should not be excessive for the task performed. However, question is whether a reasonable attorney would have spent the time when the work was performed, not whether or not "hindsight vindicates an attorney's time expenditures." ***Grant v. Martinez***, 973 F.2d 96, 99 (2nd Cir. 1992).

c. Very experienced attorneys at level equivalent to partner with high rates should delegate easier tasks to less experienced attorneys, ***Lenihan v. City of New York***, 640 F.Supp 822, 825 (S.D. N.Y. 1986), unless this is impracticable for the particular attorneys or office, ***Society for Good Will to Children v. Cuomo,*** 574 F.Supp 994, 1000-01 (E.D.N.Y. 1983), vacated on other grounds, 737 F.2d 1253 (2d Cir. 1984).

d. Attorneys may bill for time spent on clerical tasks such as photocopying and serving papers, but at a lower rate. ***Lipsett,*** 975 F.2d at 940; ***McLaughlin by McLaughlin v. Boston School Committee*** 976 F.Supp. 53 (D.Mass.1997) Courts have discretion to apply the same or differing rates for core (requiring "the special skills of lawyers and involves independent legal thought") and non-core ("less demanding tasks such as letter writing and telephone calls"). ***The Real Estate Bar Assoc for Mass. Inc. v. National Real Estate Information Services, et al.*** 642 F.Supp. 58 (2009) quoting ***Roland v. Cellucci*** 106 F.Supp.2d 128, 143 (D.Mass. 2000)(citing ***Brewster v. Dukakis*** 3 F.3d 488, 492 (1st Cir. 1993)

2. Attorneys may not bill for hours spent on tasks not "reasonably expended on the litigation," ***Webb v. Board of Education,*** 471 U.S. 234, 242 (1983), such as time spent on publicity, getting admitted in federal court, or learning time of replacement attorneys.

3. Various courts have approved compensation for hours spent in: research before filing the complaint; conferences with co-counsel (although billing judgment may mean not asking for fees for all attorneys for all conferences); negotiations; supervision of attorneys; defending a class action settlement on a Rule 23(e) motion; opposing a petition for *certiorari;* post-judgment monitoring; and preparing and litigating the fee application. ***Rolland v. Cellucci*** 106 F.Supp.2d 128 (D. Mass. 2000) ("There is little doubt that some of the services performed before a lawsuit is formally commenced may be deemed to have been spent "on the litigation" and therefore included in the calculation of a lodestar. ***Webb v. Bd. of Education***., 471 U.S. 234, 243, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985) (quoting ***Hensley v. Eckerhart,*** 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (in turn

construing section 1988)). The "“[m]ost obvious examples are the drafting of the initial pleadings and the work associated with the development of the theory of the case'.”)

4. Work of paralegals, law students and law graduates is compensable at market rates. ***Missouri v. Jenkins,*** 491 U.S. 274, 109 S.Ct. 2463 (1989); ***Lipsett,*** 975 F.2d at 939.

5. Travel time is compensable, although some courts award a lesser rate unless legal work is being done. ***Smith v. Great American Restaurants, Inc.,*** 969 F.2d 430, 440 (7th Cir. 1992).

6. Expert witness fees may not be recovered as part of attorneys fees unless the fee shifting statute explicitly authorizes them. They may only be recovered at the $30/day rate authorized by 28 U.S.C. §§ 1821 and 1920(3). ***West Virginia University Hospitals v. Casey,*** 111 S. Ct. 1138 (1991).

    a. The Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., specifically authorizes payment of expert witness fees. 42 U.S.C. § 12205. See, H.R. Conf. No. 101-485(111) reprinted in 1990 U.S. Code Cong. Admin. News 445, 496.

    b. The 1991 amendments to the Civil Rights Act added a new paragraph (c) to 42 U.S.C. §1988 to provide for expert witness fees under 42 U.S.C. §§ 1981 and 1981a but not for actions brought under 42 U.S.C. § 1983.

B. Setting Reasonable Hourly Rates

1. Hourly rates are based on the "prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." ***Blum v. Stenson***, 465 U.S. 886, 895 (1984).

    a. Prevailing market rates are rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." ***Blum***, 465 U.S. at 895 n. 11.

    b. Relevant community is district where action was brought, whether attorney is local or not. ***In re Agent Orange Product Liability Litigation,*** 818 F.2d 226, 232 (2d Cir. 1987). Out-of-town counsel can only get higher rates of his/her home district if prevailing party can show hiring outside counsel was necessary. *See*, ***Polk v. New York State Dept. of Correctional Services***, 733 F.2d 23, 25 (2d Cir. 1983). ***Ocasio v. City of Lawrence,*** 1993 WL 207767 (D. Mass.)

    c. Court need not assign same rate to every law firm in the same city. Several market rates (such as rates for small, medium and large firms) may prevail in given area, particularly where legal

community is large and diverse. ***Chambliss v. Masters, Mates & Pilots Pension Plan***, 885 F.2d 1053 (2d Cir. 1989), cert. denied, 496 U.S. 905 (1990)

2. Actual billing rate of private firm or attorney is usually accepted as evidence of prevailing market rate for his/her work although court is not required to accept it. ***Brewster v. Dukakis***, 3 F.2d 488, 492-493 (1st Cir. 1993); ***Rosie D. v. Patrick***, 593 F.Supp.2d 325 (D. Mass 2009). But the affidavit of the prevailing attorney alone may not be sufficient. ***Bordanaro v. City of Everett***, 871 F.2d 1151 (1st Cir. 1989); ***Williams v. Town of Randolph*** 574 F.Supp.2d 250 (D.Mass. 2008).

