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# COURT-AWARDED "REASONABLE" FEES: FORCING A SEGREGATED PUBLIC INTEREST BAR?

## I. Introduction

A fundamental premise of the legal system in the United States is that courts<sup>1</sup> which shape and interpret governmental or social policy should be freely accessible to those citizens who may be affected by such policies.<sup>2</sup> Unfortunately, there are no guarantees that a party anxious to present a grievance in the judicial forum can obtain adequate legal counsel. Nevertheless, because of its substantive and procedural complexities, our legal system demands competent legal representation.<sup>3</sup> Economic reality being what it is, that segment of society unable to absorb the cost of counsel fees will often go unrepresented and valid claims with potentially crucial social impact will go unheard.<sup>4</sup>

While in the past ten years the public interest<sup>5</sup> law movement has increased the availability of legal services to those whose economic

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1. While both state and federal courts allow the awarding of attorneys' fees in limited cases, discussion of fees awards practices in state courts is beyond the scope of this Comment. For a general discussion of state court fees awards, see Note, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974). See also 6 MOORE'S FEDERAL PRACTICE § 54.77[2], at 1712 (1974).

2. "The democratic promise of 'Equal Justice Under Law' necessarily requires equal access to legal institutions. In this Nation, perhaps more than in any other, access to legal institutions presupposes access to lawyers." *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Senate Subcommittee on Representation of Citizens' Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 798 (1973) (statement of J. Kline, Esq.) [hereinafter cited as *Legal Fees*]. See generally *Boddie v. Connecticut*, 401 U.S. 371 (1971); Cahn and Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970).

3. *Legal Fees*, *supra* note 2, at 798.

4. See generally Nussbaum, *Attorneys Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 305-06 (1973).

5. COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (1976) [hereinafter cited as COUNCIL FOR PUBLIC INTEREST LAW] defines public interest law in the following manner:

Public interest law is the name that has been given to efforts to provide legal representation to interests that historically have been unrepresented and underrepresented in the legal process. These include not only the poor and disadvantaged but ordinary citizens who, because they cannot afford lawyers to represent them, have lacked access to the courts, administrative agencies, and other legal forums in which basic policy decisions affecting their interests are made.

*Id.* at 3.

station would ordinarily preclude the retention of legal counsel, a crucial requirement for the continuation of such programs is the involvement of the private bar.<sup>6</sup> Such involvement, however, will depend in large measure on the economic incentives provided the private sector to accept such public interest cases.<sup>7</sup> To date, the greatest incentive has been the awarding of attorneys' fees by the courts.<sup>8</sup>

This Comment will demonstrate that the manner in which the courts have inconsistently applied standards for setting fees levels is adversely affecting the viability of such awards as a device for funding litigation.<sup>9</sup> As a result, the ability and desire of private sole practitioners and firms to accept public interest cases might be severely diminished.<sup>10</sup> The ultimate result is that a valuable segment of the legal community is lost to the public interest movement.

Part II will briefly sketch the current means by which attorneys may obtain court-awarded fees.

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6. Such involvement may be both financial as well as active. Private public interest activity may be generated by an increase in *pro bono publico* involvement, or by the providing of economic incentives, such as court-awarded fees, for the private bar to accept public interest cases. *Id.* at 298-306

Direct monetary contribution from the private bar seems more likely than an extension of *pro bono* activity. *See* pt. VI *infra*. *See generally* Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM. B. FOUNDATION RESEARCH J. 83 (1978).

7. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970) points out:

As a source of support for public interest activity, private law firms offer an enormous pool of lawyer time and talent. At first glance, only the reluctance of private lawyers to accept less income than they might otherwise make seems to prevent full harnessment of their resources to the needs of the underrepresented.

*Id.* at 1107. This Comment assumes that the profit motive of lawyers has not changed drastically since the date of the cited excerpt.

8. Court-awarded fees create a situation whereby a party may recover the value of its attorneys' services as part of its recovery. Some statutes allow the recovery directly to the attorney. *See, e.g.*, Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972 § 13, 33 U.S.C. § 928 (1976) (where employer opposes an employee's workers' compensation claim, attorneys' fees may be taxed against the employer where the employee initiates an administrative proceeding to force payment). Thus, private counsel can accept a case from a client otherwise unable to pay his fees on the basis of a prospective court-awarded fee. This practice may be in jeopardy however. *See* pt. IV *infra* for a discussion of why court-awarded fees might be in disfavor as a means of funding otherwise unaffordable litigation.

9. *See* pts. III & IV *infra*. The scope of this Comment is a discussion of assessing the level of court-awarded fees in the context of litigation. Many of the principles governing awards in such cases would be applicable on any occasion where a court is called upon to award fees to a party.

10. *See* pt. IV *infra*.

Part III will survey the varied interpretations and applications of "reasonable" fees by the courts by reviewing the criteria used to establish the amount of an award and offering some explanations why many of the criteria used might adversely affect the level of an attorney's fee award.

Part IV will investigate the possible effect of fees awards on the availability of private counsel. This section will be viewed from the standpoint of an attorney faced with an award which represents a reduction in his customary hourly rate and demands production of highly detailed records in order to justify his claim for such an award.

Part V will trace the effect of attorneys' fees awards on the ability of public interest firms and non-profit law centers to continue accepting cases where the fees awarded are not at marketplace levels.

Part VI will attempt to predict whether the *pro bono publico* efforts of the private bar are sufficient to undertake the share of public interest litigation being affected by the growing inability of private counsel to accept such cases on a prospective fees-award basis.

## II. Equitable and Statutory Bases for Attorneys' Fees Awards

Customarily, the fee arrangements between attorney and client are a matter of private contract.<sup>11</sup> In the context of litigation, the strictly followed "American rule" is that each litigant is responsible for the cost of his own attorney.<sup>12</sup> While numerous commentators have questioned the vitality of such a practice,<sup>13</sup> the Supreme Court has reaffirmed its devotion to the rule. In *Alyeska Pipeline Service Company v. Wilderness Society*,<sup>14</sup> the Court reviewed the long-standing American rule, concluding that absent statutory authority to the contrary private litigants are individually burdened with attorneys' fees.<sup>15</sup> The Court has recently reaffirmed this position.<sup>16</sup> The

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11. See generally 1 S. SPEISER, *ATTORNEY'S FEES* §§ 1.1, 2.1 (1973) [hereinafter cited as SPEISER]; ABA COMM. ON ECONOMICS OF LAW PRACTICE, *THE LAWYER'S HANDBOOK* 305 (1962).

12. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *F.D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co., Inc.*, 417 U.S. 116 (1974); *Hall v. Cole*, 412 U.S. 1 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

13. See, e.g., McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 *FORDHAM L. REV.* 761 (1972); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 *IOWA L. REV.* 75 (1963). See also 1 SPEISER, *supra* note 11, at § 12.8.

14. 421 U.S. 240 (1975).

15. *Id.* at 269. The American rule is not followed in other common law jurisdictions. For

unfortunate effect of such a system is that potential plaintiffs without the funds necessary to seek out and retain legal representation have often been forced to forego the judicial forum.

