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1996]

COVINGTON v. DISTRICT OF COLUMBIA: JUDICIAL CLOUDING OF A
ONCE CLEAR BURDEN OF PROOF IN AWARDS OF ATTORNEY FEES
UNDER 42 U.S.C. SECTION 1988

I. INTRODUCTION

Traditionally, in the United States the party prevailing in a legal action is not entitled to recover attorney fees from the losing party.¹ This principle is known as the "American Rule" and stands in diametric opposition to the "English Rule," which allows a prevailing party to recover attorney fees.² Although the American Rule is the standard throughout the

1. Jane M. Kravcik, *The D.C. Circuit Revises Its Test for Determining a Reasonable Hourly Rate*, 57 GEO. WASH. L. REV. 1122, 1123 (1989); see M. Isabel Medina, Comment, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana—An Argument Against the American Rule*, 61 TUL. L. REV. 1173, 1175-77 (1987) (tracing roots of this tradition back to colonial separation from England). Medina explains that:

Early American courts awarded costs, which included attorney fees, to winning litigants. Several factors, however, combined to reverse this early approach, one of the English legal practices imported to the colonies. First, strong resentment against British ideas, practices, and procedures was an almost inevitable result of the tension between the colonies and the mother country. One manifestation of this aversion to British practice was an increasing dislike and distrust of attorneys. Second, and of perhaps more significance, a strong strain of individualism pervaded early American culture and philosophy. This intense colonial individualism fostered a view of litigation that popularized the image of a solitary folk-hero fighting for his rights.

Id.; see also John V. Tunney, Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 641 (1974) (stating that "[t]his conscious attempt to purge English traditions from the American legal system, taken with fierce frontier individualism, made it unlikely that America would adopt a rule which routinely awarded attorney's fees").

2. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Under the "American Rule," the prevailing litigant cannot ordinarily collect attorney fees from the losing party. *Id.* International judicial systems, however, do not conform to this rule. *Id.* Most countries throughout the Western world adhere to the "English Rule." James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995). The English Rule requires the losing party to pay, within a reasonable limit, the prevailing party's legal fees. See *id.* at 225, 227 (explaining that "English rule causes litigants to increase their legal expenditures").

Although American jurisprudence is mainly based upon English common law, the American judicial system abandoned the practice of awarding attorney fees during its formative years. *Alyeska*, 421 U.S. at 247-48. Although the common law historically did not permit courts to award litigation costs, for "centuries in England there has been statutory authorization to award costs, including attorneys' fees." *Id.* at 247 n.18 (noting that as early as 1278, English courts had statutory authority to award attorney fees to successful plaintiffs, and by 1607, successful defendants had similar statutory right to fees and costs).

During this country's formative years, the United States Congress authorized federal courts to follow the practice of awarding attorney fees. *Id.* at 247-48. By

United States, numerous statutes have carved out specific exceptions throughout the years.³

In particular, Congress enacted one such exception in 1976, with its passage of the Civil Rights Attorney's Fees Awards Act.⁴ Section 1988(b)

1800, however, Congress had abandoned all of these statutes. *Id.* at 249. As a result, the American Rule, began to take hold. *Id.* Today, while this general rule is firmly entrenched, many statutory exceptions to the American Rule now exist, including section 1988 of the Civil Rights Act of 1976. 42 U.S.C. § 1988 (1994).

3. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561-62 (1986) (Citizens' Council) (stating that there are over 100 separate statutes providing for award of attorney fees); see, e.g., Freedom of Information Reform Act, 5 U.S.C. § 552(a)(4)(E) (1994); Clayton (Anti-Trust) Act, 15 U.S.C. § 26 (1994); Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (1994); Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1994); Social Security Act, 42 U.S.C. § 406(b)(1)(A) (1994); Voting Rights Act of 1965, 42 U.S.C. § 1973(l)(e) (1994); Civil Rights Attorney's Fees Awards Act of 1976, amending Civil Rights Act of 1866, Revised Statutes Section 722, 42 U.S.C. § 1988 (1994); Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(k) (1994); Fair Housing Act of 1968, 42 U.S.C. § 3612(p) (1994).

For a detailed discussion of the early statutes allowing for awards of attorney fees, see *Alyeska*, 421 U.S. at 248 n.19.

