(4) the financial position of the defendant;
(5) the amount of compensatory damages;
(6) the costs of litigation;
(7) potential criminal sanctions; and
(8) other civil actions against the defendant based on the same conduct.[2]

Consideration of these factors should result in a proper award. Consideration of the wealth of the Defendant is significant because if the damages can be paid without feeling any discomfort, the award would not have any deterrent effect.[3] The jury should consider the character of the act because there is direct relation between the amount of punitive damages awarded and the degree of malice proved. "The very purpose of punitive damages is to punish the defendant for the doing of a malicious act, and to set an example that will deter similar conduct in the future."[4] Finally the jury should consider the extent of the plaintiff's injury because even a malicious act does not justify a great award for a small injury.[5]

[1] Restatement (2d), Torts, §908 (2) (1979).

[2] Mabor & Roberts, Punitive Damages: Toward a Principaled Approach, 31 Hastings LJ (1980).

[3] Punitive Damages L & Prac Ch 5, p 105.

[4] **Missouri.** Holcroft v. Missouri-Kansas-Texas R. Co., 607 SW2d 158 (Mo App 1980).

[5] **California.** Neal v. Farmer's Ins. Exchange, 21 Cal 3d 910, 148 Cal Rptr 389, 582 P2d 980 (1978).

III. ATTORNEYS FEES IN EMPLOYMENT CASES

By James B. Helmer, Jr. and Ann Lugbill *

§8:22. Overview.

An employee or former employee who has need of legal counsel usually is not in a position to pay private attorneys on an hourly basis for services, unless the client is either extremely wealthy or only a few hours of attorneys' time are required. For

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those clients who are able to pay on an hourly rate, much of this subdivision will not apply.

Under the "American Rule," a party to a lawsuit generally bears its own attorneys' fees unless there is express statutory authorization to the contrary.[1] As a reaction to the Aleyeska decision, the Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976,[2] which authorizes courts to award reasonable attorneys fees to prevailing parties in civil rights litigation.

By statute, employees whose employment-related claims or lawsuits are successful are entitled to attorneys fees in many instances. It is beyond the scope of this work to list every attorneys' fees provision that could possibly be applicable. However, in a United States Supreme Court case involving attorneys fees, Justice Brennan complied a list of most federal statutes which authorize attorneys' fees.[3] Among the statutes which are most likely to involve discharged employees are the Freedom of Information Act, The Civil Rights Attorney's Fee Awards Act of 1976, The Civil Rights Act of 1964, The Age Discrimination in Employment Act, The Equal Access to Justice Act, Social Security Act, The Multiemployer Pension Plan Amendments Act of 1980, and the Employee Retirement Income Security Act of 1974. State statutes regulating the employment relationship may also contain statutory provisions allowing for the recovery of attorneys fees and costs. Where a specific attorneys fee statute or administrative regulation is applicable, counsel should inform themselves of the particular provisions of such provisions.

Counsel who have carefully prepared a case for trial, who have been successful before a judge or jury, and who have obtained good results for their client, should not cheat themselves, their clients, or the court by taking short cuts in preparing a fee application. It is the court's obligation, as directed by Congress and other legislative bodies, to review the fee application and to ensure that a fully compensable fee is awarded. Counsel for the employee has a responsibility to assist the court in reaching a fair and reasoned judgment. That decision must be based upon detailed information, legible data, pertinent law, affidavits of informed counsel, and charts showing the total amount of attorneys' hours, fees, and costs. Unless

counsel have met their obligations in presenting a comprehensive and understandable fee application to the court, counsel should not be heard to complain when fee requests are reduced. In those cases where fees are unnecessarily, unfairly, or unreasonably reduced, a thorough and documented fee application is the primary resource upon which counsel must rely in appealing an improper award. Unless the applicant's counsel bears his burden of presenting documented fee petitions to the trier of fact, the reviewing court may justifiably refuse to alter the original court's decision.