3. Previous fee award by same court or court in same district to same attorney is also persuasive evidence.

4. Otherwise attorney must submit affidavits of other attorneys endorsing the rate sought as the appropriate market rate for that attorney. ***Blum,*** 465 U.S. at 495 n. 11.

5. Use of current rates for "historic" work may be appropriate to compensate for delay in payment. ***Missouri v. Jenkins,*** 109 S.Ct. at 2469 (1989). See also, ***Grendel's Den, Inc. v. Larkin,*** 749 F.2d 945 (1st Cir. 1984).

C. Other Factors

1. Amount of fee not limited to amount fixed by contingent fee arrangement. ***Blanchard v. Bergeron,*** 489 U.S. 87, 95-96 (1989). Nor is a contingent fee arrangement invalidated by a lower award of fees pursuant to a fee-shifting statute. "... § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." ***Venegas v. Mitchell,*** 495 U.S. 82, 109 L.Ed.2d 74, 110 S.Ct. 1679, 1684 (1990).

2. Fee not limited by budgetary problems of losing defendant unless defendant is "in extremis." ***Cohen v. West Haven Board of Police Commissioners,*** 638 F.2d 496, 505-06 (2d Cir. 1980).

IV. Adjustments to the Lodestar

A. There is a "'strong presumption' that the lodestar figure represents the 'reasonable' fee"; upward adjustments to lodestar for contingency are no longer permissible. ***City of Burlington v. Dague,*** 112 S.Ct. 2638, 2641, 2643-44 (1992). Excellent results should ordinarily be reflected in the hourly rate and should not result in enhancement of the lodestar. ***Lipsett,*** 975 F.2d at 942. However, upward adjustment of lodestar to compensate for delay in payment is still permissible as alternative to use of current rather than historic rates. ***Missouri v. Jenkins,*** 109 S.Ct. at 2469; ***305 East 24th Owners Corp. v. Parman Co.,*** 799 F.Supp. 353, 361-63 (S.D.N.Y. 1992).

B. Downward adjustment to the lodestar may be made where the prevailing party obtained only limited success and the unsuccessful claims were wholly unrelated to the successful claims. ***Hensley v. Eckerhart,*** 461 U.S. at 434-37.

1. First inquiry is whether time spent on unsuccessful claims should be eliminated from fee request because these claims were "distinct in all respects" from successful claims. ***Id.*** at 434-35, 440.

   a. Claims are related if they involve a common core of facts or are based on related legal theories or if the claims are based on alternative legal theories for the same relief. ***Id.*** at 435.

   b. Claims are also considered related if attorney's time was "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." ***Id.***

2. If unsuccessful claims are related to successful claims, and the plaintiff achieved excellent results although not complete success, plaintiff is entitled to a "fully compensatory fee" that normally "will encompass all hours reasonable exp[ended on the litigation...." ***Id.***

   a. No reduction is warranted just because the plaintiff did not prevail on every contention raised. ***Id.***

   b. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." ***Id.***

3. If the plaintiff achieved only limited success (e.g., failed to achieve success on the major issue in the suit and so got only a minor part of the relief sought), the court must consider whether a reduction in lodestar is required because time spent was not reasonable in relation to results achieved. ***Id*** at 436, 440.

   a. Court will reduce award either by identifying specific hours that should be eliminated or by reducing the award by a percentage to account for the limited success. ***Id***. at 436-437.

   b. ***Hensley*** rejects a pure mathematical approach comparing total number of issues in case with those actually prevailed upon and reducing the award accordingly. ***Id***. at 435 n.11.

C. Fees in civil rights suit should not be reduced because fees are far greater (11 times) than the amount of damages awarded where victory serves a public interest. ***City of Riverside v. Rivera***, 477 U.S. 561 (1986); ***Foley v. City of Lowell,*** 948 F.2d 10, 20 (1st Cir. 1991). There is a public interest in private enforcement

of civil rights laws even in individual cases. ***Cowan v. Prudential Ins. Co. of America*** 935 F.2d 522 (2nd Cir. 1991)

D. However, where damages are the only relief sought and only nominal damages are awarded, "the only reasonable fee is usually no fee at all." ***Farrar v. Hobby,*** 113 S.Ct. 566, 575 (1992). When plaintiff's victory is purely technical or *de minimis*, court may award low fee or no fee without engaging in ***Hensley*** analysis. ***Id.*** See ***Domegan v. Ponte,*** 972 F.2d 401 (1st Cir. 1992) for an excellent discussion of the ***de minimis*** standard; ***Williams v. Town of Randolph*** 574 F.Supp.2d 250 (D.Mass.2008) ($100,000 sought, $1.00 awarded by jury)

V. Other Factors Affecting Amount and Allocation of Fees

A. When fees statute defines attorney's fees as part of the costs, plaintiff who rejects a Rule 68 offer of judgment and then fails to obtain greater relief than was contained in the offer may not recover fees which accrue after the date the offer was rejected, even though s/he is otherwise the prevailing party. ***Marek v. Chesny,*** 473 U.S. 1 (1985). However, fees will not be reduced to a party who rejects informal settlement offer. ***Ortiz v. Regan,*** 980 F.2d 138, 140-41 (2d Cir. 1992). ***Bogan v. City of Boston*** 432 F.Supp.2d 222 (D.Mass.2006) ("Attorneys' fees and costs prior to the offer, however, need to be determined to ascertain whether the judgment recovered by plaintiffs, attorneys' fees and costs are less than the Rule 68 offer by the City.")

