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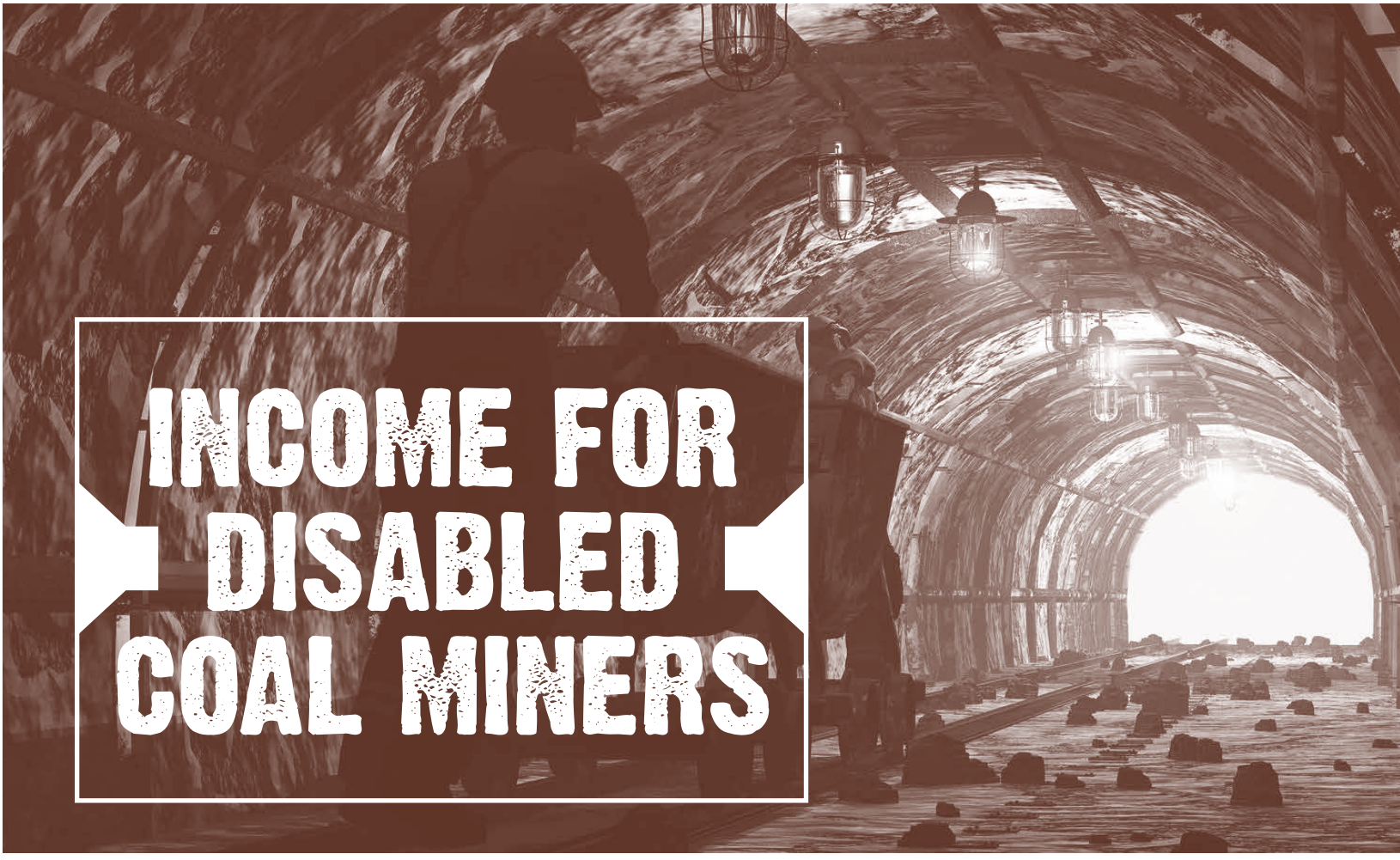

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Funding Legal Services Programs with Attorney Fee Awards

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Over the past five years the United States economy has collapsed, sending an increasing number into poverty and exacerbating the income gap in this country. At the same time legal services for the poor are struggling. In 2011 the federal Legal Services Corporation (LSC)—which provides funding to 137 legal services programs around the country—received the largest reduction in funding in over a decade.[1] At the same time Interest on Lawyer Trust Accounts funds—the other significant funding source for legal services—have essentially dried up as the result of record-low interest rates.[2] Many legal services programs have been forced to lay off attorneys and essential support staff. Even before these cuts, less than 20 percent of low-income Americans' needs for legal services were being met.[3]