While all of the above may, at the outset, appear quite burdensome, once counsel devises a format to be used in one case, it can be adopted and applied in virtually all subsequent cases. Time spent preparing the fee application is generally compensable. Thus, these succeeding fee applications should take far less time and require far less effort than the first one prepared. As more offices are equipped with computerized word processing equipment, much of the record keeping and accounting functions of a fee application can be handled by the attorneys' paraprofessional staff, with only review required by the supervising attorney.

Doing it right is worth it. Beginning with a written fee agreement with the client to presenting a concise exposition of the fee application by way of oral argument and testimony at a hearing, counsel is doing everything possible to ensure a maximum fee award. Fully compensatory fee awards have a far-reaching impact on future cases. Defendants who are required to pay fully compensatory fees will perhaps do more to avoid violations of the law in the future and such awards will encourage other attorneys to handle cases on a contingent fee basis which might otherwise go unresolved because of the client's inability to pay an attorneys' hourly fees.

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[1] **United States.** Alyeska Pipeline Service Co. v. Wilderness Society, 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612 (1975).

[2] 42 USC § 1988.

[3] **United States.** Marek v. Chesny, — US —, 87 L Ed 2d 1, 105 S Ct 3012 (1985).

§ 8:23. Written Fee Agreement.

Regardless of whether representation is on an hourly basis, or on a contingent fee basis, counsel should enter into a written,

detailed fee agreement with the client. The fee agreement should specify the obligations and responsibilities of both the attorney and the client.[1] For example, the attorney may agree to represent the client in certain specific matters related to the client's employment or former employment as well as to represent the client in collateral proceedings, such as social security disability hearings, unemployment compensation hearings, etc. In addition, the client promises to assist with the case and to appear for depositions, court hearings, etc. as counsel may require. Further, the client agrees to pay the costs of the litigation in a specified period of time from the date of billing and the client is advised as to approximate estimates of the costs that will be expended on his behalf.

The fee agreement should envision both a settlement without involvement of the court and prior to the award of attorneys fees and a posttrial settlement after attorneys fees have been awarded by the court, as well as a judgment and attorneys fee award. The fee agreement should indicate whether any retainers paid are to be refunded or are an offset against attorneys fees later awarded or received by way of settlement. The agreement should specify that counsel does not necessarily agree to represent the client in an appeal of this matter, but that it is anticipated that a new fee agreement will be negotiated for representation of the matter on appeal.

In most jurisdictions, even where a fee award may be made by statute, there is no ethical or legal obligation for counsel to limit fees to the amount of the fee award.[2] If a comprehensive fee agreement has been negotiated with the client, the attorneys fees may be a percentage of the total recovery. Depending on the case, a contingent arrangement from 25% to 50% may be appropriate. In some cases, a combination hourly rate and contingency agreement may reduce the risk for both attorney and client. Whatever the fee arrangement, it is essential that the client be given a copy of the fee agreement at the outset of the attorney-client relationship and that, as appropriate, the terms of this agreement be reviewed with the client to avoid misunderstandings.

[1] For sample fee agreements, see Ch 10.

[2] **United States.** The majority rule is set forth in Hamner v. Rios, 769 F2d 1404 (CA9, 1985); Sullivan v. Crown Paper Board Co., 719 F2d 667 (CA3, 1983); Pharr v. Housing Authority of City of Prichard, Alabama, 704 F2d 1216 (CA11, 1983).

A contrary view prevails in the Tenth Circuit. Cooper v. Singer, 719 F2d 1496 (CA10, 1983).

§ 8:24. Statutory Attorneys' Fees Awards.