However, the American rule does have its exceptions. In limited cases, the courts will allow fee-shifting,<sup>17</sup> on a discretionary basis,<sup>18</sup> where a party engages in "common fund"<sup>19</sup> or "common benefit"<sup>20</sup> litigation. Also, where a party engages in a frivolous, vexatious, or "bad faith" action,<sup>21</sup> or willfully disobeys a court order,<sup>22</sup> attorneys' fees may be assessed against him.<sup>23</sup> While the common-fund and

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example, the rule in England is that the prevailing party in litigation is entitled to attorneys' fees as a matter of right. See Goodhart, *Costs*, 38 YALE L.J. 849 (1929); C. McCORMICK, *LAW OF DAMAGES* 234-36 (1935); 1 SPEISER, *supra* note 11, at § 12.7 & note 71.

The *Alyeska* decision eliminated the "private attorney general" exception to the American rule. 421 U.S. at 269. The exception allowed a plaintiff who brought an action which vindicated important statutory rights of all citizens the costs of his attorneys' fees, under the theory that an individual should not be privately taxed with the burden of essentially public litigation. The elimination of the exception has had a profound effect on the financing of public interest litigation, and hence the ability of private parties to enforce statutory rights. See COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 314.

16. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

17. "Fee-shifting" is a commonly used phrase to describe the process whereby the courts determine whether and to what extent persons other than a client should be required to assume the costs of the client's attorney.

18. Courts are free, in their discretion, to award fees under the common fund, common benefit, and obdurate behavior exceptions. See notes 19, 20 & 21 *infra*. The power to award fees under these exceptions stems from the equitable jurisdiction of the courts. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

19. The "common fund" exception recognizes the duty of the beneficiaries of a fund recovered by the plaintiff to pay their proportionate share of the fees to which plaintiffs' attorneys are entitled. The exception was noted with approval in *Alyeska*. 421 U.S. at 257. The common fund exception first appeared in *Trustees v. Greenough*, 105 U.S. 527 (1882).

20. "Common benefit" litigation closely resembles the common fund exception. The principles are essentially the same; a plaintiff who confers a benefit on a class of beneficiaries may charge a proportionate amount of his attorneys' fees to the other beneficiaries. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), where plaintiff brought a stockholder's derivative action against defendant corporation. Though no monetary recovery was obtained, the Court charged plaintiff's attorneys' fees to the corporation, citing the corporation as the real beneficiary of the action. *Id.* at 392, 396-97. See also *Altman v. Central of Georgia Ry.*, 580 F.2d 659 (D.C. Cir. 1978).

21. Where the losing party acts solely for oppressive reasons, the court may award fees. *F. D. Rich Co., Inc. v. United States ex rel. Ind. Lumber Co.*, 417 U.S. 116 (1974); *Vaughan v. Atkinson*, 369 U.S. 527 (1972).

22. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923). See also *FED. R. CIV. P. 37(b)(2)(E)*, which allows a court to assess fees for the failure of a party to comply with a court order compelling discovery.

23. For a complete discussion of the equitable bases upon which a fees award can be obtained, see Berger, *Court-Awarded Attorneys' Fees: What is Reasonable?*, 126 U. PA. L. REV. 281, 295-303 (1977) [hereinafter cited as *Berger*].

common-benefit exceptions provide a plaintiff, otherwise unable to retain counsel, with an opportunity to lure attorneys with the promise of fees, the obdurate behavior exception does not.<sup>24</sup>

Perhaps the single most important development in the area of the availability of legal representation has been the passage or amendment of federal statutes which specifically provide for court-awarded attorneys' fees,<sup>25</sup> either on a discretionary<sup>26</sup> or mandatory basis.<sup>27</sup> Provisions of most of the statutes allow an award of "reasonable attorneys' fees",<sup>28</sup> either to a "prevailing"<sup>29</sup> or "substantially prevailing"<sup>30</sup> plaintiff. Others merely specify a prevailing party.<sup>31</sup>

The problem which becomes readily apparent is on what basis a court is to assess the quantum of a "reasonable" fee.<sup>32</sup> Since the

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24. Where the plaintiff knows that the litigation will generate a common fund, or benefit a class of beneficiaries, his attorney has a reasonable expectancy of receiving fees from the fund or from the beneficiaries as a class. Where the basis of an award is the other party's behavior, the fees award is essentially punitive, and cannot be anticipated prior to trial. Hence, it is of no utility as a method of funding litigation.

25. For a list of federal statutes authorizing the award of fees, see Berger, *supra* note 22, at 303 n.104. See, e.g., notes 26-30 *infra*.

26. See, e.g., Consumer Product Safety Act § 23, 15 U.S.C. § 2072 (Supp. V 1975), as amended by Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 10(c), 90 Stat. 503 (1976); Privacy Act of 1974, § 3, 5 U.S.C. § 552a (g)(2)(B) (1976).

27. See, e.g., Truth-in-Lending Act § 408(a), 15 U.S.C. § 1640(a) (1976); Civil Rights Act of 1964 § 204(b), 42 U.S.C. § 2000a-3(b) (1976). 42 U.S.C. § 2000a-3(b) provides that "in any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." *Id.* While the language of the statute appears to make the award discretionary, the Supreme Court has interpreted the clause as mandating an award to a successful plaintiff absent exceptional circumstances. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

28. See, e.g., Civil Rights Attorney's Fees Awards Act of 1976 § 2, 42 U.S.C.A. § 1988 (1976). "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.* See also Civil Rights Act of 1964, *supra* note 27.

29. See, e.g., Consumer Product Safety Act § 23, 15 U.S.C. § 2072 (Supp. V 1975), as amended by Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 10(c), 90 Stat. 503 (1976).

30. See, e.g., Freedom of Information Act Amendments § 1(b)(2), 5 U.S.C. § 552 (a)(4)(E) (1976); Privacy Act of 1974 § 3, 5 U.S.C. § 552a(g)(2)(B) (1976).

31. See, e.g., Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) (1976); Employee Retirement Income Security Act § 502, 29 U.S.C. § 1132(g) (1976).

32. Legislative histories of the statutes provide little guidance to the courts. The fundamental purpose of the fees awards provisions is to provide private parties the opportunity to

ability of otherwise unrepresentable clients to obtain adequate counsel usually depends on the level of a court-imposed fee award, the standards employed by the courts in the calculus of the award are crucial. Fees which fail to reflect marketplace economics<sup>33</sup> or which demand that counsel maintain hyper-accurate time and fees records<sup>34</sup> will effectively discourage acceptance of cases by attorneys when payment for such work is at the discretion of the courts. Strangely enough, the Supreme Court has never reviewed an award of attorneys' fees with the aim of announcing criteria to be used in setting a reasonable fees level.<sup>35</sup> The result has been a variety of tests being applied by lower courts.<sup>36</sup>

### III. Court Interpretation of "Reasonable" Fees

In 1974, the Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*<sup>37</sup> announced twelve factors to be considered in setting the level of an attorneys' fees award:

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enforce statutory rights. Private enforcement of such rights is essential to the protection of the public. Such was the announced purpose of the Civil Rights Attorney's Fees Awards Act of 1976 § 2, 42 U.S.C.A. § 1988 (1976). The Report of the Senate Judiciary Committee read as follows:

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

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 3 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910.