The Supreme Court in *Alyeska* reaffirmed the notion that the judicial branch does not have the power to create an exception to the American Rule. *Id.* at 249-50 n.20. The Supreme Court cited a case dating back to 1796, where the Court overturned the inclusion of attorney's fees as damages, and declared "that '(t)he general practice of the United States is in opposition (sic) to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified by, statute.'" *Id.* (quoting *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (emphasis added)); see *Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1967 (1994) (noting that "efficacy of an exception to the American Rule is a policy decision that must be made by Congress") (citing *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 847 (1993)); see also *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) ("SOCM") (Starr, J., dissenting) (stating that "[i]n the thirteen years since the Supreme Court's decision in *Alyeska* . . . federal law has moved haltingly in the direction of the venerable English Rule with respect to the award of attorney's fees").

Notwithstanding the above, federal courts recognize three judicially created exceptions to the American Rule. *Chambers v. Nasco*, 501 U.S. 32, 45 (1991) (citing *Alyeska*, 421 U.S. at 257-59). These include: first, the "common fund exception," derived from historic equity jurisdiction; second, in cases where a party exhibits "willful disobedience of a court order;" and third, where a party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.*

Recently, Congress considered legislation to change the American Rule. Although the Republican Party's "Contract with America" included an absolute "loser pays" provision, the House of Representatives passed a less stringent version on March 7, 1995. *House OKs Bill to Cut Lawsuits—It Would Put Pressure on Parties to Settle Before Trial*, STAR TRIB. (Minneapolis-St. Paul), Mar. 8, 1995, at A1. The adopted legislation "is more of a measure designed to bring enormous pressure on both sides in a suit to settle before reaching court." See *id.* (explaining that "bill would apply only to so-called diversity suits, those suits that are in federal courts because they involve the laws of two states and the damages being sought exceed \$50,000"); see also *Products Liability Merits Bipartisan Support*, ATLANTA J., Mar. 6, 1995, at A8 (noting that "loser pays" is most controversial provision in tort reform).

4. 42 U.S.C. § 1988 (1994). Section 1988(b) contains a fee shifting provision which provides in relevant part:

of this Act allows the trial court to shift "reasonable attorney's fees" to the prevailing party at its discretion.⁵ The United States Supreme Court has interpreted section 1988(b) to require a trial court to complete a two-step process before awarding attorney fees.⁶ First, the trial court must calculate the "lodestar."⁷ This calculation is merely the product of the number of

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b).

5. *Id.*; see *Chambers*, 501 U.S. at 55 (stating that Supreme Court reviews court's award of attorney fees under abuse of discretion standard); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628 (4th Cir. 1995) (affirming that Fourth Circuit reviews awards of attorney fees under abuse of discretion standard); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1200-01 (10th Cir. 1986) (revealing that Tenth Circuit reviews awards of attorney fees under abuse of discretion standard); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984) (announcing that First Circuit reviews awards of attorney fees under abuse of discretion standard); *Rosario v. Amalgamated Ladies' Garment Cutters' Union*, 749 F.2d 1000, 1004 (2d Cir. 1984) (holding that Second Circuit reviews awards of attorney fees under abuse of discretion standard); *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1242-43 (9th Cir. 1982) (clarifying that Ninth Circuit reviews awards of attorney fees under abuse of discretion standard), *vacated*, 461 U.S. 952 (1983); *Copeland v. Marshall*, 641 F.2d 880, 900-01 (D.C. Cir. 1980) (en banc) (stating that District of Columbia Circuit reviews awards of attorney fees under abuse of discretion standard).

6. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (explaining two-step process); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 323-24 (5th Cir. 1995) (emphasizing that "determination of reasonable attorney's fees involves a two-step procedure"), *cert. denied*, 116 S. Ct. 173 (1995); see also *Carroll*, 53 F.3d at 627-28 (applying *Hensley's* two-step approach); *Public Interest Research Group, Inc. v. Windall*, 51 F.3d 1179, 1181-82 (3d Cir. 1995) (same); *Sands v. Runyon*, 28 F.3d 1323, 1333 (2d Cir. 1994) (same); *Metz v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 39 F.3d 1482, 1493 (10th Cir. 1994) (same); *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622-23 (9th Cir. 1993) (same); *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1993) (same); *Gekas v. Attorney Registration & Disciplinary Comm'n of Supreme Court of Illinois*, 793 F.2d 846, 851-52 (7th Cir. 1986) (same); *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 86 (1st Cir. 1984) (same); *United Slate, Tile and Composition Roofers Damp and Waterproof Workers Ass'n, Local 307 v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495, 502-03 (6th Cir. 1984) (same); *Premachandra v. Mitts*, 727 F.2d 717, 732-33 (8th Cir. 1984) (same), *rev'd on other grounds*, 753 F.2d 635 (8th Cir. 1985).