While not explicitly applicable in all cases, the standards for attorneys' fees in civil right cases enunciated by the United States Supreme Court in two recent decisions are the leading cases regarding attorneys' fees.[1] Generally, each of the Federal Circuit Courts of Appeal have leading cases which govern the award of attorneys' fees in their jurisdictions.[2]

The Supreme Court's decision in Blum v. Stenson, indicates that the beginning point in determining a reasonable fee is the number of hours reasonably expended and the reasonable hourly rate for the attorneys' services provided.[3] The best and most reliable method for setting forth to the Court the number of reasonable hours expended is a description of the services provided by attorney, date, type of services, and amount of time expended.[4] This information should be based upon the original, contemporaneous, detailed time records. Any attorney who submits a sloppy application or attempts to reconstruct hours expended runs the risk of having substantial portions of his fee request denied.[5] The reasonable hourly rates for the attorneys' services provided are determined by a number of factors, including prevailing rates in the market place, the experience and skill of counsel, the hourly rates charged to noncontingent clients for similar services, etc.

Factors which a court may also consider significant in determining whether the number of hours is reasonable and whether the hourly rates requested are reasonable include the following: the total number of hours expended, the number of hours expended by opposing counsel, the ratio between more experienced and less experienced counsel so that the request is not top-heavy with the highest hourly rate, the amount of duplication or reduction of duplication made by counsel, supervision of litigation and delegation of tasks, complexity of litigation, fee awards in prior cases involving the same counsel,

fee awards in similar or contemporaneous cases pending in the district.[6]

Counsel should also be aware that hours expended on administrative proceedings[7] and state law issues[8] can sometimes be compensable pursuant to a federal statute authorizing awards of attorneys fee. It is possible to recover for all time expended on a partially successful case when the unsuccessful issues are not frivolous and overlap with the successful issues so that work performed on the unsuccessful issues is relevant to both.[9] The courts have also recognized that hours expended on the preparation of petitions for attorneys' fees awards,[10] hours of paralegals and law clerks[11] and hours expended on appeals[12] can be compensable.

Where a defendant contests the hours expended or the hourly rates requested, the defendant's counsel's hourly rates and hours expended are, therefore, pertinent and discoverable.[13] Even where the employee's attorneys spend more time than that of opposing counsel, reasonable justifications for this difference can be made, including the amount of time spent in discovery and preparing for depositions, that the employee was successful in the litigation and the opposing party was not, and that the employer's counsel had the assistance of the employer's in-house legal staff.

In addition to the time records and billing records of opposing counsel, the opinions of other attorneys as to whether the time expended and the hourly rates requested are reasonable can be obtained. Such counsel should make themselves familiar with the record and with the qualifications of counsel requesting fees. Their opinions can be presented by way of an affidavit or sworn testimony, or both.

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[1] Blum v. Stenson, 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541 (1984); Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983).

[2] **United States.** See, e.g., Northcross v. Board of Education of Memphis City Schools, 611 F2d 624 (CA6, 1979), cert den 447 US 911 (1980); Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F2d 161 (CA3, 1973) and 540 F2d 102, 110 (CA3, 1976); Johnson v. Georgia Highway Exp., Inc., 488 F2d 714 (CA5, 1974).

[3] Blum v. Stenson, 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541 (1984).

[4] **United States.** In Hensley v. Eckerhart, note 1, supra, the United States Supreme Court stated that a fee applicant should "maintain billing time

records in a manner that will enable a reviewing court to identify distinct claims." 461 US at 437.

[5] **United States.** Silberman v. Bogle, 683 F2d 62, 66 (CA3, 1982); Bier v. Fleming, 538 F Supp 437, 450 (ND Ohio, 1981).

[6] **United States.** Webb v. Board of Education of Dyer County, Tennessee, 471 US —, 85 L Ed 2d 233, 107 S Ct 1923 (1985); New York Gaslight Club, Inc. v. Carey, 447 US 54, 64 L Ed 2d 723, 100 S Ct 2024 (1980).

[7] **United States.** Maher v. Gagne, 448 US 122, 132–133, n 15, 65 L Ed 2d 653, 100 S Ct 2570 (1980).