B. When several defendants are responsible for fees, award may be allocated on percentage basis according to relative extent of each defendant's wrongdoing or other factors. ***Grendel's Den,*** 749 F.2d at 959-960.

1. Alternatively, joint and several liability for fees may be imposed where action or inaction of several defendants produces single indivisible injury, ***Koster v. Perales,*** 903 F.2d 131 (2nd Cir. 1990), or where claims against all defendants were unitary and defenses were coordinated, ***Vulcan Society v. Fire Dept.,*** 533 F.Supp. 1054, 1060, 1064 (S.D.N.Y. 1982).

2. Eleventh Amendment does not bar fee award against a state, ***Hutto v. Finney,*** 437 U.S. 678 (1978), or interest on fee award against a state to compensate for delay in payment, ***Missouri v. Jenkins,*** 109 S.Ct. at 2469 (1989); ***Foley,*** 948 F.2d at 10.

C. Interest at the federal rate (28 U.S.C. § 1961) accrues automatically from the date of the judgment or order awarding attorney's fees. ***R.W.T. v. Dalton,*** 712 F.2d 1225, 1234-35 (8th Cir. 1983), *cert. denied* 464 U.S. 1009.

VI. The Fee Motion

A. Motion for attorney's fees must be filed and served no later than 14 days after entry of judgment. Fed.R.Civ.P 54(d)(2)(B).

B. Because fee issue is collateral to a judgment on the merits, that judgment is final and appealable even though statutory attorney's fees are left unresolved. ***Budinich v. Becton Dickinson & Co.*** 486 U.S. 196 (1988). Judgment must be timely appealed or appellate review will be foreclosed. ***Id.*** at 202-203.

C. Party seeking fees has burden of documenting number of hours spent and submitting evidence in support of claim. ***Hensley*** 461 U.S. at 433.

1. Attach typed copies of each attorney's contemporaneous time records, but inform opposing counsel that originals are available upon request. ***Grendel's Den, Inc. v. Larkin***, 749 F.2d 945, 952 (1st Cir. 1984). Failure to keep contemporaneous records will result in a substantial reduction or possible disallowance of fees. ***Id.*** at 952; ***Phetosomphone*** 984 F.2d at 8.

2. Describe in affidavit which hours have been eliminated in the exercise of reasonable billing judgment.

3. In complex case, divide case into phases (e.g., complaint, preliminary injunction, discovery) and state in affidavit how many hours were spent in each phase.

4. Time sheets should identify each entry by date, nature of the activity (including which issue or claim it related to, if appropriate), and amount of time spent. Failure to provide sufficient specificity may result in reduction of fee award. ***See, Grendel's Den; Lipsett,*** 975 F.2d at 938; ***Phetosomphone v. Allison Reed Group, Inc.*** 984 F.2d 4 (1st Cir. 1993).

D. Burden of proof of prevailing market rate is on moving party.
Each attorney's affidavit should list professional qualifications and level of experience and briefly describe his/her role in the case.

1. Each attorney's affidavit should indicate the hourly rate charged for each year of work on the case.

a. Court generally will accept attorney's statement that s/he has already been awarded fees at the specified rate by this court or a reference to a decision in which another local attorney with comparable experience and expertise was awarded fees at the requested rate.

b. Public interest attorneys without an established rate may prove rate by including affidavit from a local private attorney listing rates for

attorneys with comparable experience and establishing that these rates are acceptable in local legal community.

E. Party opposing fee application has burden of challenging "the accuracy and reasonableness of the hours charged." ***Blum v. Stenson,*** 465 U.S. 886, 892 n. 5 (1984). However even if the fee target does not mount an opposition to a fee request, a court must review it critically to ensure overall fairness. ***Foley v. City of Lowell,*** 948 F.2d 10, 19 (1st Cir. 1991)

1. Right to evidentiary hearing is waived if opposing party fails to submit evidence specifically controverting relevant facts asserted by fee applicant. ***Blum.***

2. Evidentiary hearing will generally not be held where fee request presents only legal issues or where factual issues can be resolved based on affidavits and documentary submissions. *See, e.g.,* ***Institutionalized Juveniles v. Secretary of Public Welfare,*** 758 F.2d 897, 910 n. 22 (3d Cir. 1985).

3. Any objection to hours or rates sought must be supported with proof in order to put the matter into issue. ***J. G. v. Board of Education of Rochester City School Dist.,*** 648 F.Supp. 1452, 1459 (W.D.N.Y. 1986), *aff'd* in relevant part, 830 F.2d 444 (2d Cir. 1987); ***Population Services International v. Carey,*** 476 F.Supp. 4, 9-10 (S.D.N.Y. 1979).

4. Opposing party must raise any material questions of disputed facts before the fee motion is submitted for the court's determination. *See,* ***Imprisoned Citizens Union v. Shapp*** 473 F.Supp 1017,1021 (E.D. Pa. 1979) (applying Rule 56 summary judgment standards to fee motion). Note: This case appears to be unique.