7. See *Hensley*, 461 U.S. at 433 (explaining how to calculate attorney fee awards while using definition of lodestar, but not using actual term). The United States Supreme Court in *Hensley*, explained that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* The sum of these two figures is referred to as the "lodestar." *Citizens' Council*, 478 U.S. at 563. Courts may adjust the "lodestar" up or down, depending on the quality of an attorney's work. *Id.* The Third Circuit first developed the "lodestar" approach in *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973), *vacated on other grounds*, 540 F.2d 102 (1976). Subsequently, the *Hensley* Court adopted this approach, with some minor modifications. *Citizens' Council*,

hours reasonably worked by the attorneys and a reasonable hourly rate charged for the legal services.⁸ Second, once the court determines the "lodestar" it may adjust this figure as the facts of the case warrant.⁹ The subject of this Note, *Covington v. District of Columbia*,¹⁰ concerns the United States Court of Appeals for the District of Columbia's application of section 1988's fee shifting provision, and in particular, the court's determination of the relevant reasonable hourly rates.¹¹

This Note discusses the circumstances surrounding *Covington* and explores the accuracy of the court's determination of the applicable reasonable hourly rates.¹² In particular, this Note examines the District of Columbia Circuit's reliance on a matrix as specific evidence to prove the market rate for reasonable attorney fees.¹³ Part II of this Note details the development of jurisprudence concerning attorney fee awards.¹⁴ Part III reviews the factual setting for the *Covington* opinion.¹⁵ Furthermore, Part IV examines the *Covington* court's analysis both in a narrative and critical light.¹⁶ Finally, Part V contemplates the effect of *Covington* on future section 1988 litigation, particularly in light of the emerging practice of private civil rights litigation.¹⁷

II. BACKGROUND

This Part examines the development of Supreme Court and circuit court case law respecting the award of attorney fees under section 1988(b).¹⁸ First, Section A sets the scene for Congress's passage of section

478 U.S. at 563-64 (noting that *Hensley* Court adopted "hybrid" approach, which determines the "lodestar" first and then allows for adjustments).

8. See *Hensley*, 461 U.S. at 433 (noting that "lodestar" is number of hours reasonably expended multiplied by reasonable hourly rate).

9. See *Citizens' Council*, 478 U.S. at 563 (explaining that "lodestar" may be adjusted depending on attorney's quality of work).

10. 57 F.3d 1101 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 916 (1996).

11. *Id.* For a discussion of the facts of *Covington*, see *infra* notes 123-38 and accompanying text. For a discussion of the *Covington* court's analysis, see *infra* notes 142-77 and accompanying text. For a critique of the *Covington* court's analysis, see *infra* notes 178-201 and accompanying text.

12. For a discussion of Supreme Court case law regarding reasonable rate determination, see *infra* notes 29-63 and accompanying text.

13. For a discussion of the *Covington* court's reasonable rate calculation, see *infra* notes 150-69 and accompanying text.

14. For a discussion of the development of attorney fee awards case law, see *infra* notes 18-122 and accompanying text.

15. For a review of the facts of *Covington*, see *infra* notes 123-38 and accompanying text.

16. For an examination of the *Covington* court's analysis, see *infra* notes 142-77 and accompanying text.

17. For a discussion of the effect of the *Covington* opinion, see *infra* notes 202-17 and accompanying text.

18. For a discussion of the background of section 1988(b), see *infra* notes 18-122 and accompanying text.

1988(b).¹⁹ Next, Section B details the Supreme Court's interpretation and analysis of section 1988(b) attorney fee awards.²⁰ Finally, Section C discusses the United States Court of Appeals for the Seventh Circuit and the District of Columbia Circuit's jurisprudence regarding section 1988(b).²¹

A. *Alyeska and the Birth of Section 1988*

Since the early part of this century, as private attorneys began to play a more prominent role in the enforcement of civil rights violations, federal courts began to recognize the attorneys' civil rights contributions by awarding attorney fees to the prevailing parties.²² Consequently, this "private attorney general" trend led to the judicial amelioration of the American Rule, which denied the prevailing party in a legal action the right to seek attorney fees from the losing party.²³ On May 12, 1975, however, the Supreme Court reaffirmed the American Rule and ended the proliferation of fee awards in federal courts in *Alyeska Pipeline Service Co. v. Wilderness Society*.²⁴ Soon thereafter, Congress responded to the *Alyeska* decision by enacting the Civil Rights Attorney's Fees Awards Act of 1976 ("Act").²⁵