In North Carolina Dept. of Transportation v. Crest Street Community Council, No. 85–767 42 FEP 177 (1986), the United States Supreme Court held that 42 USC § 1988 authorizes awards of attorneys in court actions but not for prevailing in administrative proceedings where there is no subsequent law suit. The case involved an action to enforce Title VI of the 1964 Civil Rights Act and would apply to other civil rights acts covered by § 1988, such as 42 USC §§ 1981, 1983 and 1985.

[8] **United States.** Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983).

[9] **United States.** City of Riverside v. Rivera, 477 US —, 91 L Ed 2d 466, 106 S Ct 2686 (June 27, 1986); Johnson v. Georgia Highway Exp., Inc., 488 F2d 714, 717–719 (CA5, 1974), cited in S Rep No. 1011, 94th Cong, 2d Sess 6 (1976) and HR Rep No. 1558, 94th Cong, 2d Sess 8 (1976).

[10] **United States.** Jones v. MacMillan Bloedel Containers, Inc., 685 F2d 236, 239 (CA8, 1982); Copeland v. Marshall, 641 F2d 880 (CA DC, 1980); Bond v. Stanton, 630 F2d 1231, 1235 (CA7, 1980); Love v. Mayor, City of Cheyenne, Wyoming, 620 F2d 235 (CA10, 1980); Northcross v. Board of Education of Memphis City Schools, 611 F2d 624, 637 (CA6, 1979), cert den 447 US 911 (1980); Weisenberger v. Huecker, 593 F2d 49 (CA6, 1979), cert den 444 US 880 (1979); Lund v. Affleck, 587 F2d 75, 77 (CA1, 1978).

[11] **United States.** Suzuki v. Yuen, 678 F2d 761 (CA9, 1982); Lamphere v. Brown University, 610 F2d 46 (CA1, 1979); Harceg v. Brown, 536 F Supp 125 (ND Ill, 1982); Berman v. Schweiker, 531 F Supp 1149 (ND Ill, 1982); Municipal Authority of Town of Bloomsburg v. Commonwealth of Pennsylvania, 527 F Supp 982 (MD, Pa, 1981); McBroom v. Western Elec. Co., Inc., 526 F Supp 831 (MD NC, 1981); In re Equity Funding Corp. of America Securities Litigation, 438 F Supp 1303 (CD Cal, 1977).

[12] **United States.** Chrapliwy v. Uniroyal, Inc., 670 F2d 760 (CA7, 1982), cert den 461 US 956 (1983); Johnson v. State of Mississippi, 606 F2d 635 (CA5, 1979); Lund v. Affleck, 587 F2d 75 (CA1, 1978).

[13] **United States.** See, Mitroff v. Xomox Corp., 38 EPD ¶35,654 (SD Ohio, 1985), revd on other grounds — F2d — (CA6, 1986); Blowers v. Lawyers Cooperative Pub. Co., Inc., 526 F Supp 1324, 1327 (WD NY, 1981); Naismith v. Professional Golfers Ass'n., 85 FRD 552, 563–564 (ND Ga, 1979); Stastny v. Southern Bell Tel. & Tel. Co., 77 FRD 662, 663–664 (WD NC, 1978).

§ 8:25. Factors Determining Fee.

Each of the various courts of appeal and, to some extent, the state courts, have a list of factors to be considered in determining an appropriate fee award. Generally, the factors include many or all of the following considerations:

(1) the lodestar (hourly rate times hours expended);
(2) professional skill and standing of the counsel for both parties;
(3) prevailing market place rates;
(4) the results obtained and benefits conferred upon the prevailing party;
(5) contingent nature of representation;
(6) risk of not being paid;
(7) complexity of litigation;
(8) litigation in a developing area of the law;
(9) litigation on strongly disputed facts;
(10) preclusion from handling other matters;
(11) unpopularity of the lawsuit;
(12) public interest in awarding fees that will encourage other attorneys to represent parties in similar litigation;
(13) the novelty and difficulty of the questions;
(14) the customary fee;
(15) time limitations imposed by the client and circumstances;
(16) the nature and length and professional relationship with the client; and
(17) awards in similar cases.