In 2010, in the midst of this tumult, Congress restored the right of legal services programs to seek attorney fees, which had been prohibited for recipients of LSC funding since 1996.[4] With its repeal of one paragraph of a lengthy appropriations bill, Congress opened the door for legal services organizations to return to independently generating funding to continue their representation of low-income clients. As LSC explained when implementing the repeal, pursuit of attorney fees serves a myriad of purposes. Not only does obtaining attorney fees allow organizations to serve additional clients, but also

> the ability to make a claim for attorneys' fees is often a strategic tool in the lawyers' arsenal to obtain a favorable settlement from the opposing side. Restricting a recipient's ability to avail itself of this strategic tool puts clients at a disadvantage and undermines clients' ability to obtain equal access to justice. The attorneys' fees restriction can also be said to undermine one of the primary purposes of fee-shifting statutes, namely to punish those who have violated the rights of persons protected under such statutes.[5]

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[1]Legal Services Corporation, Fact Book 2011 (June 2012), http://1.usa.gov/YE5cHW.

[2]Alan Houseman, Center for American Progress, The Justice Gap: Civil Legal Assistance Today and Tomorrow 7 (2011), http://bit.ly/VVYTz1.

[3]*Id.* at 3.

[4]Rochelle Bobroff, *Legal Services Attorney Fees Are Obtainable in Pending Cases*, 44 Clearinghouse Review 157 (July–Aug. 2010) (citing Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 533, 123 Stat. 3034 (2010)).

[5]Attorneys' Fees: Fee-Generating Cases: Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 75 Fed. Reg. 6816 (Feb. 11, 2010), http://1.usa.gov/Ub4fYV.

As LSC recognized, aggressive pursuit of attorney fees and litigation costs serves the mission of legal services programs as well as a client's litigation needs. Pursuit of attorney fees creates pressure on the opposing party to reach an early resolution, before costs increase, and enables legal services programs to continue with valuable and necessary services to current and future clients. Attorney fee awards enable a program to expand services, pay for litigation costs, such as depositions, travel, or experts, and train and pay competitive salaries to attract and retain talented staff. In this era of shrinking budgets, the availability of attorney fee awards is a ray of hope on the future of legal services.

Background of the LSC Attorney Fee Restriction

The LSC was created in 1975 to "create equal access to the system of justice in our Nation" that would "reaffirm[] faith in our government of laws" and "assist in improving opportunities for low-income persons."[6] Hundreds of legal services programs sought and received funding pursuant to the newly created LSC.[7] These organizations—like all other plaintiffs' lawyers—were able to use statutes that provided for legal fees to be awarded to a victorious plaintiff (fee-shifting statutes) to fund their programs for low-income clients.

In 1996, as a result of the Republicans' "Contract with America," Congress slashed funding to LSC by over 30 percent and simultaneously passed numerous restrictions on the funding and operation of legal services programs. Congress prohibited LSC-funded programs from participating in legislative or policy advocacy, class action litigation, representation of undocumented immigrants, community organizing activities, abortion-related litigation, litigation on behalf of prisoners, and representation of individuals being evicted from public housing and accused of drug activity.[8] Congress prohibited recipients of LSC funding from "claim[ing] … or collect[ing] and retain[ing], attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees."[9] In response to these restrictions, many legal services programs gave up LSC funding or spun off counterparts that would continue to pursue fee shifting and other newly prohibited work.[10]

In 2010, without altering the other restrictions, Congress repealed the prohibition on seeking and collecting attorney fees, permitting "restricted" legal services programs to, for the first time in nearly fifteen years, generate their own funding to support their programming.[11] With the restriction on fees lifted, low-income clients can pursue their full claims—including their right to reasonable attorney fees and costs—just like any other litigant. This extends to cases that were filed both before and after the ban was lifted.[12]

In pursuing their right to fees, LSC-funded organizations must abide by LSC regulations for fee-generating cases. These regulations require that LSC funding recipients determine that the client will not be able to find representation by the private bar, notwithstanding the potential availability of attorney fees.[13] Further, the

[6]Legal Services Corporation Act of 1974, 42 U.S.C. § 2996.