5. "If the fee-seeker properly documents her claim and plausibly asserts that the time cannot be allocated between successful and unsuccessful claims, it becomes the fee-target's burden to show a basis for segregability." ***Lipsett,***975 F2d at 941

6. On appeal, a fee award is reviewable only for mistake of law or abuse of discretion. ***Lipsett,*** 975 F.2d at 937; ***Phetosomphone***, 984 F.2d at 6. ***French v. Corporate Receivables, Inc.***, 489 F.3d 402, 403 (1st Cir. 2007) ("We normally uphold attorneys' fee awards unless they constitute an abuse of discretion."); ***Brewster v. Dukakis*** 3 F.3d at 492 ("Without wishing unduly to prolong the discussion, we add one further observation: by tradition and almost by necessity, district judges have great discretion in deciding what claimed legal services should be compensated.")

F. "A request for attorney's fees should not result in a second major litigation." ***Hensley,*** 461 U.S. at 437. The hours spent on attorney fee litigation may be

compensated at a lower rate. ***Brewster v. Dukakis*** 3 F.2d 488, 494 (1st cir. 1993) . ***Iverson v. Braintree Property Associates***, 2008 WL 552652 (D. Mass.)

VII. Miscellaneous

A. ***Evans v. Jeff D.*** 475 U.S. 717 (1986) No *per se* prohibition against defendants making settlement offers that condition favorable merits relief on waiver of statutory feed.

B. §1988 attorney fees belong to the client. Recommendation is that client declare them as income on federal taxes – then deduct them as an expense. Not needed in a class action.

C. ***Astrue v. Ratliff*** 08-1322 argued February 22, 2010 in the Supreme Court. Does an EAJA fee award belong to the client or to the attorney? Party prevailed in case against the Social Security Administration and awarded EAJA fees. Party owed debt to the U.S. so Dept of Treasury informed her that the award had been applied to her debt. Attorney Ratliff appealed arguing the EAJA award is hers not the party's. District Court dismissed for lack of standing, Eighth Circuit reversed. Stay tuned.

EQUAL ACCESS TO JUSTICE ACT
28 U.S.C. § 2412

Jim Breslauer

Neighborhood Legal Services.
March 31, 2010

I. EAJA FIRST ENACTED IN 1980

A. Originally designed to assist small businesses in redressing unreasonable federal agency actions. *See,* e.g., ***Battles Farm Co. v. Pierce***, 806 F.2d 1098, 1101 (D.C. Cir 1986) ("anti-bully law"), vacated 108 S. Ct. 2890 (1988).

B. Constitutes waiver of sovereign immunity against federal government.

C. Most frequently used against Dept. of Health and Human Services in context of securing Social Security, SSI and Medicare benefits.

1. Also available against any other federal agency or official (i.e., HUD, EPA, INS, OSHA, NLRB, etc.).

2. Some limitations on IRS actions. 28 U.S.C. § 2412(e) (i.e., no fees in civil proceedings for the collection of any tax under § 7430 of the Internal Revenue Code).

D. Reenacted and amended in 1985.

II. SUBSECTION (d), THE MOST COMMONLY USED SECTION, PROVIDES FOR MANDATORY FEES AND OTHER EXPENSES TO A PREVAILING PARTY IF THE POSITION OF THE GOVERNMENT IS NOT "SUBSTANTIALLY JUSTIFIED" 28 U.S.C. §2412(d)(1)(A)

A. Limited to civil actions (other than tort claims) brought by or against the U.S.

1. Fees can include time spent on work necessary to file suit, i.e. research and drafting initial complaint, ***Webb v. Bd. of Ed.*** 471 U.S. 234, 85 L.Ed 2d 233, 243 (1985) as well as on post judgment monitoring. ***Pennsylvania v. Delaware Valley Citizens Council*** 478 U.S. 546, 92 L.Ed 2d 439 (1986).

2. Fees also available for work performed before administrative agencies if administrative hearing was adversarial as defined in 5 U.S.C. §504(b)(1)(c). 28 U.S.C. § 2412(d)(3).

3. However, fees may be awarded for time spent on "non-adversarial" administrative proceedings if pursuant to a court-ordered remand.

   a. *See,* ***Sullivan v. Hudson***, 109 S.Ct 2248, 2257 (1989) (where award for work in administrative proceedings upheld because government's position was not justified and representation in additional administrative proceedings were necessary to the ultimate vindication of plaintiff's rights; administrative proceedings were so intimately connected with judicial as to be considered part of civil action).

   b. *But see,* ***Shalala v. Schaefer*** 509 U.S. 292, 125 L.Ed 2d 239, 113 S.Ct 2625 (1993), which severely limited ***Hudson*** remands in Social Security cases. Also ***Curtis v. Shalala*** 12 F.3d 97 (7th Cir. 1993). See Section IV, infra.

B. Awarded to "prevailing party" other than U.S.

1. "Party" limited to individuals whose net worth does not exceed $2,000,000.; or business, unit of local government or organization whose net worth does not exceed $7,000,000, which had less than 500 employees at the time the action was filed; or is a §501(c)(3) nonprofit, or an agricultural cooperative, regardless of net worth. 28 U.S.C. § 2412 (d)(2)(B).