Section 1988(b) of the Act authorizes courts to award attorney fees to parties who prevail in actions to enforce civil rights under any one of its many enumerated federal statutes.²⁶ The legislative history of section 1988(b) demonstrates that while Congress sought to attract "competent counsel" for civil rights cases, it did not intend to create a "windfall" for

19. For a discussion of Congress's passage of section 1988(b), see *infra* notes 22-28 and accompanying text.

20. For a discussion of the Supreme Court's section 1988(b) case law, see *infra* notes 29-63 and accompanying text.

21. For a discussion of circuit case law concerning interpreting section 1988(b), see *infra* notes 64-122 and accompanying text.

22. R. Walton Shelton, *Relative Responsibility: A Proposed Methodology for Allocation of Attorneys' Fees in § 1988 Cases*, 40 BAYLOR L. REV. 487, 489 (1988).

23. *Id.* The policy behind the "private attorney general" concept is that civil rights litigation should not be discouraged, but encouraged. *Id.* In addition, if the judicial system forced potential litigants to bear their own costs, many would be unable or reluctant to seek judicial help. *Id.*

24. 421 U.S. 240, 247 (1975). See generally Shelton, *supra* note 22, at 489 (noting expansion of fee awards).

25. 42 U.S.C. § 1988(b) (1994). The Senate Report explained the purpose of section 1988(b):

This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

S. REP. NO. 94-1011, at 1, reprinted in 1976 U.S.C.C.A.N. 5908, 5909.

26. 42 U.S.C. § 1988(b) (1994). For the relevant text of section 1988(b) see *supra* note 4.

the attorneys.²⁷ Accordingly, section 1988(b) "filled the gap" created in

27. S. REP. NO. 94-1011, at 6, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. This Senate Report explains in relevant part:

S. 2278 [42 U.S.C. 1988(b)] . . . is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

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.

.
The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which "private attorneys general" play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws

.
The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws. The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.

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. . . [I]n *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the "private attorney general" theory. . . . This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action

This bill, S. 2278 [42 U.S.C. 1988], is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys' fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act "[P]rivate attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. . . . This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. . . .

Alyeska, by allowing the courts to continue the practice of awarding attorney fees in civil rights litigation.²⁸

B. *The Supreme Court and Section 1988*

In the twenty years since Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, federal courts of appeals have cited this statute in over one hundred cases.²⁹ Nevertheless, the Supreme Court has only interpreted this statute in a relatively small number of cases.³⁰ Accordingly,

.....
 In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 [42 U.S.C. 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. . . .

It is intended that the amount of fees awarded under S. 2278 [42 U.S.C. 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) [*aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, (436 U.S. 547 (1978))]; *Davis v. County of Los Angeles*, 8 E.P.D. 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter."

S. REP. NO. 94-1011, at 2-6, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909-13 (footnotes omitted); see *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (emphasizing that Congress did not intend for section 1988(b) to improve financial lot of attorneys by acting as form of economic relief).

28. See SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, *Source Book: Legislative History, Text and Other Documents; Civil Rights Attorneys' Fees Awards Act of 1976*, 94th Cong., 2d Sess. 21-23 (1976) (noting statement by Senator Kennedy: "[Section 1988(b)] is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the *Alyeska* decision").

29. Compare *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 2353 (1995) (involving one of most recent cites to 42 U.S.C. § 1988), with *Hutto v. Finney*, 437 U.S. 678, 693 (1978) (involving one of earliest cites to 42 U.S.C. § 1988); see also *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (noting that Supreme Court's interpretation of "reasonable" under one fee shifting statute applies "uniformly to all" fee shifting statutes).