In two leading cases, the United States Supreme Court determined that the results obtained and the reasonable number of hours spent times a reasonable hourly rate are the most important factors to consider in setting a reasonable attorney fee in civil rights case.[1] Nonetheless, the other above factors are all likely to be considered in some way by the Court in ruling upon a fee application.

In another decision[2] the United States Supreme Court held that the amount of damages recovered by a successful plaintiff is relevant but only one of the many factors a court should consider in calculating an award of attorneys' fees. Thus, the United States Supreme Court held that a reasonable attorney

fee does not have to be proportionate to the amount of damages recovered.

In addition to the above factors, the United States Supreme Court has cautioned successful counsel to exercise "billing judgment" in calculating the proper amount of fees to request:

> "Counsel for a prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission."[3]

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[1] **United States.** Blum v. Stenson, 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541 (1984); Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983).

[2] Riverside v. Rivera, 477 US —, 91 L Ed 2d 466, 106 S Ct 2686, 54 USLW 4849 (1986) (affirming award of attorneys' fees in excess of $245,000 despite fact that plaintiffs only recovered $33,350).

[3] Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983).

§ 8:26. Upward Adjustments.

The United States Supreme Court has held that the sum of the reasonable hourly rate times the reasonable number of hours is presumed to be a reasonable fee,[1] and that overall quality of performance ordinarily should not be used to adjust the lodestar.[2] Nonetheless, once the initial determination of reasonable hours of reasonable hourly rates has been made to arrive at a "lodestar," counsel should endeavor to request an upward adjustment above the base rate in appropriate cases. Generally, in nonstatutory common fund (class action) cases, the upward adjustment may be several times the lodestar. In statutory attorneys fees cases, however, the United States Supreme Court has indicated that upward adjustments are appropriate where counsel has achieved "exceptional success."[3] Secondly, an upward adjustment is appropriate when the quality of services rendered was superior in light of the normal hourly rates charged.[4] Thirdly, the United States Supreme Court has indicated that attorneys fees awards may be upwardly adjusted to compensate counsel for the risk that services would go uncompensated in the event that the action was not successful.[5]

The issue of upward adjustments is now pending before the United States Supreme Court.[6]

The court reviewing a fee petition must have documentation to justify an upward adjustment. Both counsel making the application for fees and other attorney experts can assist the court by way of affidavits or sworn testimony regarding the success obtained, quality of services rendered, and the risk of the litigation. Counsel should select attorney experts whose opinions would be valued by the court, but should be careful not to use the same expert witness in all cases. Thus, attorney experts could be specialists in litigation, employment law, management of a law firm, or defense of employment actions.

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[1] Blum v. Stenson, 465 US 886, 897, 79 L Ed 2d 891, 104 S Ct 1541 (1984).

[2] Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 US —, 92 L Ed 2d 439, 106 S Ct 3088 (1986).

[3] Hensley v. Eckerhart, 461 US 424, 435, 76 L Ed 2d 40, 103 S Ct 1933 (1983).

[4] Blum v. Stenson, 465 US 886, 899, 79 L Ed 2d 891, 104 S Ct 1541 (1984).

[5] Blum v. Stenson, 465 US 886, 901, 79 L Ed 2d 891, 104 S Ct 1541 (1984).