[7]Currently the Legal Services Corporation (LSC) funds 137 nonprofit civil legal services programs located in all fifty states and Puerto Rico (Legal Services Corporation, *supra* note 1).

[8]*Id.*; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 504, 110 Stat. 1321 (1996); see also 42 U.S.C. § 2996f.

[9]Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504.

[10]Houseman, *supra* note 2, at 7. Currently some nine hundred legal services programs and two hundred law school clinics provide legal services to the poor without LSC funding (*id.* at 6).

[11]Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); see also Bobroff, *supra* note 4.

[12]Bobroff, *supra* note 4.

[13]45 C.F.R. § 1609.3 (2013).

resulting fees may be used only for purposes permitted by LSC.[14] The issue of whether an organization complies with LSC regulations, however, may not be raised by an opposing party as part of the litigation (in response to a fee petition or otherwise). Instead only LSC has jurisdiction to decide whether a program complies with the regulations.[15]

Fees—When Available?

The American Rule generally provides that all litigants must bear the expense of their own attorney fees.[16] However, Congress and state legislatures have permitted fee shifting—that is, allowing the successful litigant to recover fees from the other party—where they determine that litigation by "private attorneys general" serves a public good.[17] Pursuant to a court's equitable powers or rules of procedure, fees may be sought on procedural grounds or as a sanction.

Hundreds of statutes allow courts to award attorney fees and costs in addition to actual damages, civil penalties, and, at times, punitive damages. When a substantive cause of action permits fee shifting, the complaint should include a request for fees in the prayer for relief. Fee-shifting claims commonly pursued by legal services programs include civil rights claims, state and federal consumer protection claims, social security challenges, disability rights claims, and employment rights claims.[18] States allow for award of attorney fees in areas that have been historically subject to the American Rule. For instance, some states permit the recovery of attorney fees for breach-of-contract claims.[19] Several states also permit recovery of attorney fees and costs for successful pursuit of intentional tort claims.[20]

Attorney fees may also be recovered on a piecemeal basis for success on procedural motions, even when fees are not otherwise available. When seeking fees on procedural grounds, the request for fees should be set forth in the appropriate motion. For instance, attorney fees are available for successful motions to remand actions to state court when "the removing party lacked an objectively reasonable basis for seeking removal."[21]

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[14] *Id.* § 1609.4.

[15] 42 U.S.C. § 2996e(b)(1)(B); see also Bobroff, *supra* note 4, at 160–61 (citing cases).

[16] *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 247 (1975). By contrast, pursuant to federal rule, costs are generally recoverable by the prevailing party (Fed. R. Civ. P. 54(d)(1)).

[17] See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986).

[18] Attorney fees for federal civil rights claims can be sought pursuant to 42 U.S.C. § 1988 (permitting recovery of attorney fees for enforcement of 42 U.S.C. §§ 1981, 1981a, 1982, 1983, 1985, 1986, 1681 *et seq.*, 2000bb *et seq.*, 2000cc *et seq.*, §§ 2000d *et seq.*, 13981). Federal statutes providing fees for consumer claims include the Truth in Lending Act, 15 U.S.C. § 1640(a)(3); the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(5); the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3); the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d); the Fair Credit Reporting Act, 15 U.S.C. §§ 1681n(a)(3), 1681o(a)(2); and the Servicemembers Civil Relief Act, 50 U.S.C. app. § 597a. Fees can be obtained for social security challenges pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Federal statutes providing fees for disability rights claims include the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3), and the Americans with Disabilities Act, 42 U.S.C. § 12205. Federal employment fee-shifting statutes include the Fair Labor Standards Act, 29 U.S.C. § 216(b); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k); the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g); and the Family Medical Leave Act, 29 U.S.C. § 2617(a)(3). There are comparable state statutes for similar state causes of action.

[19] See, e.g., Ark. Code Ann. § 16-22-308; Recovery of Attorney's Fees, Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (2012) (also permitting recovery of attorney fees for employment and other enumerated claims); see also Recovery of Expenses of Litigation Generally, Ga. Code Ann. § 13-6-11 (2012) (permitting recovery of attorney fees for contract claims when defendant acted in bad faith). In Arizona the defendant may recover fees from the plaintiff if plaintiff does not prevail (see, e.g., *Wilkinson v. Wells Fargo Bank National Association*, No. CV11-02467-PHX-DGC, 2012 WL 6028956 (D. Ariz. Dec. 4, 2012)). In Texas only the party prevailing on affirmative claim or counterclaim may recover fees (see, e.g., *Polansky v. Berenji*, No. 03-11-00592-CV, 2012 Tex. App. LEXIS 10180 (Tex. App. Dec. 7, 2012)).