2. "Prevailing" undefined in statute

   a. Definition of other statutes, such as 42 U.S.C. § 1988, applicable. See. e.g., ***McQuiston v. Marsh,*** 707 F.2d 1082, 1085 (9th Cir. 1983).

   b. Determination of prevailing party status, like the finding that the government's position lacked justification, need only be made once in a case, i.e. if court finds that the position of the government in contesting the merits of the case was not justified it will not make a determination of whether its position in opposing fees was not justified. ***Commissioner, I.N.S. v. Jean,*** 110 Sup. Ct. 2316, 1320 (1990).

   c. Plaintiff or petitioner need not be fully successful, as long as successful on some significant issue in litigation. ***McDonald v. Sec. H.H.S.*** 884 F.2d 1468, 1475 (1st Cir. 1989). *See also* ***Texas State Teachers v. Garland Independent School District,*** 109 S. Ct. 1486 (1989) (holding "central issue" test inappropriate for determining prevailing party status under Section 1988).

d. Party can be considered prevailing even if not personally successful in obtaining ultimate benefit sought, if prevails on important issue, such as procedural changes or standards. See, e.g., ***MacDonald v. Schweiker,*** 553 F. Supp. 536 (E.D.N.Y. 1982) (suit served as "catalyst" for change). *See also,* ***Guglietti v. Sec. H.H.S. 900 F. 2d 397, 401 (1st Cir. 1990)***

e. Success can also be attributable to a favorable settlement. *See,* e.g., ***Parks v. Bowen,*** 839 F.2d 44 (2d Cir. 1988) (fees paid for time spent on appeals which government subsequently withdrew). But only if meets ***Buckhannon*** criteria, see 42 U.S.C. 1983, 1988 §II. A., above

f. Fees can be awarded for all work even if petitioner not successful on all claims, where all claims are based on related legal theories or common core of facts, or where "excellent results" obtained. *See* ***McDonald,*** 884 F.2d at 1479, citing ***Hensley v. Eckerhart,*** 461 U.S. 424, 435 (1983).

3. Where plaintiff's individual claim for benefits is remanded for further administrative action when the government makes an error, is generally considered prevailing party at that point. ***Shalala v. Schaefer*** 509 U.S. 292 (1993). See section IV *infra.* For Social Security "sentence 6" remands (remanded for the taking of additional evidence) no prevailing party status unless and until claimant is awarded benefits.. *See also,* ***Mass Fair Share v. L.E.A.A.*** 776 F.2d 1066, 1068 (D.C. Cir. 1988)

4. Determination that party has prevailed is sufficient, without more, for an award of **costs.**

a. *See,* 28 U.S.C. § 2412 (a)

b. But for fees and expenses, petitioner must satisfy section (b) or (d) as well, i.e., establish that the government's position was not substantially justified or acted in bad faith.

C. Under subsection (d), court must award fees unless it finds that the position of the government was substantially justified or there exist "special circumstances." The "special circumstances defense rarely succeeds. *See,* e.g., ***State of La., ex rel. Guste, v. Lee*** 853 F.2d 1219, 1225 (5th Cir. 1988).

D. Substantial justification test

1. Burden is on government to prove its position was substantially justified. ***U.S. v. Yoffe*** 775 F.2d 447 (1st Cir. 1985)

2. Defined as "justified in substance or in the main" or "has a reasonable basis in law and fact." ***Pierce v. Underwood*** 108 S.Ct. 2541, 2550 (1988); ***Aronov v. Napolitano*** --- F.3d ---, 2009 WL 975836 (1st Cir. Apr. 13, 2009) fees can be denied if government's position was "at least reasonable" and, "of course if the agency reasonably believes the action or inaction is required by law."

   a. More than "reasonably justified" but not "justified to a high degree." ***Underwood***, 108 S.Ct. at 2550 n.2

   b. *See,* ***Bay Area Peace Navy, v. U.S.*** 914 F.2d 1224, 1230 (9th Cir 1990) for summary of standard.

   c. The granting of a stay pending appeal is not necessarily indicative of substantial justification. ***McDonald*** 884 F.2d n.8

   d. There may not be substantial justification even if the government wins in the District Court but is then reversed on appeal. ***Sierra Club v. Secy of the Army*** 820 F.2d 573 (1st Cir. 1987)

   e. Unlike Section 1988 - winning is not always enough! "The substantial justification analysis does not hinge on whether the agency was right or wrong but on whether its actions were reasonable." ***Aronov v. Napolitano*** 562 F.3d 84, (1st Cir. 2009)

3. Position of government

   a. Post 1985 Amendments, position of U.S. "means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(a) (2) (D)

      i. Now clearly includes prelitigation, as well as litigation position. ***Tang and Luo v. Chertoff*** –F.Supp.2d--, WL 699221(D.Mass March 1, 2010) litigation position of government was justified, but its pre-litigation delay of 4 years to decide adjustment of status petition was not justified. EAJA fees awarded.

      ii. *See,* e.g., ***Center for Science in the Public Interest v. Regan,*** 802 F.2d 518, 520-21 (D.C. Cir. 1986); ***McDonald*** 884 F.2d at 1476.

   b. Once the government's position has been determined to be without substantial justification, there should be no need for further inquiry. *See* ***I.N.S. v. Jean,*** 110 S. Ct. 2316 (1990)

4. Fees awarded for all phases of litigation, even if government's litigation position, when considered apart from underlying agency decision, was wholly or partially reasonable. ***McDonald*** 884 F.2d at 1480, quoting ***Trichilo v. Secretary of Health and Human Services,*** 823 F.2d 702, 708 (2d Cir. 1987) ***(Trichilo I)***

    a. *See also* ***Smith v. Bowen,*** 867 F.2d 731, 734 (2d Cir. 1989) (Fees can be awarded for time spent overcoming unreasonable litigation tactics, even if underlying position is justified.)