The Committee held that appropriate standards for setting the level of fees awarded should be governed by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), S. REP. No. 94-1011, 94th Cong. 2d Sess. at 6, [1976] U.S. CODE CONG. & AD. NEWS, at 5913. *But see* pt. III *infra*.

One statute specifically addressing the issue of what factors are to be included in the calculus of a fees award level is the Consumer Product Safety Comm'n Improvements Act of 1976 § 10(a), 15 U.S.C. § 2059(e)(4) (1976). "The actual time expended by the attorney in providing advice and other legal services" and reasonable expenses as may be incurred by the attorney, are to be recovered at "the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee." *Id.* It is suggested that such factors are susceptible to the same problems as noted in pts. III and IV *infra*.

33. See pt. IV(A) *infra*.

34. See pt. IV(B) *infra*.

35. While the Court has dealt with the entitlement of a party to a fees award, it has never dealt with the issue of what factors are to be applied in calculating the amount of an award. See, e.g., *Hutto v. Finney*, 98 S. Ct. 2565 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

36. See pt. III *infra*.

37. 488 F.2d 714 (5th Cir. 1974).

- (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 or the results obtained
- (9) the experience, reputation, and ability of the attorney
- (10) the undesirability of the case
- (11) the nature and length of the professional relationship with the client
- (12) fees awards in similar cases<sup>38</sup>

The court pointed out that the statute which authorized the fees award "was not passed for the benefit of the attorneys", nor was it designed to "make the prevailing counsel rich."<sup>39</sup> Since the *Johnson* decision in 1974, and after a period of uncertainty and conflict as to what criteria to employ in determining the level of a fees award, most of the circuits have now rallied around the *Johnson* test.<sup>40</sup>

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38. *Id.* at 717-19. The factors are also those promulgated by the ABA CODE OF PROF. RESP. DR 2-106.

39. 488 F.2d at 719. See also *Barnett v. Pritzker*, 73 F.R.D. 430 (S.D.N.Y. 1977).

40. See, e.g., *Spectrofuse Corp. v. Beekman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978); *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978); *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 98 S.Ct. 2565 (1978); *First Colonial Corp. of America v. American Benefit Life Ins. Co.*, 544 F.2d 1291 (5th Cir. 1977); *EEOC v. Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977); *King v. Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 98 S.Ct. 3146 (1978); *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974). *But see Copeland v. Marshall*, No. 77-1351 (D.C. Cir. Oct. 30, 1978); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977); *Lindy Bros. Bldrs., Inc., v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976).

The *Johnson* factors were also cited with approval in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976. See note 32 *supra*.

The recent *Copeland* decision established a new formula in the District of Columbia circuit for computing fees awards levels. The formula reimburses the attorney for his costs, and allows for a "controllable" profit. Such a test will force the attorney to defend his costs, profits and methods of handling each case. It might also lead to a situation where the small firm or sole practitioner will receive a smaller recovery than a large commercial firm, due to the discrepancy in profit structures. Nonetheless, *Copeland* seems to be, at least for now, confined to application in cases in which the government is a defendant, as the action was brought under Title VII of the Civil Rights Act of 1964, against the U.S. Department of Labor. For a general discussion of *Copeland*, see *The Nat'l L.J.*, March 19, 1979, at 15, col. 3. Public interest groups seeking *en banc* review of the decision were recently dealt a serious blow when the court refused to accept five of six *amicus curiae* briefs filed by various civil rights groups



While the expected result of the recognition of the *Johnson* criteria by the majority of courts would be some degree of uniformity in fees awards, the results have been less than consistent. While *Johnson* establishes guidelines to be employed by trial courts in setting fees, it provides no guidance as to the relative importance of each of the twelve factors.<sup>41</sup> Hence, lower courts have mechanically applied the test factors, achieving widely divergent results in very similar cases.<sup>42</sup> The initial problem is that lower courts are free to stress one factor at the expense of another. The result is an infinite variety of applications of the factors first announced in *Johnson*.<sup>43</sup>

A second confusion resulting from *Johnson* is that several of the factors are either conflicting or duplicative. One commentator has noted that the "time and labor involved" must necessarily reflect the "novelty and difficulty of the questions" in each case.<sup>44</sup> Assessing both factors individually might result in a double recovery.<sup>45</sup> Application of *Johnson* factor number four, the preclusion of other employment, directly conflicts with factor ten, the undesirability of the case. The fact that an attorney would accept a case, at the expense of taking others, would seem to indicate that the case is "desirable". The skill reflected in *Johnson* factor number three will of necessity overlap the experience and ability of the attorney reflected in factor nine. Additionally, a court accounting for the fixed or contingent nature of the fee has the option to reward the

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and government agencies, including the American Civil Liberties Union, the NAACP, and the EEOC. Only the EEOC brief was accepted. The brief is two pages long, and contains only a short statement on the probable effects of the decision on fees levels and the availability of counsel. The Nat'l L.J., April 9, 1979, at 2, col. 3.

41. See Berger, *supra* note 23, at 286.

42. Compare NAACP v. Bell, 448 F. Supp. 1164 (D.D.C. 1978) with Willett v. Chester Water Authority, 447 F. Supp. 967 (E.D. Pa. 1978). Both cases were brought under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.A. § 1988 (1976). The court in NAACP set a \$100 per hour fee, while the Willett court set the fee at \$50 per hour for a senior attorney and \$30 for a junior associate.

43. See, e.g., Exner v. FBI, 443 F. Supp. 1349 (S.D. Cal. 1978). The court stressed the time spent, novelty and complexity of issues, level of attorney skill, attorney's customary fee, experience, reputation, and ability of counsel, and awards in similar cases. In Phillips v. Moore, 441 F. Supp. 833 (W.D.N.C. 1978), the court stressed the factors of *Exner*, minus the awards in similar cases factor, and added the results obtained factor, whether the fee was fixed or contingent, the undesirability of the case, and the cost of operating a law practice.

44. See Berger, *supra* note 23, at 286 n.26.

45. A court which calculated a recovery on the basis of both the time spent on the issues and the novelty of the questions would necessarily allow a bonus for the novelty while already having reflected the bonus in the amount of time the attorney would be allowed to recover for.

attorney for undertaking litigation which entails some risk, yet another court might reduce the fee on the basis that counsel was willing at the onset of litigation to accept no fee at all. In either event, such a factoring of the contingent nature of the fee is in derogation of the customary fees factor of number five where it exceeds the attorney's contingent fee arrangement with the client, or where it fails to reflect counsel's normal expectation of reward for accepting the case on a contingent basis. Factoring such considerations into a fees award would unfairly reflect a compromise reached by the courts between conflicting criteria.