United States. Hensley v. Eckerhart, 461 US 424, 434, 76 L Ed 2d 40, 103 S Ct 1933 (1983) (district court may consider factors enumerated in Johnson v. Georgia Highway Exp., Inc., 488 F2d 714, 717–719 (CA5, 1974), one of which is contingent nature of the case); Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 762 F2d 272 (CA3, 1985), affd 478 US —, 92 L Ed 2d 439, 106 S Ct 3088, reh granted 478 US —, 92 L Ed 2d 737, 106 S Ct 3331 (1986);

[6] **United States.** Most of the Circuit Courts which have considered this issue since Blum has ruled that risk of loss is a permissible factor to consider in adjusting the lodestar. Wildman v. Lerner Stores Corp., 77 F2d 605 (CA1, 1985); LaDuke v. Nelson, 762 F2d 1318 (CA9, 1985); Sierra Club v. Clark, 755 F2d 608 (CA8, 1985); Jones v. Central Soya Co., 748 F2d 586 (CA11, 1984); Hall v. Borough of Roselle, 747 F2d 838 (CA3, 1984);

See also Murray v. Weinberger, 741 F2d 1423 (CA DC, 1984); Foster v. Board of School Commissioners, 39 EPD 35, 929 (SD Ala, 1985).

But see McKinnon v. City of Berwyn, 750 F2d 1383 (CA7, 1984).

An upward adjustment of 20% was approved based on substantial risks of failure and no fee in NAACP, Detroit Branch v. Detroit Police Officers Ass'n, 620 F Supp 1173 (ED Mich, 1985).

A 50% multiplier for success and risks was awarded in Liberles v. Danial, 619 F Supp 1016 (ND Ill, 1985).

There was an upward adjustment of 30% for success and risks in Bailey v. Container Corp., 40 EPD 36, 264 (SD Ohio, 1986).

§ 8:27. Expenses and Costs.

In cases in which attorneys' fees may be awarded, certain expenses of the litigation are normally reimbursed by the losing party.[1] Such costs include depositions, photocopying, paralegal expenses, travel, telephone calls, etc.[2] The costs sought for reimbursement should be items which the attorney would normally bill as costs to fee paying clients.[3] Such costs should be itemized and documented.

The Court has broader authority with respect to litigation expenses under 42 USC § 1988 than under Rule 54(d) of the Federal Rules which is narrowly confined to subpoena and filing fees and limited deposition expenses under 28 USC §§ 1911–1929.[4]

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[1] **United States.** See 27 USC § 1920 and 42 USC § 1988.

[2] **United States.** See State of Illinois v. Sangamo Const. Co., 657 F2d 855 (CA7, 1981); Northcross v. Board of Education of Memphis City Schools, 611 F2d 624, 639 (CA6, 1979).

[3] Hensley v. Eckerhart, 461 US 424, 431, 76 L Ed 2d 40, 103 S Ct 1933 (1983).

[4] Ginsberg v. Burlington Industries, 500 F Supp 696 (SD NY, 1980); Wehr v. Burroughs Corp., 477 F Supp 1012 (ED Pa, 1979).

§ 8:28. Fee Application.

Assuming that the plaintiff employee has prevailed in a case in which a statute recognizes attorney fees as a recoverable element of damages, it is counsel's duty to make an application to the court for fees. This application must be timely filed within the time limits set forth by the statute, the court rules, or order of the court. Counsel should perform the necessary research to ensure that the fee application is timely, keeping in mind that the fee application can always be supplemented if there are substantial fees incurred subsequent to the time of the application. Counsel should also contact the court or the court's clerk to determine if there are any specific rules, forms, or procedures regarding attorneys fee applications and should abide by such guidelines to the extent reasonably possible.

The steps in preparing a fee application for the court shall be set forth, roughly in chronological order, below.

Reviewing Time Records

The time records must be reviewed by counsel and compiled in a format suitable for the court, opposing counsel, and expert witnesses to review. Normally, this requires a typewritten or computerized transcription of the time records or some other summary for the time expended. If more than one attorney worked on the case, that should be reflected in the records. Some courts may require that time be segregated by the type of activity, such as trial, discovery, deposition, attorneys fees, application preparation time, etc.