30. See *Venegas v. Mitchell*, 495 U.S. 82 (1990) (interpreting section 1988); *Missouri v. Jenkins*, 491 U.S. 274 (1989) (same); *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (same); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (same); *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986) (same); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) (same); *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (same); *Kentucky v. Graham*, 473 U.S. 159 (1985) (same); *Blum v. Stenson*, 465 U.S. 886 (1984) (same); *Hensley v. Eckerhart*, 461

this Section examines the cases in which the Court has molded and shaped section 1988(b), focusing on the evolution of the Supreme Court's interpretations of section 1988(b)'s intricacies.³¹

In 1983, the Supreme Court offered its first major interpretation of section 1988(b) in *Hensley v. Eckerhart*.³² The *Hensley* Court held that district courts should ordinarily award attorney fees to a prevailing party in a civil rights action.³³ In addition, while the *Hensley* Court explained that trial courts must determine an award based on the facts of each case, it also emphasized that the most useful starting point to determine an award is to calculate the "lodestar," which is the product of the number of hours reasonably expended on the litigation and a reasonable hourly rate.³⁴

U.S. 424 (1983) (same); *Moor v. Alameda County*, 411 U.S. 693 (1973) (same); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that it is Supreme Court's duty to interpret law). In *Marbury*, Justice Marshall explains that:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177-78 (emphasis added).

31. For a discussion of the Supreme Court's interpretation of section 1988, see *infra* notes 32-63 and accompanying text.

32. 461 U.S. 424, 426 (1983). In *Hensley*, Mr. Eckerhart brought a suit on behalf of all persons involuntarily confined at a state hospital. *Id.* After a trial, the district court found constitutional violations in five of the six areas it examined. *Id.* at 427. Accordingly, Mr. Eckerhart sought to invoke section 1988(b)'s fee shifting provision. *Id.* at 428. The district court awarded \$133,332.25, and the Eighth Circuit affirmed. *Id.* at 428-29.

33. *Id.* at 429. The *Hensley* Court, however, did recognize that the district courts should not award attorney fees in the event that an award would be unjust. *Id.* In addition, the *Hensley* Court held that a defendant may recover an award of attorney fees if the suit was "vexatious, frivolous, or brought to harass or embarrass the defendant." *Id.* at 429 n.2 (citing H.R. REP. NO. 94-1558, at 7 (1976)).

34. *Id.* at 433. While stressing the importance of the particular facts in each case, the Court noted that Congress favorably cited to a twelve factor approach applied by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Hensley*, 461 U.S. at 430 n.3. These factors are:

- (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 employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (citing *Johnson*, 488 F.2d at 717-19). For a discussion of the "lodestar" concept, see *supra* notes 7-9 and *infra* notes 42-41, 64 and accompanying text.

Under *Hensley*, plaintiffs recover attorney fees if they have "obtained excellent results."³⁵ This presumption of an award, however, does not place the burden of proof on the defendant if the parties litigate a motion for attorney fees.³⁶ The *Hensley* Court held that if the parties cannot reach a settlement, the fee applicant must establish its "entitlement to an award and document[] the appropriate hours expended and hourly rates."³⁷ Finally, the *Hensley* Court emphasized that a district court must thoroughly explain its reasoning, anytime it awards attorney fees.³⁸

Within one year of the *Hensley* decision, the Supreme Court clarified the application of section 1988(b) in *Blum v. Stenson*.³⁹ In *Blum*, the Court

35. *Hensley*, 461 U.S. at 435. To clarify its holding, the *Hensley* Court explained that "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 435 (citations omitted). Therefore, no attorney's awards are allowed to compensate for services on an unsuccessful claim. *Id.* If, however, a plaintiff is only partially successful, then the "lodestar" may be excessive because the "most crucial factor is the degree of success obtained." *Id.* at 436.

36. *See id.* at 437 (emphasizing that ideally parties will come to agreement on amount of fee without need for second major litigation). Recently, almost every federal court of appeals has cited to this *Hensley* holding. *See* Bingham v. Zolt, 66 F.3d 553, 565 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1418 (1996) (citing *Hensley's* no second major litigation holding); Hadix v. Johnson, 65 F.3d 532, 536 (6th Cir. 1995) (same); Florin v. Nationsbank of Georgia, N.A., 60 F.3d 1245, 1246 (7th Cir. 1995) (beginning opinion by citing to *Hensley's* no second major litigation holding); Trimper v. City of Norfolk, 58 F.3d 68, 74 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 535 (1995) (same); Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995) (citing *Hensley's* no second major litigation holding); *In re* Thirteen Appeals Arising Out Of the San Juan DuPont Plaza Hotel Fire Litigation, 56 F.3d 295, 301 (1st Cir. 1995); (same); Friends of Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 883 (8th Cir. 1995) (same); Bell v. Schexnayder, 36 F.3d 447, 449 (5th Cir. 1994); (same); Beard v. Teska, 31 F.3d 942, 958 (10th Cir. 1994) (same); *In re* Rasbury, 24 F.3d 159, 167 (11th Cir. 1994) (same); Brewster v. Dukakis, 3 F.3d 488, 493 (1st Cir. 1993) (same).