5. In disability cases

    a. Obtaining a reversal because the secretary's decision not based on substantial evidence is not necessarily enough to prove its position was not substantially justified for EAJA purposes. *See,* e.g., ***Fulton v. Heckler,*** 784 F.2d 348, 349 (10th Cir. 1986); ***Guthrie v. Schweiker,*** 718 F.2d 104 (4th Cir. 1983).

    b. Failure to follow court precedents often shows lack of justification. *See,* e.g., ***Hyatt v. Heckler,*** 807 F.2d 376, 382 (4th Cir. 1986), cert. denied, 108 S.Ct. 79 (1987); ***Brown v. Sullivan***, 724 F.Supp 76 (W.D.N.Y. 1989)

    c. Even if government consents to remand, fees may still be appropriate, *See,* e.g., ***Ramirez-Isalquez v. Heckler*** 632 F.Supp 100, 101 (S.D.N.Y. 1985). But if Secretary does not file answer and promptly seeks remand, fees may be denied. ***Callejo v. Heckler,*** 613 F. Supp. 1229 (S.D.N.Y. 1985 (Note, however, that this case predates the 1985 amendments, which clarified that position of government includes pre-litigation position.)

III. FORM OF PETITION, 28 U.S.C. § 2412 (d)(1)(B)

A. Notice of Motion with attached Affidavit of attorney.

1. Include allegation that the party is prevailing and eligible under subsection (2)(B)(i.e., net worth - see Section II B.I1 *supra.)*

2. Include itemized statement of attorney or expert witness (*see* 28 U.S.C. § 2412 (d)(2)(A)) including actual time spent, rate at which fees computed, and amount sought.

    a. Contemporaneous time records required. *See,* ***New York State Assoc. for Retarded Citizens, Inc. v. Carey*** 711 F.2d 1136, 1147-48 (2nd Cir. 1983); ***Grendel's Den, Inc. v. Larkin,*** 749 F.2d 945 (1st Cir. 1984).

b. For rate computation, *see* §V, *infra.*

3. Include allegation that position of government not substantially justified.

B. Move for leave to amend/supplement, if additional briefing or oral argument necessary.

IV. TIMING OF PETITION

A. Must be filed within thirty (30) days of final judgment. (Set forth on a separate document - Rule 58)

1. Time limit has been held to be jurisdictional. ***Long Island Radio Co. v. N.L.R.B.,*** 841 F.2d 474 (2d Cir. 1988).

a. ***But*** *see* ***Golbach v. Sullivan,*** 778 F. Supp 9 (N.D.N.Y. 1991 holding time limit to be waivable statute of limitation where government failed to object in a timely fashion to a petition filed one day late.

b. *See also* ***Irwin v. Veterans Administration,*** 111 S.Ct. 453, 456-57 (1990) applying equitable tolling to a statute of limitations because government has waived sovereign immunity.

2. Final judgment defined as one that "is final and not appealable and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G).

a. Prior controversy over "final judgment" clarified by 1985 Amendments. House Report accompanying amendment makes clear that under new definition, a petition is timely as long as it is filed within 30 days of expiration of time for filing a notice of appeal or writ of certiorari. H. Rep. No. 99-120[I], 99th Cong. 1st sess. (1985), reprinted in [1985] U. S. Code Cong. & Ad. News, 132, 146 n. 26.

b. Generally, petition is due 90 days from date judgment <u>entered</u> (i.e. 60 days to appeal per F.R.A.P. Rule 4, 28 U.S.C.A., plus 30 days per EAJA).

c. "Settlement" includes dismissal with consent, even if no "order" produced. *Id.* ("The court should avoid an overly technical construction of these terms. This section should not be used as a trap for the unwary resulting in unwarranted denial of fees"). Note, however, that a consent decree is <u>generally</u> considered nonappealable and petition should be filed 30 days from date of entry of <u>order</u> of settlement.

3. Petition may be filed before final judgment. *Supra*, U.S. Code Cong. Ad News, 132, 146 n.26.

a. Apply for leave to amend/supplement if necessary.

b. May be necessary step now to preserve rights in light of ***Schaefer.*** See below

B. Timing of petition following court-ordered remand of a Social Security case.

1. ***Shalala v. Schaefer*** 509 U.S. 292 (1993) somewhat clarified the water muddied by ***Melkonyan v. Sullivan*** 111 S.Ct. 2157 (1991)

a. In ***Schaefer***, the Supreme Court held that a remand under sentence four of 42 U.S.C. §405(g) (the court may enter "a judgment...reversing the decision of the Secretary...[and] remanding the cause for a rehearing") is a final judgment for EAJA purposes. Regardless of whether a claimant is awarded benefits after remand, the obtaining of a remand renders her the "prevailing party".

b. However, the ***Melkonyan*** Court relied on its earlier decision in ***Sullivan v. Finkelstein***, 496 U.S. 617 (1990) where the Court distinguished between sentence four and sentence six (court may "order additional evidence taken before the Secretary...upon a showing that there is new evidence which is material and that there is good cause...") remands.

i. The ***Melkonyan*** Court held that "final" means final **court** judgment, and under ***Finkelstein*** a sentence six remand final court judgment occurs only after the Secretary files the evidence obtained at the remand with the court and the court then rules on the merits of the case.