The attorney preparing the fee application should review the time compilations of all attorneys and paralegals, if any, to determine the accuracy of those time records, whether any time periods are missing, and to determine if there was duplication of effort. If counsel finds that duplication occurred, that time should either be eliminated from the fee application altogether or counsel should make a percentage reduction in the attorneys fees requested to reflect duplication of effort. Duplication of effort may occur when more than one attorney works on the case, where an attorney is training a less-experienced attorney, where there are multiple counsel, or where responsibility for the cases was transferred from one attorney to another.

Compilation of Attorneys' Time

The description of the services rendered by date, name of attorney, and type of services should be presented in a format suitable for review by the court, opposing counsel, and expert witnesses. It all should be in a format suitable for review by an appellate court. The description of services should be legible, understandable and provide sufficient details for the courts to determine what services were rendered.

Attorneys Fee Application

The attorneys' fee application itself should include a legal brief, a transcription or summary of the contemporaneous time records for the attorneys, a chart showing the attorneys names, hours expended, total number of hours expended, hourly rates,

and total fees requested. Additional documentation, such as unpublished opinions awarding fees, time records of opposing counsel, support documentation for unusual costs, if any, should also be attached as exhibits to the brief.

The brief should contain an exposition of the pertinent law pursuant to which the fee application is submitted, including the general principles of law regarding fee applications as set forth by the United States Supreme Court or other appropriate state supreme courts. Authorities should also be cited for the particular issues and contentions. The brief should also incorporate and apply the law to the particular circumstances of the case at issue, describing for the court the information necessary for the court to make a documented fee award, consistent with the applicable case law. Where an attorney presents a fully documented fee application, the burden on the court may well be reduced because the court, in its opinion, may merely refer to pleadings already on file rather than make its own, original exposition of the facts and law pertinent to the case.

Affidavits of Counsel

The attorneys' fee application should be supported by an application of the primary or trial counsel in the case. Counsel's affidavit should set forth the legal qualifications of the attorneys representing the plaintiff, including background information such as colleges and law schools attended, awards, law review or other scholastic achievements, prior employment, litigation or employment law experience, fees awarded in prior cases and any other information counsel believes to be pertinent. The affidavit should also detail how time records were kept in the case, what reductions, if any, were made for duplication and how, the attorney fee agreement between counsel and the client, whether the costs requested for reimbursement are normally costs charged to clients, the risk of the litigation and any foregone opportunities, the normal hourly billing rates for the attorneys on whose behalf fees are requested, and a recapitulation of the total attorneys time and fees expended. The affidavit should incorporate into it any other exhibits which are attached, such as a statement of costs or unpublished opinions.

Where appropriate or otherwise required, one or more affidavits of expert attorneys should also be provided to the court. Such affiants should be experienced, knowledgeable, and respected members of the bar who are known to the Court or whose credentials are sufficient to satisfy the court that the attorneys' opinions are valuable to the court in its deliberations. Like trial counsel, the expert attorney should set forth background information, including personal credentials, litigation experience, familiarity with trial counsel, knowledge regarding billing practices in the locality and the particular type of case, the achievements of counsel, the impact of the litigation beyond the individual parties involved, difficulty and complexity of the case, the risk the case represented, and the skill and expertise of the attorneys as demonstrated in the case before the court. Prior to preparing the affidavit, the expert attorneys should be encouraged to review as much of the record of the case as is appropriate, including pleadings, court rulings, applicable law, and the attorneys time records. Above all, the expert should state an opinion regarding a reasonable fee award in the case, which should be equivalent to or greater than the fee requested by the successful plaintiff's attorney.

In those cases in which it is possible that a hearing will be held on the attorneys fees requested and testimony given, care should be given to ensure that all statements made in the attorneys fee application will withstand cross-examination by opposing counsel. An attorney who has carefully prepared a client's case, successfully obtained a victory for the client, and submitted a thorough and documented fee award should be able to respond to any reasonable question which either the court or opposing counsel could make.