37. *Hensley*, 461 U.S. at 437. The Court explained that this requires an applicant to exercise good "billing judgment" and to maintain billing time records in a fashion which will allow a court to segregate the distinct claims. *Id.* Federal Courts of Appeals apply this same guideline. *See, e.g.,* Trimper, 58 F.3d at 74 (requiring fee applicant to exercise good billing judgment); Building Serv. Local 47 v. Grandview Raceway, 46 F.3d 1392, 1402 (6th Cir. 1995) (same); Lunday v. City of Albany, 42 F.3d 131, 133-34 (2d Cir. 1994) (same); Loranger v. Stierheim, 10 F.3d 776, 780 (11th Cir. 1994) (same); Pearson v. Fair, 980 F.2d 37, 47 (1st Cir. 1992) (same); Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir. 1992) (same); Smith v. Freeman, 921 F.2d 1120, 1122 (10th Cir. 1990) (same).

38. *See Hensley*, 461 U.S. at 437 (noting that "the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained").

39. 465 U.S. 886 (1984). *Blum* involved an action between a statewide class of Medicaid recipients and the State of New York over the implementation of the Supplemental Security Income program. *Id.* at 889. The district court settled the underlying claim based on the parties' cross motions for summary judgment. *Id.* The court awarded the total amount requested, \$118,968, which included a fifty percent "bonus" because of the great benefit to society. *Id.* at 891. Subsequently, the Second Circuit released an unpublished opinion affirming the award. *Id.* at 891-92.

explained that district courts must calculate reasonable fees “according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.”⁴⁰ In addition, the *Blum* Court held that an applicant must show “that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.”⁴¹ The *Blum* Court concluded that trial courts may adjust the “lodestar,” but only in the rare cases where the fee applicant offers “specific evidence” showing that the attorney performed superior services.⁴²

40. *Id.* at 895. Here, the Court reasoned that the legislative history does not support a position that Congress sought to vary awards depending upon whether a party was represented by private counsel, or by a “nonprofit legal service.” *Id.* at 894. As a result, the Court concluded that before district courts are permitted to utilize a cost-based approach, the authority to do so must come from Congress, not the judiciary. *Id.* at 895-96.

41. *See id.* at 895 n.11 (reaffirming that burden of proof is on fee applicant to produce sufficient evidence). In a footnote, the Court shed light on an issue which subsequently ripened in *Covington*. *Id.*; *see Covington*, 57 F.3d at 1107 (concerning necessary proof of reasonable rate). In particular, the *Blum* Court explained that:

We recognize, of course, that determining an appropriate “market rate” for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely. The fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer’s customary rate. But the fee usually is discussed with the client, may be negotiated, and it is the client who pays whether he wins or loses. The § 1988 fee determination is made by the court in an entirely different setting: there is no negotiation or even discussion with the prevailing client, as the fee—found to be reasonable by the court—is paid by the losing party. Nevertheless, as shown in the text above, the critical inquiry in determining reasonableness is now generally recognized as the appropriate hourly rate. And the rates charged in private representations may afford relevant comparisons. In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Blum, 465 U.S. at 895 n.11; *see also* *City of Burlington v. Dauge*, 505 U.S. 557, 563 (1992) (explaining that “lodestar” concept has “become the guiding light of our fee shifting jurisprudence”).

42. *Blum*, 465 U.S. at 896-99. The *Blum* Court found that many of the twelve factors enumerated in *Johnson*, are represented in the lodestar determination. *Id.* at 897 n.13 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). As a result, the *Blum* Court explained that district courts are not

Following *Blum*, the Supreme Court in *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*,⁴³ addressed whether section 1988(b) permitted a party to seek attorney fees in an action separate and apart from the proceeding in which the party sought to enforce a civil rights claim.⁴⁴ The *Crest Street* Court concluded that section 1988(b) only allows an award of attorney fees in an action to enforce a civil right under one of its many enumerated statutes.⁴⁵ In doing so, the *Crest Street* Court reasoned that an award of attorney fees depends not only upon the results obtained, but also on what actions the parties took to achieve the results.⁴⁶

to award attorney fees based solely on an examination of each individual factor. *Id.* at 900. To do so, the Court concluded, would be "double counting." *Id.* at 899. Accordingly, the *Blum* Court rejected the fifty percent "bonus" award and the double counting. *Id.* at 900-01; see *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (stating that fee shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys").