The most significant problem inherent in the *Johnson* test is in requiring the trial court to assess fees on the basis of the results achieved or the recovery obtained. Clearly, such a requirement conflicts with the court's duty to recognize the time and labor involved.<sup>46</sup> Theoretically, where an attorney invests a great deal of time and energy, wins at trial, yet still loses a single nondispositive issue, his fee, if awarded at all, could reflect the value of his time, discounted by the courts' discretionary deduction for the loss of the issue. In effect, assessment of the results obtained creates a situation where a court may make a *post hoc* decision that the action should not have been brought, or that an argument should not have been advanced.<sup>47</sup>

Such a decision offends the notion that the judicial forum should be freely available to all parties. Nonetheless, application of the results-obtained factor by the courts has been inconsistent; some courts have accorded it a high degree of importance, while others have ignored the results entirely.<sup>48</sup>

Perhaps the most troubling inconsistencies resulting from judicial application of the *Johnson* criteria involve the widely divergent

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46. See Berger, *supra* note 23, at 287-89.

47. But see National Ass'n of Letter Carriers v. United States Postal Serv., 590 F.2d 1171 (D.C. Cir. 1978), where the court held such *post hoc* determinations to be impermissible.

48. Note that *Johnson* factor eight allows the court either to assess the amount recovered or the results obtained. The Second Circuit in *Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977), pointed out that judges should not be unduly influenced by the monetary size of a judgment or settlement. 560 F.2d at 1099.

Lower courts are divided. Compare *Phillips v. Moore*, 441 F. Supp. 833 (W.D.N.C. 1977) (results obtained first factor applied by court) with *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976) (importance and novelty of issues, time expended, and quality of briefs submitted most significant factors). See note 43 *supra* and accompanying text.

sums awarded.<sup>49</sup> An attorney litigating a private antitrust case stands almost invariably to receive as much as three times the fee an attorney will receive for litigating a civil rights case.<sup>50</sup> Assuming both spend the same amount of time on each trial and the skills of counsel are comparative, the rationale for the difference in fees awarded must concern the relative difficulty of each case. Yet, the antitrust litigation might turn on well-travelled laws, while the civil rights case may be unique. Still, the clear trend is toward rewarding commercial litigation more handsomely than public interest litigation.<sup>51</sup>

Another difficulty is that while most appellate courts require the trial judge to base a fees award on record evidence,<sup>52</sup> most courts of appeal are unwilling to disturb a trial court's award if the trial judge mechanically recites he or she has computed the award with reference to *Johnson*. Since review of an award is based on an abuse of discretion standard,<sup>53</sup> the "*Johnson* clause" inserted by many of the lower courts is sufficient to ward off review.<sup>54</sup> The end result is that many judges are allowed to enter conclusory judgments as to the level of fees granted, and few of the awards have been vacated.<sup>55</sup>

While the *Johnson* criteria have been afforded some degree of consideration by most courts, many others have added and subtracted criteria to be used in computing the level of fees awards.<sup>56</sup> In *Lindy Brothers Builders, Inc. v. American Radiator and Stan-*

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49. See, e.g., *Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977), modified, 580 F.2d 748 (5th Cir. 1978) (Civil Rights Attorney's Fees Awards Act- \$127,565 award); *Johnson v. O'Brien*, 445 F. Supp. 122 (E.D. Mo. 1977) (award of \$2850); *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976)(\$10,000 awarded).

50. See *Berger*, supra note 23, at 293; COUNCIL FOR PUBLIC INTEREST LAW, supra note 5, at 321.

51. Courts have often employed a "public interest discount" rationale, citing the *pro bono* character of the cases and the obligation of practitioners to accept cases where the client is unable to pay. See, e.g., *National Council of Community Mental Health Centers v. Weinberger*, 387 F. Supp. 991 (D.D.C. 1974); COUNCIL FOR PUBLIC INTEREST LAW, supra note 5, at 321.

52. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), where the court remanded, requiring the trial court to furnish a record reflecting the considerations leading to the award. *Id.* at 720.

53. *Id.*; *Lindy Bros. Bldrs., Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976); *Weeks v. Southern Bell Tel. and Tel. Co.*, 467 F.2d 95, 97 (5th Cir. 1972).

54. See, e.g., *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977). "The district court properly bases its award on an examination of the factors in *Johnson* . . . . We find no error in its award of fees." *Id.* at 756.

55. See *Berger*, supra note 23, at 286.

56. See notes 41-43 supra and accompanying text.

*dard Sanitary Corp.*,<sup>57</sup> the Third Circuit affirmed the application of a "lodestar" concept.<sup>58</sup> The trial court computes this lodestar by multiplying the hours submitted by the attorney by the court's finding of what a reasonable hourly rate would be.<sup>59</sup> The hours submitted are subject to review by the court;<sup>60</sup> the court may also reduce the hours for such variables as the manner in which the attorney spent his time, the quality of his work, and the contingent nature of success in the action.<sup>61</sup> Thus, the award becomes almost entirely discretionary. In *Hughes v. Repko*,<sup>62</sup> the Third Circuit modified its *Lindy* standard to give the district courts the power to determine not only the number of hours the attorney devoted to the case, but also whether it was "reasonably necessary" to spend that number of hours in order to perform the services.<sup>63</sup> The burden of persuading the court of the necessity of the time spent rests with the attorney.<sup>64</sup> Unlike the *Johnson* test, *Lindy* does not reduce the award for the simplicity of the issues involved, preferring to reflect such a determination in the time-spent factor.<sup>65</sup>

The Second Circuit has decided that its lodestar test is to be calculated on the basis of multiplying the number of hours spent by the attorney by the hourly rate normally charged for similar work by attorneys of like skill in the area.<sup>66</sup> In *City of Detroit v. Grinnell Corp.*,<sup>67</sup> the court added that this lodestar may then be adjusted by less objective factors such as the "risk of litigation," complexity of the issues, and the skills of the attorney.<sup>68</sup>

In applying either the *Johnson*, *Lindy* or *Grinnell* standards, several courts have supplemented the award by mechanically adding a bonus percentage to the awarded fee.<sup>69</sup> While some judges have

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57. 540 F.2d 102 (3d Cir. 1976).

58. *Id.* at 108, citing *Lindy Bros. Bldrs., Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973).

59. 540 F.2d at 108 (3d Cir. 1976); see also *Lindy Bros. Bldrs., Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973).

60. 540 F.2d at 109.

61. *Id.* at 112-13.

62. 578 F.2d 483 (3d Cir. 1978).

63. *Id.* at 487.

64. *Id.*

65. *Id.*

66. *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977).

67. 560 F.2d 1093 (2d Cir. 1977).

68. *Id.* at 1098.