[20] *Wedig v. Brinster*, 469 A.2d 783, 789 (Conn. App. Ct. 1983) ("Punitive or exemplary damages in a fraud case include attorney's fees."); *DeKalb County v. McFarland*, 203 S.E.2d 495, 499 (Ga. 1974) ("Every intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses of litigation including attorney fees.").

[21] *Martin v. Franklin Capital Corporation*, 546 U.S. 132, 141 (2005); 28 U.S.C. § 1447(c) (2013).

The Federal Rules of Civil Procedure (and state counterparts) permit the recovery of attorney fees and costs in several situations. Federal Rule 37 requires a court to permit the recovery of attorney fees and costs for meritorious filings of motions to compel discovery. This award is nondiscretionary:

> If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.[22]

The court may refuse to award such fees only when the movant did not attempt to resolve the dispute prefiling, the other party's nondisclosure was "substantially justified," or an award of fees would be unjust.[23] Attorney fees are also available for defending against a meritless discovery motion, or as a discovery sanction for failure to supplement or disclose, comply with a court order, or participate in developing a discovery plan.[24]

Similarly a court may award attorney fees and costs as a sanction for another party's failure to appear at a scheduling or other conference or obey a scheduling or other court order.[25] When defending a low-income client against a debt collection or eviction action, fees may be recoverable under Rule 41(d) of the Federal Rules of Civil Procedure or its state counterpart if the opposing party previously dismissed the same action.[26] Indeed, attorney fees and costs may be sought as sanctions for any abuse of judicial process by the opposing party.[27]

Fee Petitions

Fee-shifting statutes permit award of attorney fees under different circumstances, such as to the "prevailing" party, the "substantially prevailing" party, when "appropriate," or simply according to the court's "discretion."[28] A party is considered to have prevailed when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," including through a damages award or declaratory or injunctive relief.[29] The determination of an attorney fee award is within the discretion of the trial court.[30]

In general, a petition or motion for attorney fees and costs should be submitted after obtaining a favorable judgment or ruling, or after reaching a settlement for the client that leaves open the question of attorney fees.[31] Under the Federal Rules of Civil Procedure, the motion must be made within fourteen days of entry of judgment and state the grounds for seeking fees and an estimate of the amount of fees sought.[32]

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[22] Fed. R. Civ. P. 37(a)(5)(A).

[23] *Id.*

[24] *Id.* 37.

[25] *Id.* 16(f).

[26] *Id.* 41(d).

[27] *Chambers v. NASCO Incorporated,* 501 U.S. 32, 46 (1991).

[28] *Hardt v. Reliance Standard Life Insurance Company*, 130 S. Ct. 2149, 2157 (2010).

[29] *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)).

[30] See, e.g., *Perdue v. Winn*, 130 S. Ct. 1662, 1676 (2010).

[31] See, e.g., *Barbour v. City of White Plains*, 700 F.3d 631 (2d Cir. 2012) (permitting court to determine attorney fee award after acceptance of offer of judgment).

[32] Fed. R. Civ. P. 54(d)(2).

A reasonable fee is generally determined by the lodestar method, which "approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case."[33] The lodestar is calculated by multiplying the reasonable amount of time expended on the litigation by a reasonable hourly rate.[34] Courts consider several factors in determining whether a rate or time spent is reasonable: the novelty and complexity of the issues presented, skill and experience of counsel, quality of representation, results obtained, the time and labor required, the preclusion of other employment as the result of accepting the case, the customary fee for similar work in the community, time limitations imposed, the undesirability of the case, the nature and length of the relationship with the client, and awards in similar cases.[35] Courts should award comparable hourly rates to both nonprofit and for-profit counsel.[36]

The movant must submit evidence of the hours worked and rates claimed with the fee petition.[37] Reasonable hours must be evidenced through contemporaneous, detailed billing records setting forth the specific activity conducted, the time spent, and the individual who completed the activity.[38] Time expended by support staff is recoverable so long as it was billed for work that would be typically completed or charged by an attorney.[39] Billing records are best introduced as attached to an affidavit of each individual who completed the work, affirming that the work was actually completed and setting forth the individual's skills, background, experience, and, where applicable, past fee awards. Invoices for costs incurred should also be attached to the fee petition.