The *Blum* Court, however, did not discuss under which circumstances a trial court may change a rate to one other than the rate requested "when that requested rate is not only the attorney's billing rate, but is also 'in line with' rates prevailing in the community for similar services by lawyers who are reasonably comparable." *Islamic Center of Miss., Inc. v. City of Starkville*, 876 F.2d 465, 469 n.8 (5th Cir. 1989) (*comparing* *Thompson v. Kennickell*, 836 F.2d 616, 620 (D.C. Cir. 1988); *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1159-61 (8th Cir. 1985); and *Laffey v. Northwest Airlines*, 746 F.2d 4, 25 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), *overruled in part by, SOCM*, 857 F.2d at 1518-24, *with SOCM*, 857 F.2d at 1524; *Student Public Interest Research Group v. AT&T Bell Lab.*, 842 F.2d 1436, 1443-50 (3d Cir. 1988); *Norman v. Housing Auth.*, 836 F.2d 1292, 1299-1301 (11th Cir. 1988); *Lightfoot v. Walker*, 826 F.2d 516, 524-25 (7th Cir. 1987); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 55-60 (D.C. Cir. 1987) (Wald, J., concurring in part, dissenting in part), *modified in part*, 857 F.2d 1516 (1988) (en banc); and *Neely v. City of Grenada*, 624 F.2d 547, 550-51 (5th Cir. 1980)).

43. 479 U.S. 6 (1986).

44. *Id.* at 12. In *Crest Street*, residents of an established and predominantly black area of Durham, North Carolina, sought the help of the North Central Legal Assistance Program in an effort to prevent the extension of a highway through their neighborhood. Richard Gans, *The Supreme Court's Interpretation of Section 1988 and Awards of Attorney's Fees for Work Performed in Administrative Proceedings: A Proposal for Result-Oriented Approach*—North Carolina Department of Transportation v. Crest Street Community Council, Inc., 62 WASH. L. REV. 889, 894 (1987). After successfully blocking the proposed construction, the residents filed a separate complaint seeking attorney fees. *Crest Street*, 479 U.S. at 11. Although the district court dismissed the complaint, the Fourth Circuit reversed the decision. *Id.*

45. *Crest Street*, 479 U.S. at 12. The *Crest Street* Court noted that the "legislative history is replete with references to 'the enforcement of the civil rights statutes 'in suits,' 'through the courts' and by 'judicial process.'" *Id.* (citing *Webb v. Board of Educ.*, 471 U.S. 234, 241 n.16 (1985) (quoting S. REP. NO. 94-1011, at 2-6, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909-13)).

46. *Id.* at 14. The *Crest Street* Court, however, did recognize that time spent on administrative proceedings to enforce a civil rights claim prior to any litigation may still be covered by section 1988(b). *Id.* at 15; see Gans, *supra* note 44, at 890 (noting that Court "did not discuss the availability of attorney's fees awards under

Subsequent to its decision in *Crest Street*, and in an attempt to resolve a split among the federal courts of appeals regarding section 1988(b)'s compatibility with contingency fees, the Supreme Court again examined this fee shifting provision in *Blanchard v. Bergeron*.⁴⁷ The *Blanchard* Court focused on the way in which a contingency fee arrangement impacts an attorney fee award.⁴⁸ In particular, the *Blanchard* Court held that a compensation arrangement based on a contingency fee does not affect an award of attorney fees.⁴⁹ The *Blanchard* Court stated that a reasonable attorney fee "contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less."⁵⁰

section 1988 for negotiations subsequent to the filing of an administrative complaint").

47. 489 U.S. 87 (1989). In *Blanchard*, Arthur Blanchard brought a suit alleging that the Sheriff's Deputy, Bergeron, beat him while he was patronizing Oudrey's Odyssey Lounge. *Id.* at 88. After a trial, the jury awarded Blanchard \$5,000 in compensatory damages and \$5,000 in punitive damages. *Id.* at 89. Subsequently, Deputy Blanchard invoked section 1988's fee shifting provision, with an attorney's fees motion for more than \$40,000. *Id.* The district court, however, awarded Deputy Blanchard \$8,386.92. *Id.* On appeal, the Fifth Circuit reduced the award, reasoning that Deputy Blanchard had entered into a contingency fee agreement. *Id.* at 90. The Fifth Circuit's holding, however, was not consistent with holdings from other circuits. See *Cooper v. Singer*, 719 F.2d 1496, 1507 (10th Cir. 1983) (holding contingency fee agreement does not limit section 1988(b) award), *overruled in part on other grounds by*, *Venegas v. Mitchell*, 495 U.S. 82, 84 n.1 (1990); *Sisco v. J.S. Alberici Constr. Co.*, 733 F.2d 55, 56 (8th Cir. 1984) (same); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982) (same).