69. See, e.g., *Lindy Bros. Bldrs. v. American Radiator and Standard Sanitary Corp.*, 540

recognized the need for providing incentives for counsel to accept public-interest cases,<sup>70</sup> few if any courts coincide in their level of "bonus" to be awarded. In *Lindy* the court approved a bonus of 100%, citing the risk involved in the case and the quality of work performed by the attorneys.<sup>71</sup> In *Kiser v. Miller*,<sup>72</sup> the court added a premium of 10% in order to induce counsel to represent the public and enforce the law.<sup>73</sup> Apart from the discrepancy in motives for such incentives, awarding a bonus under the *Lindy* rationale would duplicate several of the factors enunciated in *Johnson*.<sup>74</sup> Apparently, while some factors are mandatory in one circuit, their application is discretionary in another.<sup>75</sup>

In the final analysis, the divergent methods of calculating the level of fees awards and the disparity of each of the factors employed has led to the situation where counsel is, at the onset of litigation, unsure not only of whether a fee will be awarded at all, but of the amount of the award as well. While each circuit has announced a standard to be applied in calculating a fees level, the endless variables at work in any exercise of discretion by the trial court is impossible to predict. The end result is a standard which is incapable of prior calculation by the attorney. Such a consideration must enter into counsel's decision to accept the case.

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F.2d 102, 113 (3rd Cir. 1976); *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 687-88 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), *rehearing denied*, 99 S. Ct. 231 (1978).

70. See, e.g., Richey, *Attorney's Fees: A Two-Pronged Problem*, TRIAL, Nov.-Dec. 1975, at 59, *reprinted in Hearings on the Awarding of Attorneys' Fees Before the House Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 422 (1975).

71. 540 F.2d 102, 115-16 (3rd Cir. 1976).

72. 364 F. Supp. 1311 (D.D.C. 1973), *modified on other grounds sub nom. Kiser v. Huger*, 517 F.2d 1237 (D.C. Cir. 1974).

73. 364 F. Supp. at 1318.

74. The 100% bonus affirmed in *Lindy* was on the basis of the risk of the litigation and the quality of the work of the attorneys. Such factors reflect the considerations made mandatory by *Johnson* in factors six and nine. See Berger, *supra* note 23, at 291. In *National Ass'n of Regional Medical Programs Inc. v. Weinberger*, 396 F. Supp. 842, 850-51 (D.D.C. 1975), the court awarded a 100% bonus based on factors already reflected in the amount of time spent and the normal billing rate of the attorneys. Thus, the bonus duplicated the normal award.

75. Under *Lindy*, factors accounted for in determining the eligibility for a bonus are discretionary with the court. The same factors are of required application by the *Johnson* court. See note 74 *supra*.

#### IV. The Effect of "Reasonable" Fees on Private Practitioners: The Availability of Counsel

The practice of law, like any other profession, is motivated by economic self-interest. Undeniably, the attorney who fails to generate sufficient fee-producing work will not be in practice long. Reflected in an attorney's fees level are his operational costs, costs of maintaining expertise in his field, and a reasonable profit margin.<sup>76</sup> In the context of public interest cases, an attorney who accepts such a case relying only on the promise of a fees award at the conclusion of litigation runs a substantial risk of disappointment.<sup>77</sup> The court may refuse to award fees, or the award it hands down may be woefully low. Where the latter occurs, and the award fails to cover the attorney's costs, the ultimate burden of acceptance of the public interest case will be borne by the remainder of the attorney's fee-paying clients.<sup>78</sup> The potential for conflict of interest is high.<sup>79</sup> Thus, where court-awarded fees fail to reflect the attorney's worth in the marketplace, most private lawyers will entertain second thoughts about accepting public interest cases without some definite fee arrangement in advance. In addition, where a fees award substantially exceeds the market rate for an attorney's services, the ultimate loser is the opposing party, and the results might be unnecessarily punitive.<sup>80</sup> The uncertainty with which most courts approach setting fees-awards levels might be reflected in the unwillingness of counsel to accept cases contingent on such awards.

##### A. Fee Reductions

Particularly in the application of the *Johnson*, *Lindy*, and *Grinnell* criteria, a court's first investigation will be in testing the validity and necessity of counsel-submitted hours.<sup>81</sup> It is clear that

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76. Obviously, these factors are not exclusive. See generally 1 SPEISER, *supra* note 11, at § 1:35.

77. See pt. III *supra*.

78. See Berlin, Roisman, & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675, 687-88 (1970).

79. *Id.* at 681.

80. Since the legislative purpose of most fees award statutes is to increase the availability of counsel to those otherwise unable to retain an attorney, see note 32 *supra*, a situation where a court awards an excessive fee for the purpose of punishing the opposing party would be just the type of "judicial legislating" proscribed by the Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975).

81. *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977); *Lindy Bros. Bldrs., Inc. v. Am. Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 108 (3rd Cir. 1976);

the norms by which such hours are to be tested are personal to the trial judge,<sup>82</sup> derived from hindsight in the particular case and his own past experiences. For many courts, the time sheets submitted by the attorney are not conclusive,<sup>83</sup> and for the most part, the time submitted is reduced by the court in setting the level of the fee.<sup>84</sup> Where the court reduces the attorney's compensable hours, the amount of the award is comensurately reduced.<sup>85</sup>

While assessment of compensable hours is discretionary with the court, the second step in assessing any lodestar is the computation of a "reasonable" hourly rate.<sup>86</sup> The methods by which this rate is computed diverge.<sup>87</sup> Where the hourly rate is set as a community standard,<sup>88</sup> the rate may not properly reflect the personal skills of the attorney or his dedication to the case. Where the community rate is high for such cases, incompetent counsel are rewarded.<sup>89</sup>

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

82. See, e.g., Marr v. Rife, 545 F.2d 554 (6th Cir. 1976). "[T]he judge may make an independent determination of the proper expenditure of time that is reasonably necessary for the preparation and presentation of the particular case." *Id.* at 556. See also text accompanying notes 59-63 *supra*.

83. See, e.g., Kane v. Martin Paint Stores, Inc., 439 F. Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978)(court required precise time records, including purposes for which the time was spent. Court reduced the time submitted by 10%, citing no reason); Lockheed Minority Solidarity Coalition v. Lockheed Missile and Space Co., 406 F. Supp. 828 (N.D. Cal. 1976)(required time records and identification of purposes for which the hours were spent. Court accepted a claim of 1004.5 hours, then added 20 hours).

84. See, e.g., Keyes v. School Dist. No. 1, 439 F. Supp. 393, 407-12 (D. Colo. 1977); Parker v. Matthews, 411 F. Supp. 1059, 1067 (D.D.C. 1976); Kiser v. Miller, 364 F. Supp. 1311, 1318 (D.D.C. 1973), *modified on other grounds sub nom.* Kiser v. Huges, 517 F.2d 1237 (D.C. Cir. 1974).

85. Where the calculation of the fee is based on a "lodestar," see notes 58 & 59 *supra* and accompanying text, reduction in the number of compensable hours will reduce the ultimate award.