A reasonable hourly rate can be shown through affidavits of other local lawyers who are familiar with the skill of the attorney; fees received by the attorney in past court awards or settlements as set forth in an affidavit, court order, or other documentation; or fee awards to other attorneys in similar types of proceedings, set forth in court orders or supporting affidavits.[40] Legal services attorneys should consider requesting supporting affidavits from members of their boards of directors, private cocounsel, or cooperating attorneys. To establish reasonable rates, courts have also relied on fee surveys such as the Laffey Matrix, subject area surveys, and surveys conducted by state bar associations.[41] The reasonableness of an hourly rate or hours spent in litigation may also

[33]*Perdue*, 130 S. Ct. at 1672.

[34]See *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[35]See *Blum v. Stenson,* 465 U.S. 886, 898–900 (1984); *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719 (5th Cir. 1974). Many circuits have adopted the twelve factors set forth in *Johnson* as guiding principles for determining appropriate rates (see *Robinson v. Equifax Information Services Limited Liability Company*, 560 F.3d 235, 243 (4th Cir. 2009); *Winter v. Cerro Gordo County Conservation Board*, 925 F.2d 1069, 1074 n.8 (8th Cir.1991); but see *Perdue,* 130 S. Ct. at 1671–72 (*Johnson* factors give little guidance and produce disparate results)).

[36]*Blum*, 465 U.S. at 895; see also *Saldivar v. Rodela*, No. EP-12-CV-00076-DCG, 2012 WL 4497507, at *2–7, *9 (W.D. Tex. Oct. 1, 2012).

[37]*Hensley*, 461 U.S. at 433.

[38]*Id.* at 437; *Role Models America v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004).

[39]*Hyatt v. Barnhart*, 315 F.3d 239, 255 (4th Cir. 2002); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988); *Allen v. U.S. Steel Corporation*, 665 F.2d 689, 697 (5th Cir. 1982).

[40]See *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 646–47 (7th Cir. 2011); *Westmoreland Coal Company v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010).

[41]See, e.g., Civil Division, U.S. Attorney's Office, District of Columbia, Laffey Matrix 2003–2013 (n.d.), http://1.usa.gov/YXdP0k; Ronald L. Burdge, United States Consumer Law Attorney Fee Survey Report 2010–2011 (2011), http://bit.ly/X7YlEC; *Bywaters v. United States*, 670 F.3d 1221, 1226 n.4 (Fed. Cir. 2012) (adopting Laffey Matrix), reh'g denied, 684 F.3d 1295; Pickett, 664 F.3d at 649–50 (reviewing use of Laffey matrix outside D.C. area and citing cases from Third, Fourth, Seventh, and Ninth Circuits); *Saldivar*, 2012 WL 4497507, at *9 n.25 (citing rate survey conducted by State Bar of Texas to establish reasonable hourly rate); *Kelly v. Corrigan*, No. 11-14298, 2012 WL 3587562, at *9 (E.D. Mich. Aug. 20, 2012) (relying on fee survey conducted by State Bar of Michigan); *Moore v. Midland Credit Management Incorporated*, No. 3:12-CV-166-TLS, 2012 WL 6217597 (N.D. Ind. Dec. 12, 2012) (surveying cases approving use of Consumer Law Attorney Fee Survey Report); *Bennetts v. Astrue*, No. 3:10-CV-1124-PK, 2012 WL 6131565 (D. Or. Dec. 10, 2012) (citing Oregon State Bar Economic Survey to establish reasonable hourly rate);

be supported by evidence, obtained through discovery, of opposing counsel's rates and time in the case.[42]

A fee award will be discounted by work on an unsuccessful claim when the claim rests on different facts and legal theories from the successful claims.[43] However, the U.S. Supreme Court recognizes that, in many cases, counsel's work cannot be divided between claims because "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories."[44] In such cases, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."[45]

In rare circumstances, an enhancement above the lodestar figure may also be awarded. However, the enhancement must be based on a factor that is not considered in determining the lodestar.[46] The burden of demonstrating the appropriateness of an enhancement lies with the movant, who must present "specific evidence" in support of the award.[47] An enhancement may be appropriate when the market rate does not adequately capture the attorney's true market value, when the litigation requires extraordinary outlay of expenses, or when the litigation is exceptionally protracted or delayed.[48]

Obtaining Fees Through Settlement

As the Supreme Court has made clear, attorney fee claims are ideally resolved through settlement, without involvement of the court.[49] While negotiating attorney fees is often simple after a judgment on the merits, many legal services attorneys perceive a challenge in advocating fees when negotiating a settlement for their clients. Opposing parties exploit the internal conflict felt by legal services attorneys and insist that any fee award must be accompanied by an equal reduction in relief for the low-income client. This is not the case.