ii. Now, under ***Schaefer*** a fee petition must be filed within 90 days of a sentence four remand, but it cannot be filed for a sentence six remand until the case returns to the court post remand. thus a party is prevailing upon obtaining a sentence four remand, regardless if she eventually obtains benefits, but is not prevailing under a sentence six remand until the court rules in her favor after the Secretary takes new evidence and presents it to the court.

iii. These decision severely limit the fees available under ***Sullivan v. Hudson*** 490 U.S. 877 (1989). ***Hudson*** held that EAJA fees may be available for post remand administrative work. Under ***Schaefer*** the court case ends upon entry of a sentence four remand, SO no ***Hudson*** fees are available. They would be available under a

sentence six remand. *See* ***Curtis v. Shalala*** 12 F.3d 97 (7th Cir. 1993). There is one small window still open. In ***Schaefer*** the court indicated that ***Hudson*** fees could be available in sentence four remands ***if*** the court specifically retains jurisdiction and if the Secretary does not object. How likely does this seem?

c. Beware also of the hints in ***Melkonyan*** that a Sentence Six remand for new and material evidence may undermine a claim that the position of the government was not substantially justified! *See also* ***Rosado v. Bowen,*** 823 F.2d 40, 43 (2d Cir. 1987). *See also* ***Tucunango v. Sullivan,*** 810 F.Supp. 103 (S.D.N.Y. 1993), holding that a remand prior to the government's answer should be made pursuant to sentence six.

V. COMPUTATION OF FEES

A. Calculate "Lodestar" under the Section 1988 rules. 28 U.S.C. § 2412(d)(2)(A) (i.e. prevailing market rate). However, there is a statutory cap of $75/hour which may be exceeded if "the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." § 2412 (d)(2)(A)(ii). *But* the $75. maximum need not be awarded. ***Trividad v. Sec. H. H. S.,*** 935 F. 2d 13 (1st Cir. 1991)

1. COLA award should be automatic "except in unusual circumstances." ***Baker v. Bowen,*** 839 F.2d 1075, 1084 (5th Cir. 1988).

2. COLA is based on increases in the Bureau of Labor Statistics' Consumer Price Index (CPI). *See*, e.g., ***Trichilo v. Bowen,*** 832 F.2d 702 (2d Cir. 1987). ***(Trichilo I)***

   a. For updates in CPI, call the Department of Labor CPI hotline (617) 565-2325 or http://www.bls.gov/data/inflation_calculator.htm.

   b. CPI-U for "all items," rather than the CPI-W for "personal and educational services" (which includes legal services and generally results in significantly higher rates) is proper measure. *see*, ***Harris v. Sullivan*** 968 F.2d 263 (2d. Cir. 1992).

3. COLA increases measured from 1981 (date of enactment) rather than 1985 (date of reenactment of EAJA). ***Sierra Club v. Secretary of Army*** 820 F.2d 513 (1st Cir. 1987).

4. Rate generally calculated at current v. historic rate.

a. General rule favors paying at current rate to account for delays. Compare ***Pennsylvania v. Delaware Valley Citizens Council*** 107 S.Ct. 3078, 3081-82 (1987)

b. *But see, **Mass Fair Share v. L.E.A.A.*** 776 F.Supp 1066, 1069 (D.C. Cir. 1985) (fees should be paid at rate for year in which work was performed.)

i. But unusual, prolonged delays may be compensated for wityh "special factor increase. *See, **Willet v. I.C.C.*** 844 F2d 867, 875, *reh'g denied* 857 F.2d 793, 795 (D.C. Cir. 1988)(despite sovereign immunity concerns).

ii. Se below re: "special factors"

5. "Special factor" increase limited by **Pierce v. Underwood,** supra.

a. Only if attorneys qualified for the proceeding in some specialized sense, rather than general legal competence (i.e. patent lawyer) 108 S. Ct. at 2554.

b. Contingency repudiated as "special factor." *Id.,* 108 S.Ct. at 2554.

c. *But see, **Pirus v. Bowen***, 869 F.2d 536 (9th Cir. 1989), where expertise of counsel in complex class action recognized.

6. Multipliers generally not available because of sovereign immunity considerations. *See*, e.g., ***International Woodworkers of America v. Donovan***, 792 F.2d 762, 766 (9th Cir. 1986).

B. Fees for law student and paralegal work calculated at market rate. ***Jean v. Nelson*** 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds ***Comm. I.N.S. v. Jean,*** 110 S.Ct. 2316 (1990).

C. Relationship to fees under 42 U.S.C. § 406(b).

1. Under Section 406(b), fees cannot exceed 25% of back award but fees may be calculated on contingency basis, rather than lodestar. *See* ***Wells v. Sullivan,*** 907 F.2d 367 (2d Cir. 1990).

2. Neither EAJA nor the Social Security Act limit fees under either provision - - statutes compatible, per 1985 Amendments

a. However, amendments require that if an attorney receives fees under both statutes for the same work, the attorney must refund the smaller fee to the claimant. Pub. L. No. 99-80, § 3, 99 Stat. 86 (1985) (amending § 206 of EAJA, 94 Stat. 2330 (1980), reprinted at U.S. Code Cong. & Ad News 132, 148).

b. Statement that smaller fee will be returned should be included in affidavit/pleading, if applicable, i.e., if a 406(b) fee will be requested.