86. See note 59 *supra*.

87. Some circuits employ the attorney's customary hourly rate for similar cases; others use a community standard. See note 66 *supra*. The majority of courts leave the hourly rate to the trial court's discretion. See, e.g., NAACP v. Bell, 448 F. Supp. 1164 (D.D.C. 1978) (\$100 per hour based on experience and reputation of the attorneys, and the novelty of the case); Morehead v. Lewis, 432 F. Supp. 674 (N.D. Ill. 1977) (court will not accept attorney's own accounting for the value of his services, but will exercise its own knowledge and experience); Goff v. Texas Instruments, Inc., 429 F. Supp. 973 (N.D. Tex. 1977) (hourly rate set at \$50, based on what a "reasonably prudent local attorney proceeding to dispose of the case by preliminary motion" might have charged); Lund v. Affleck, 442 F. Supp. 1109 (D.R.I. 1977)(\$60 hourly rate).

88. See, e.g., City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977).

89. For a contrary statement see notes 38, 61 & 68 *supra* and accompanying text. The courts, under the *Johnson*, *Grinnell*, and *Lindy* tests, are allowed to reduce the hourly rate,

Conceivably, an attorney handling a public interest case which has national effects might receive only a relatively low local rate. Courts have not enunciated how to deal with litigation which is unique, and has no local antecedent. In any case, where the amount of a fee is set by the court's discretion, most of the cases disagree as to the proper fee level.<sup>90</sup>

Most cases hold that the hourly rate is reduced depending upon how the attorney spent his time. While courtroom time nets a higher rate, time spent on the telephone or on administrative tasks relevant to the case is compensated at lower levels.<sup>91</sup> The courts usually do not explain how this often necessary time expenditure is any less an effective representation of the client. Courts will also strain to reduce the hourly rate for less experienced attorneys.<sup>92</sup> In one case, the court set a \$50 per hour rate for one attorney and a \$35 per hour rate for an attorney who, though having as much experience as his senior associate in the subject matter of the litigation, was paid \$15 per hour less because he had been admitted to the bar only two years earlier. Since neither of the two had ever tried a Title VII case before, arguably both should have received the same hourly rate. The court admitted its view to be wholly subjective.<sup>93</sup>

In many cases where the hourly rate is established by community standard, the courts might still impose a maximum ceiling for the rate.<sup>94</sup> Few courts cite reasons for doing so. One court went so far as to conclude that only in extreme circumstances would the hourly rate exceed two-thirds of the average billing rate of attorneys doing

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for example, where the case is not difficult, or increase the rate in order to reward counsel for outstanding work. The problem with adjusting the rate upward in order to reward counsel is that the opposing party or an unrepresented class member is forced to pay the reward.

90. See, e.g., *Willett v. Chester Water Auth.*, 447 F. Supp. 967 (E.D. Pa. 1978)(\$50 per hour for senior attorney, \$30 for associate); *Hartmann v. Gaffney*, 446 F. Supp. 809 (D. Minn. 1977)(\$60 per hour); *Kulkarni v. Nyquist*, 446 F. Supp. 1274 (N.D.N.Y. 1977)(\$40 per hour); *Adams v. Hempstead Heath Co.*, 426 F. Supp. 1141 (E.D.N.Y. 1977)(\$20-\$30 per hour); *Schmidt v. Schubert*, 433 F. Supp. 1115 (E.D. Wis. 1977)(\$45 per hour); *Latham v. Chandler*, 406 F. Supp. 745 (N.D. Miss. 1976)(\$20-\$40 per hour); *Spero v. Abbott Laboratories*, 396 F. Supp. 312 (N.D. Ill. 1975)(\$5 per hour); See also *Berger*, *supra* note 23, at 290.

91. See, e.g., *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *McCormick v. Attala County Bd. of Educ.*, 424 F. Supp. 1382 (N.D. Miss. 1976); *Jordan v. Fusari*, 422 F. Supp. 1179 (D. Conn. 1975).

92. See, e.g., cases cited at note 90 *supra*.

93. *Lockheed Minority Solidarity Coalition v. Lockheed Missile and Space Co.*, 406 F. Supp. 828, 834 (N.D. Cal. 1976).

94. See, e.g., *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978)(\$100 per hour maximum).



similar work.<sup>95</sup>

Few of the courts consider the length of the litigation, or the fact that counsel fees have been held in abeyance pending conclusion of the case in setting the level of fees.<sup>96</sup> Thus, the attorney is forced to expend his time and absorb his overhead without benefit of income from the case. Still further, few courts recognize that the length of the litigation creates a situation whereby inflation reduces the award.<sup>97</sup>

Not only is the length of the litigation itself a significant problem, but in many cases courts will not allow attorneys' fees for the purpose of litigating the issue of the amount of the award.<sup>98</sup> At times, argument over that issue alone can be both protracted and expensive.<sup>99</sup>

The ultimate conclusion that may be drawn from the disparate awards of counsel fees is that an attorney, upon accepting a case where his only expectation of fees depends on a court award, can anticipate that the award will probably not reflect the market rate for his services. The obvious effect of this trend is that a variety of private practitioners will be precluded from accepting public interest cases, or will simply shun such work.<sup>100</sup>

## B. Compelled Scrutiny of Attorneys' Records

A second factor capable of motivating attorneys away from public

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95. *Commonwealth v. O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977), cited with approval in *White v. Beal*, 447 F. Supp. 788 (E.D. Pa. 1978).

96. See, e.g., cases cited at note 40 *supra*.

97. See cases cited at note 40 *supra*. But see *Lockheed Minority Solidarity Coalition v. Lockheed Missile and Space Co.*, 406 F. Supp. at 834. The court did consider the postponement of the fees award and the effect of inflation on the amount in assessing the fee awarded.

98. This is particularly true where the fees are granted under the common fund or common benefit exceptions to the American rule. See pt. II *supra*. The rationale for this withholding is that the litigation of fees levels does not benefit the class, and hence class members should not be made to pay for the extra labor. See, e.g., *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); *City of Detroit v. Grinnell Co.*, 560 F.2d 1093 (2d Cir. 1977); but see *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977).

99. See, e.g., *Lindy Bros. Bldrs., Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976). Following settlement of the private antitrust action, the attorneys applied to the district court for a fees award. The court granted the fees award, an appeal was taken by the other party, and the court of appeals vacated and remanded. The district court entered a new award, and a second appeal was taken. The court of appeals once again vacated and remanded. *Id.* at 102.