Retainer Agreements. Legal services programs must set forth their entitlement to attorney fees in their retainer agreement, both as part of their ethical obligations and to ensure that the client understands the nature of the client's claims from the beginning of the relationship. The agreement should first establish that the client is not required to pay any fees for services rendered out of the client's personal funds or property and that the client is not personally liable for any debt created by the agreement.[50] The agreement should go on to explain that the client may be entitled to attorney fees under some—(but not necessarily all)—legal claims, and the agreement should state that the client authorizes the legal services program to apply for a fee award on the client's behalf and to accept and keep the fee awarded by the court or paid by an opposing party in settlement of the attorney fee claim.

In setting forth information about settlement, the retainer should explain that, while the client must make the ultimate decision about any settlement, the client is agreeing that the right to fees is assigned to the legal services program. To assuage concerns about a fee recovery in

[42]See, e.g., *Henson v. Columbus Bank and Trust Company*, 770 F.2d 1566, 1574–75 (11th Cir. 1985); *Mendez v. Radec Corporation*, 818 F. Supp. 2d 667, 670 (W.D.N.Y. 2011); *Serricchio v. Wachovia Securities*, 258 F.R.D. 43, 44 (D. Conn. 2009); *Brown Distributing Company of West Palm Beach v. Marcel*, 866 So. 2d 160, 161 (Fla. Dist. Ct. App. 2004).

[43]*Hensley*, 461 U.S. at 434–35.

[44]*Id.* at 435.

[45]*Id.*

[46]*Perdue*, 130 S. Ct. at 1673.

[47]*Id.*

[48]*Id.* at 1674.

[49]*Hensley*, 461 U.S. at 437.

[50]Legal services programs may, under certain circumstances, collect out-of-pocket costs incurred through the litigation (see 45 C.F.R. § 1609.5 (2013)).

excess of the recovery for the client, the retainer can establish that the legal services program will receive a fee equal to the reasonable hourly rate for attorney fees times the number of hours the attorney has reasonably worked on the case at the time of settlement, unless the program determines that a fee of this size, when subtracted from the net settlement amount, would leave the client with less than the anticipated compensatory recovery discounted by the probability of success at trial. In that event the client would retain an appropriate settlement, and the program would retain any remaining monies as fees.

The moment of entering into the attorney-client relationship is central to later negotiation of attorney fees. An attorney can explain that the program is able to provide services to the client based, in part, on obtaining fee awards from past cases, in which the clients agreed to the necessity of fees. As a result, obtaining fees in the instant suit will enable the program to help other people in similar situations in the future. The attorney can explain that plaintiffs represented by private attorneys uniformly seek legal fees in similar suits, and that the defendants should be required to pay this additional amount in their suit as well, as part of their liability for any bad acts. When clients understand the reasoning for seeking fees, they often become invested for the same reasons as the program is in obtaining the fees.

The retainer agreement also has significant consequences for the potential taxation of any attorney fee award. The Internal Revenue Service explains that attorney fees—even those obtained through fee-shifting statutes—are generally taxable as income because the plaintiff has a contractual obligation to pay the fees pursuant to plaintiff's retainer agreement with the attorney.[51] However, in the case of a legal services program client, attorney fees are not taxable because, as set forth explicitly in the retainer agreement, that client has no obligation to pay the attorney.[52]

Negotiating Attorney Fees and Costs. In negotiating attorney fees and costs, opposing counsel often attempts to create the false premise that attorney fees must be traded off against relief for your client. This is not so. In fact, a litigant has an independent right, separate from the litigant's entitlement to actual damages and other relief, to recover attorney fees. As the Supreme Court explains, the right to attorney fees is "uniquely separable from the cause of action to be proved at trial."[53] As a result, a request for attorney fees "merely seeks what is due because of the judgment" in the litigant's favor.[54] Indeed, an entirely separate suit may be filed for the sole purpose of recovering attorney fees after resolution of the underlying claim, or fees may be sought after acceptance of an offer of judgment or other settlement that does not include attorney fees.[55] This separate right to attorney fees may also be set forth in a retainer agreement that assigns the right to attorney fees to the legal services program to pursue.