VI. COSTS AND EXPENSES

A. Costs awarded to prevailing party

1. 28 U.S.C. §2412(a)

2. Generally, limited to docketing fees, transcripts, interpreters. *See,* e.g., ***Farmers Cooperative Dairy, Inc. v. Block,*** 703 F.Supp. 379, 383 (E.D. Pa. 1989).

B. Expenses available under Sections (b) and (d)

1. 28 U.S.C. § 2412(d)(2) sets forth expenses, including expert witness fees, costs of studies, etc.

2. Costs normally billed to client, including but not limited to those for telephone charges, postage, travel and photo-copying are reimbursable as "fees and other expenses" under EAJA. ***Aston v. Sec'y of Health and Human Services*** 808 F.2d 92(2d Cir. 1986)

3. Computerized legal research costs may also be reimbursable. ***Garcia v. Bowen*** 702 F.Supp 409, 411 (S.D.N.Y. 1988)

VII. SECTION (b) PROVIDES FOR DISCRETIONARY FEES TO PREVAILING PARTIES AGAINST FEDERAL GOVERNMENT UNDER COMMON LAW THEORIES (BAD FAITH, COMMON FUND OR COMMON BENEFIT) OR OTHER STATUTES. 28 U.S.C.§2412(b)

A. Available to prevailing party with no statutory limit on amount or time limits for filing.

1. *See,* e.g., ***Hyatt v. Sullivan*** 711 F.Supp 833, 834 (W.D.N.C. 1989) re hourly rate in nonacquiescence case.

2. *See,* e.g., **McQuiston v. March** 707 F.2d 1082 (9th Cir. 1983) re time limits.

3. Government can also be awarded fees under 28 U.S.C.§2412(b) *See,* e.g., ***Vann v. U.S.*** 615 F.Supp 6 (D. Tenn 1985)

B. Bad Faith Fees

1. Some courts have been reluctant to award "bad faith" fees where plaintiff unable to show government acted "vexatiously". *See,* e.g., ***Well v. Bowen*** 855 F.2d 37, 46-47, (2d Cir. 1988)(Wells I)

2. *But see,* ***Bowen v. Sullivan*** 724 F.Supp 765 (W.D. N.Y. 1989), where "bad faith" fees awarded in a case where the Secretary of Health and Human Services refused to follow the "treating physician rule." *(See* ***Schisler v. Bowen,*** 851 F.2d 43, 2d Cir. 1988). *See also* ***Velasquez v. Heckler,*** 610 F. Supp. 328 (S.D.N.Y. 1984) (fees awarded where government refused to consent to a remand for ***City of New York*** class member).

3. ***See also Brown v. Sullivan,*** 916 F.2d 492, 296 (9th Cir. 1990), where "cumulative effect" of various delays and improprieties amounted to bad faith.

C. Courts reluctant to award fees under common fund and common benefit analyses against federal government.

1. Fees paid by all taxpayers, not just by benefiting persons. ***E.g., Grace v. Burger,*** 763 F.2d 457 (D.0 Cir.) *cert. denied* 106 S.Ct. 583 (1985); ***Linguist v. Bowen,*** 839 F.2d 1321 (8th Cir. 1988), *cert. denied,* 109 S.Ct. 259 (1988). Compare ***In Re Washington Power Supply System Securities Litigation #*** 91-16669 (9th Cir. 3/23/94).

2. Even in nationwide class, too hard to determine exactly who benefited. ***Edwards v. Heckler,*** 789 F.2d 659 (9th Cir. 1985).

D. "Other statutes" (i.e., 42 U.S.C. § 1988)

1. Federal government's liability under 42 U.S.C. § 1988 rejected where defendant not acting under color of state law per § 1983. *See,* e.g., ***Lauritzen v. Lehman,*** 736 F.2d 550 (9th Cir. 1984); ***Premachandra v. Mitts,*** 753 F.2d 635 (8th Cir. 1985) *(en Banc).*

2. But liability where federal defendants liable under § 1983 for joint action with state or local officials to deny plaintiffs' constitutional rights. ***Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd. ,*** 735 F.2d 895 899-900 (5th Cir. 1984).

3. However, "conspiracy" theory based on cooperation between state and federal officials in program like AFDC or Medicaid not successful to date. *See,* e.g., ***Kali v. Bowen,*** 854 F.2d 329, 331 (9th Cir. 1989).

4. Federal defendant also liable under § 1988 and § 2412(b) for violations arising under other statutory provisions enumerated in § 1988, such as Title VI. *See,* e.g., ***Crest Street Community Council, Inc. v. North***

Carolina Dep't of Transportation 769 F.2d 1025 (4th cir. 1985), *rev'd. on other grounds*, 107 S.Ct. 336 (1986)

VIII. APPEALS OF FEE AWARDS/DENIALS

A. Standard on appeal is "abuse of discretion". **Pierce v. Underwood**, supra.

B. Fees on fees available once the government's underlying position found to be not justified. ***Commissioner of INS v. Jean*** 101 S.Ct. 2316 (1990). *See also*, ***McDonald v. Sec'y H.H.S.*** 884 F.2d 1468, 1480 (1989)

C. *See*, ***Wells I*** *supra*, 855 F.2d at 47, for "cautionary note,", warning that Secretary's position in vigorously opposing appropriate fees may subject him to additional fees for bad faith pursuant to 28 U.S.C. §2412(b)

D. Application/Petition for appellate fees made directly to Court of Appeals. First Circuit Local Rule 39.1

E. Interest payable if U.S. appeals award and award is affirmed. 28 U.S.C. §2412(f).

Cases