Hearing on Fee Application

While not mandatory, in fee awards that are particularly contested, either the court or the parties may desire a hearing on the fee award. At the hearing, counsel should, by way of argument, present the parameters of the fee application. Thereafter, primary counsel in the case should take the witness stand to present testimony focusing principally on the most contested

issues and emphasizing why reasonable hourly rates are necessary, and, where applicable, an upward adjustment is justified. Expert attorney witnesses should, likewise, provide similar testimony. Likely cross examination topics by opposing counsel include whether the hourly rates requested are those normally charged and received, whether the fee arrangement is truly contingent, whether an expert witness has previously testified on behalf of the attorneys involved in the pending application or whether counsel submitting the application has testified on behalf of the expert attorney in other fee matters, and inquiries regarding prior fee awards.

Alternatives to Hearing

Where the disputes are limited to legal issues or where the contested issues are limited, the court may decline counsel's request for hearing. Further, where possible, counsel should seek to limit the matters in dispute by stipulating to hourly rates and the accuracy of the numerical totals, agreeing on an upward adjustment (albeit modest), or generally stipulating to the lodestar. Where defense counsel's hourly rates and time expended exceeds that of opposing counsel, these stipulations often can be achieved, providing that counsel is willing to eliminate duplicative time or time spent on matters not directed to the case, such as handling administrative matters prior to filing a lawsuit or time spent researching potential claims that were never alleged in the lawsuit. Opposing counsel may stipulate to the lodestar without giving up the client's right to contest the award on appeal, to the extent that the defendant contests the underlying verdict on appeal.

Supplement of Applications

As a result of briefing, a hearing on the fee application, or substantive developments in the case, it may be necessary to file a supplemental fee application. Generally, the criteria set forth above apply. Particular attention should be given to updating the court and correlating the material in the earlier brief with the subsequent brief, especially as regards total fees and costs

requested. In addition, where case law developments have occurred in the interim, the court should be apprised of the effect of such rulings upon the applicant's fee petition. In reviewing the supplemental application, the court should have no question in its mind as to the total amount of fees and costs requested and the basis for the total request.

Particular Issues Which May Be Raised

The prevailing parties are entitled to an award of attorneys fees under dozens of federal statutes and additional other state statutes. In a complicated case, determining the prevailing party may be an issue. Counsel should not be penalized severely because three or four alternative methods of obtaining the same result are initially attempted by pleading three or four causes of action in the original complaint. Likewise, counsel is entitled to payment for services rendered in litigating the successful cause of action. It is important to keep in mind, however, that in a hotly contested fee application, the court's ability to carve out a small number of hours as being uncompensable because of their lack of direct relationship to the case may render its opinion less vulnerable to attack on appeal and more likely to be accepted by opposing counsel.

§ 8:29. Timing of Fee Negotiations.

As indicated above, where possible, counsel should negotiate on the fee award. However, counsel should be careful not to bargain regarding fees until after the merits of a client's case are resolved, either by way of judgment or settlement. This does not mean that the court must be presented with a settlement prior to any discussion regarding attorneys fees, unless there is a particular prohibition set forth by the statute or local rule.[1] The most ethical and practical manner in which to handle the conflicting obligations of securing the best possible settlement for the client and insuring that attorneys fees are also fully compensatory, is for counsel to settle the merits of the claim and then begin discussion of the attorneys' fees. In the second stage, the parties may either agree to a fee award or may agree that the court will decide it. In any event, counsel for both parties may

then represent to the court that the attorneys' fees negotiation did not compromise settlement of the case on the merits. This procedure is usually necessary in class actions where the court must approve the settlement. In individual or private actions, the court is not involved and the only issue is the ethical issue that any attorney faces in a contingent case.

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[1] **United States.** Evans v. Jeff D., 475 US —, 89 L Ed 2d 747, 106 S Ct 1531 (1986) (rejecting argument that simultaneous negotiation over fee, and merits award constituted conflict of interest for plaintiff's counsel).