What is wise in negotiations is to pursue attorney fees as a claim for relief separate from the other substantive relief sought by the client and to resist discussions of a lump-sum settlement. This can be achieved by notifying opposing counsel at the beginning of settlement negotiations that you will be conducting essentially two negotiations: first, you will seek acceptable relief for the client,

[51]Internal Revenue Service, Private Letter Ruling 201015016, at 2–3 (April 16, 2010), http://1.usa.gov/VfZuwh (citing *Sinyard v. Commissioner*, 268 F.3d 756 (9th Cir. 2001)).

[52]*Id.* at 3.

[53]*White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 452 (1982).

[54]*Id.* (quoting *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980)); see also *Budinich v. Becton Dickinson*, 486 U.S. 196, 200 (1988).

[55]*New York Gaslight Club v. Carey*, 447 U.S. 54, 71 (1980) (allowing separate federal suit for recovering attorney fees under Title VII); *Barbour*, 700 F.3d 631 (permitting motion for fees after acceptance of offer of judgment silent on issue of fees). Fees may not, of course, be sought when a settlement agreement has expressly waived any right to attorney fees (*Evans v. Jeff D.*, 475 U.S. 717 (1986)).

and, second, after you agree on relief for the client, you will negotiate an amount for reasonable attorney fees and costs or submit a motion for fees to the court.[56] This approach can be supported by the legal services program's board of directors through a resolution stating an expectation that attorneys will negotiate relief for the client prior to attorney fees so as to avoid a potential perceived conflict of interest between the organization's mission to assist low-income clients and the need to support itself.[57] Even when this approach is used, the opposing party will likely wish to know a figure for attorney fees. While preserving your position, give a maximum figure for fees and costs in exchange for an agreement that the figure will not be negotiated until an appropriate agreement is reached for the plaintiff.

Of course, to accept or reject a settlement proposal is always within the client's discretion. However, when the attorney has established a good working relationship with the client understanding that attorney fees are sought to establish settlement pressure for the client's case, create a deterrent for illegal conduct, and enable the attorney to provide similar services to others, the client will likely choose to reject settlement offers that do not appropriately compensate the legal services program for its services. If both attorney and client stand their ground, the decision to reject an inadequate settlement offer is unlikely to impede an eventual, appropriate settlement of well-supported claims—including the claim for attorney fees.

■ ■ ■

Well-heeled defendants have grown accustomed to disregarding the full extent of their liability to low-income individuals. With the lifting of the LSC fee restrictions, this can change. Despite being newly allowed to seek fees, legal services attorneys all too often do not seek fees or give up attorney fees first in settlement negotiations in an effort to meet individual clients' needs. But legal services programs can best serve their mission by aggressively and effectively pursuing attorney fees. Pursuit of attorney fees serves the needs of low-income clients by making defendants—often large, well-funded entities—understand that violating the rights of people living in poverty can cost as much as mistreating those with the means to pay their own counsel (who will certainly seek fees). And—along with serving the needs of the individual client—the fees so sought can constitute the necessary resources to continue providing competent, meaningful legal services to low-income people well into the future. Like legal services programs, fee-shifting statutes were not created to enable pursuit of personal gain—they were created to aid in the pursuit of justice.

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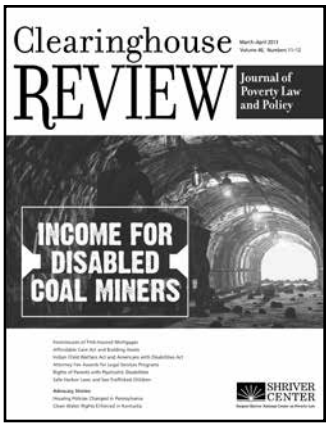
[56] *Evans*, 475 U.S. at 734 (explaining that cases may be settled through fee waiver, settlement containing attorney-fee component, or agreement to have fees fixed by court).

[57] This dilemma is generally not believed to create a violation of ethical rules or the professional rules of conduct (*see id.* at 727–28 & n.14; but see *id.* at 728 n.15 (noting that legal bar holds conflicting views on this issue)).



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