100. See *Court Ruling On Fees Worries Public-Interest Lawyers*, *New York Times*, Nov. 14, 1978, at A25, col. 1 [hereinafter cited as *Court Ruling*].

interest cases is the fact that courts will base their conclusions as to reasonable expenditures of time and hourly rates on the records maintained by counsel. In most cases, this requires the maintenance of a timekeeping system capable of judicial scrutiny.<sup>101</sup> Some courts have required precise records, including the purposes for which the attorney's time was spent.<sup>102</sup> Others accept an affidavit of counsel as verification of time spent.<sup>103</sup> Nonetheless, in the event the attorney fails to keep sufficient records, the doubts as to time will be resolved against him—often an expensive proposition. Other courts freely reconstruct time records.<sup>104</sup>

Regardless of how many hours the court accepts as a valid expenditure of time, the figure may be reduced by the court, in its discretion, where it determines the time was spent unnecessarily.<sup>105</sup> In one case, the trial court employed its own estimate of the time required to analyze, research and draft documents on a specific point of law, reducing a documented 90.75 hour request to a final award of thirty hours.<sup>106</sup>

In terms of assessing an hourly rate, those courts employing a system whereby counsel's customary fees for the same or similar services are used to determine the hourly rate,<sup>107</sup> the court may compel production of pertinent financial records, financial statements, and fee structures.<sup>108</sup> The effect of compelled disclosure of such documents might be a reluctance of many practitioners and commercial firms to accept public interest cases. This is especially

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101. See, e.g., *King v. Greenblatt*, 560 F.2d 1024 (1st Cir. 1977).

102. See, e.g., *In re Meade Land & Dev. Co.*, 527 F.2d 280, 283-84 (3d Cir. 1975).

103. See, e.g., *Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977), *modified on other grounds*, 580 F.2d 748 (5th Cir. 1978).

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

105. See notes 62 & 63 *supra* and accompanying text.

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

107. See generally *Rodriguez v. Taylor*, 569 F.2d 1231, 1247 (3d Cir. 1977); *Lindy Bros. Bldrs. Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1977).

108. See, e.g., *Stastny v. Southern Bell Tel. & Tel. Co.*, 77 F.R.D. 662 (W.D.N.C. 1978) which compelled disclosure of billing rates and fees charged by counsel, including fees negotiated with opposing parties. The information required also included names of attorneys, number of hours and the billing rates for each lawyer and paralegal employee. The court also required a statement whether counsel intended in the future to adjust their hourly rates upward because of their success in the action.

For a general discussion of methods of maintaining time records and financial statements in anticipation of requests for fees awards, see Belton, *Feeing the Unfee'd Lawyer: Attorneys' Fees in Civil Rights Litigation*, 5 LITIGATION, No. 2, at 32 (Winter 1979).

true where such cases represent only a small percentage of the firm's caseload, yet would require production of public and non-public interest case fee information.<sup>109</sup> Disclosure of such information would make it a matter of record for review by the appellate courts,<sup>110</sup> and could arguably make such information susceptible of discovery by opposing parties.<sup>111</sup> In essence, such information would be confidential in name only.

### C. Judicial Discretion in Assessing Attorney Performance

Perhaps the most distasteful problem for an attorney is to have the quality of his work judged subjectively by a court. The *Johnson* factors which require courts to set fees levels with reference to the skill of the attorney compel a court to consider counsel's performance throughout the litigation.<sup>112</sup> Furthermore, such findings become a matter of record for review.<sup>113</sup> Essentially the court is directed to assess retrospectively not only the competence of the attorney in general, but the effectiveness of his advocacy and the tactical decisions he has made. Theoretically, an error which would normally have little significance might be underscored by a court which takes exceptional notice of such misfires. The amount of the fee would be thereby reduced.

A conflict between the court and counsel might result under a provision allowing court appraisal of attorney performance. Under Canon Seven of the Code of Professional Responsibility,<sup>114</sup> the duty of the lawyer is to represent his client zealously. Clearly, a court applying the vision of hindsight might view an action of counsel as extraneous, while in fact the attorney viewed his action as attempting to provide for every contingency. Essentially, the attorney's zeal

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109. See *Court Ruling*, *supra* note 100.

110. Since trial courts are required to base their awards on record evidence, time and financial records submitted by counsel presumably become a part of the trial record. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974).

111. *Stastny v. Southern Bell Tel. & Tel. Co.*, 77 F.R.D. 662 (W.D.N.C. 1978), discussed at note 108 *supra*, was an order compelling discovery.

112. *Johnson* factors three and nine require the trial court to assess whether the attorney has performed with the necessary skill, as well as judge his ability overall. See note 38 *supra* and accompanying text. See also *Berger*, *supra* note 23 at 294.

113. See note 52 *supra*. The court in *Johnson* clearly stated that the lower court must elucidate the factors which "contributed to the decision and upon which it was based." 488 F.2d at 717. If the trial court bases its award on the ability of counsel, per *Johnson* factor number nine, it must so state. *Id.*

114. ABA CODE OF PROF. RESP. EC 7-1.

would be penalized. The court could interpret attorney thoroughness as redundancy or as an unnecessary expenditure of time. The ethical duty to press a client's interests conscientiously may be met with a lower price, at the court's discretion.<sup>115</sup> Thus, the impression an advocate makes before a court cannot be discounted as a significant factor in the assessment of fees.<sup>116</sup> Obviously, such an uneasy situation will tend to direct counsel away from cases which entail just such a subjective investigation.<sup>117</sup> No attorney should be forced to choose between his client and the value of his services.

### V. Reduced Fees Awards and the Non-Profit Public Interest Law Centers

The heart of the world of public interest law is the non-profit law center.<sup>118</sup> The economic basis upon which most of these centers operate is varied. Typically, the operating capital is provided by private charitable foundations, contributions from the private bar and the general public, citizens groups, government programs, reduced client-paid fees, and court-awarded attorneys' fees.<sup>119</sup> A somewhat smaller segment of public interest activity is assumed by the private public-interest law firm, which relies almost entirely on reduced client-paid fees and court-awarded fees for its funding.<sup>120</sup> Lastly, the private commercial bar contributes a portion of public interest representation, either gratuitously or at significantly reduced rates as *pro bono publico* activity, or at normal rates assumed by the client or accepted with the promise of court-awarded fees.<sup>121</sup> As noted earlier, the inconsistency of courts in awarding fees threatens the willingness of private practitioners to assume cases with a fees award as the sole means of payment.<sup>122</sup> Similarly, inconsistencies in

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115. See Berger, *supra* note 23, at 294.

116. *Id.*

117. See F.D. Rich v. Industrial Lumber Co., 417 U.S. 116 (1974). The Court rejected an abandonment of the American rule due to a concern that the earnings of attorneys would come "from the flow of the pen of the judge." 417 U.S. at 129. The potential for abuse in such a system of judicial discretion is high, as is the potential loss of public confidence in the legal system, and of lawyer confidence in the courts.

118. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 79.

119. B. WEISBROD, J. HANDLER, & N. KOMESAR, PUBLIC INTEREST LAW 534, (1978) (hereinafter cited as WEISBROD).

120. Berlin, Roisman, & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675, 680 (1970); COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 138.

121. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 300.

122. See pt. IV *supra*.

awarding fees affects the economic stability of private public-interest firms as well.<sup>123</sup> Many such firms are on precarious financial ground now,<sup>124</sup> and a situation whereby market fees are not awarded does not aid this situation.

In contrast, the non-profit law center has a sufficient economic base such that lower-than-market fees will not lead to its ultimate financial demise.<sup>125</sup> While it is true the non-profit center is in need of continued funding, the absence of higher court-awarded fees is only one factor contributing to its economic distress. With a broader economic base than private firms, the non-profit center can survive with reduced court-awarded fees.<sup>126</sup> Nevertheless, both private public interest activities and public non-profit centers would benefit from consistently increased court awards of attorneys' fees.

A second advantage the non-profit center has which reduces its expenses, vis-a-vis the private sector, is its ability to qualify for tax-exempt status under the Internal Revenue Code.<sup>127</sup> A non-profit center qualifies for tax-exempt status where it derives no more than one-half its total costs from court or agency awarded fees, is controlled by a board "representative of the public interest", and is not involved in any lobbying efforts or attempts to influence legislation.<sup>128</sup> Where the center qualifies, the effect on funding can be substantial. Court-awarded fees become a substantial item of tax-free income, and can be supplemented by the other resources mentioned earlier.<sup>129</sup> Clearly, no private firm can qualify for such treatment.<sup>130</sup>

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123. Since the economic bases upon which the private public interest firms operate are essentially those of reduced client-paid fees and court awards, the inability to predict the level of a court-awarded fee will have much the same effect on the public interest firm as it does on the commercial firm. See note 120 *supra* and accompanying text.

124. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 137.

125. See note 119 *supra*.

126. This, of course, assumes that the other funding methods increase. For a discussion of the future prospect for funding, see COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 219-328. See also Halpern, *Public Interest Law: Its Past and Future*, 58 *JUD.* 119, 125 (Oct. 1974) [hereinafter cited as Halpern].

127. I.R.C. § 501(c)(3).

128. FORD FOUNDATION & ABA SPEC. COMM. ON PUB. INTEREST PRACTICE, *PUBLIC INTEREST LAW: FIVE YEARS LATER* 33 (1976).

129. See note 119 *supra*.

130. Since private firms rely heavily on court-awarded fees, they would not qualify for tax-exempt status where their budgets reflect over 50% of income from fees. Acceptance of fees from clients, even though low, would be an automatic disqualification as well. See note 128 *supra* and accompanying text.

The end result of this comparison is that the non-profit public interest center, because of its broader funding base, can absorb decreased court-awarded attorneys' fees.<sup>131</sup> Since the primary reliance of the private bar is on marketplace fees awards in public interest litigation, an award which fails to reflect such levels seriously jeopardizes the ability of private counsel to accept such cases, especially where the award is not sufficient to defray expenses or provide the attorney with his customary salary.

## VI. Pro Bono Services: Taking up the Slack?

Most commentators agree that, assuming the private bar can be lured into public interest practice by court-awarded fees, the need for lawyers to assume public interest causes will still not be fully met.<sup>132</sup> Growth in the number of attorneys willing to accept such cases must therefore come from extensions of *pro bono* activities. However, such an outlook reflects more desire than reality.<sup>133</sup> As a 1975 study indicates,<sup>134</sup> the private bar's contribution to public interest practice comes mainly from sole practitioners, includes little or no litigation, and benefits small groups of individuals rather than large segments of society.<sup>135</sup> Estimates are that over 60% of private attorneys spend less than 5% of their annual billable hours in public interest or *pro bono* work.<sup>136</sup> Most of the *pro bono* work done for individuals is most frequently in the areas of matrimonial or criminal law.<sup>137</sup> Few lawyers contribute work in the areas of welfare, employment, poverty, social security, mental health, or health law-areas which normally are considered public interest.<sup>138</sup> The conclusion drawn by the study is that the overwhelming majority of *pro*

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131. As one commentator noted: "At present, the funding of only Legal Services appears secure, and one price for this security has been curtailment of the types of cases the program can take." Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM. B. FOUNDATION RES. J. 83, 104 (1978).

132. "The number of firms that could at best be supported by all the sources and methods projected in this paper still falls far short of the number of practicing lawyers required to meet the needs that the [public interest] work of the past five years has helped to reveal . . . ." FORD FOUNDATION & ABA SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, PUBLIC INTEREST LAW: FIVE YEARS LATER 38 (1976).

133. See Halpern, *supra* note 126, at 126.

134. Handler, Hollingsworth, Erlanger, & Ladinsky, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A.J. 1388 (1975).

135. *Id.* at 1394.

136. *Id.* at 1389.

137. *Id.* at 1390.

138. *Id.*

*bono* work is not contributed to aid groups or individuals seeking to change the status quo or enforce public rights.<sup>139</sup>

Assuming this trend continues, the hope that the *pro bono* activities of the private bar can assume some of the public interest workload created by the unwillingness of private counsel to accept cases on a potential fees-award basis is wishful thinking.<sup>140</sup> A significant increase in contributed time to public interest causes is unlikely.<sup>141</sup>

## VII. Conclusion

Since both the continued growth of public interest law firms and increased involvement of the private commercial bar are essential to the adequate representation of all segments of society,<sup>142</sup> the courts should seek to construct a system whereby attorneys' fees reflect a fair marketplace<sup>143</sup> fee with a minimum of inquisition into the fee structures and time records of attorneys. Until now, the courts have employed a system whereby little if any consideration has been given to the overhead an attorney must absorb in the conduct of a private practice,<sup>144</sup> or the fact that most litigation in which an award of fees is granted is both lengthy and non-generative of income during the term of trial.<sup>145</sup> Counsel might wait up to three years for the litigation to conclude, and subsequently spend a year arguing the amount of the fees award.

The situation being created is one in which the private commercial bar, having chosen to represent a client who otherwise could not pay for legal services, is faced with the prospects of reduced fees, court investigation of confidential records, and judicial assessment of counsel's trial and pre-trial performance. It can only be expected such cases will be looked upon distastefully by most private practitioners. The result must be that private public interest firms and non-profit centers will be left to absorb these cases, if accepted at all. Given the turbulent financial situation of many public interest

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139. *Id.* at 1391.

140. Halpern, *supra* note 126, at 126.

141. See generally F. MARKS, K. LESWING, & B. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* (1972) [hereinafter cited as MARKS].

142. See Halpern, *supra* note 126, at 125. "Abandonment of public interest practice . . . would force the profession to turn its back on even the pretence that an adversary process is basic to justice . . ." *Id.* See also 65 A.B.A.J. 332 (1979).

143. Most commentators agree that the fees should be set at marketplace levels. See, e.g., COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 5, at 321.

144. See note 76 *supra* and accompanying text.

145. See notes 97 & 99 *supra* and accompanying text.

firms, such a result would be intolerable. The private bar must be given the incentives to undertake public interest representation.<sup>146</sup> A higher level of court-awarded fees would provide this incentive, while adding significant funds to the non-profit centers and public interest firms. Such an investment would be reflected in the ability of larger segments of the public to obtain legal representation. The unfortunate effect of the status quo is that the courts are driving the private bar away from the public interest forum, and placing a heavy burden on the public interest bar to solicit and obtain increased funding in order to represent an increased number of clients.

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146. "Economic inducement, of course, would be the most palatable way for the bar. It is also a way which would cause the least dislocation to the prevailing system." MARKS, *supra* note 141, at 284.