Next, the *Blanchard* Court recognized that the Fifth Circuit was not the only circuit to hold that a contingency fee arrangement governs a section 1988(b) fee award. *Blanchard*, 489 U.S. at 90 n.4; see *Pharr v. Housing Auth. of Prichard*, 704 F.2d 1216 (11th Cir. 1983) (holding that contingency fee agreement governs in section 1988(b) fee award), *overruled in part by*, *Blanchard*, 489 U.S. at 90 n.4 (1989).

48. *Blanchard*, 489 U.S. at 96. BLACK'S LAW DICTIONARY defines contingent fees as:

Arrangement between attorney and client whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered; e.g., 25% if the case is settled, 30% if the case goes to trial. Frequently used in personal injury actions. Such fee arrangements are often regulated by court rule or statute depending on the type of action and amount of recovery; and are not permitted in criminal cases.

BLACK'S LAW DICTIONARY 614 (6th ed. 1990).

49. *Blanchard*, 489 U.S. at 90, 96. The *Blanchard* Court noted that some federal courts of appeals concluded that a section 1988(b) fee award should not be limited by a contingency fee arrangement. *Id.* at 90 & n.4. See, e.g., *Cooper*, 719 F.2d at 1507 (stating that contingency fee agreement does not limit section 1988(b) attorney fee award).

50. *Blanchard*, 489 U.S. at 93. The Court hypothesized that where a lawyers' organization agrees to take a case without compensation, section 1988(b) does not prohibit that organization from recovering reasonable fees. *Id.* at 94. The *Blanchard* Court explained, "[t]hat a nonprofit legal services organization may contractually have agreed not to charge any fee of a civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way." *Id.* at 95.

Less than three months after the *Blanchard* decision, the Supreme Court examined the constitutional questions surrounding the application of section 1988(b) in *Missouri v. Jenkins*.⁵¹ In *Jenkins*, the Supreme Court addressed both the applicability of the Eleventh Amendment on section 1988(b) and the process that district courts must follow when awarding fees for paralegal and law clerk time.⁵² The *Jenkins* Court first reaffirmed its holding in *Hutto v. Finney*,⁵³ where it determined that attorney fee awards ancillary to prospective relief, are "not subject to the strictures of the Eleventh Amendment."⁵⁴ Building on its reasoning in *Hutto*, the *Jenkins* Court rejected Missouri's claim that the Eleventh Amendment prohibited a district court from awarding an enhanced fee because of a delayed payment.⁵⁵ Similarly, the *Jenkins* Court also rejected Missouri's second contention that the district court must not calculate the compensation of paralegals and law clerks by examining the relevant market.⁵⁶

51. 491 U.S. 274 (1989). This case involved the "attorney's fee aftermath" of litigation concerning school desegregation. *Id.* The underlying litigation began in 1977 when the Kansas City Missouri School District, and others, brought suit against the State of Missouri, alleging that state and federal agencies perpetuated a system of racial segregation in the metropolitan area of Kansas City. *Id.* at 276. After a trial lasting more than half a year, the district court found that the State was liable and ordered "various intradistrict remedies . . . including \$260 million in capital improvements and a magnet-school plan costing over \$200 million." *Id.* Soon after prevailing at the trial level, the School District sought to recover attorney's fees pursuant to section 1988(b). *Id.* Subsequently, the district court awarded approximately \$4.0 million in costs and fees. *Id.* at 276-77.

52. *Id.* at 275. The State of Missouri argued that sovereign immunity and the Eleventh Amendment precluded a district court from awarding an enhanced fee because of a delay in payment. *Id.* at 249. The State relied on a recent Supreme Court decision, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), in which the Court held that "[Congress is required to] express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Jenkins*, 491 U.S. at 279 (quoting *Scanlon*, 473 U.S. at 243). But the *Jenkins* Court explained that the application of section 1988(b) to the states is not contingent on express abrogation of the states' immunity. *Id.* at 284.

The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The State's second argument in *Jenkins*, maintained that time allocable to law clerks and paralegals should be compensated at cost rather than at the market rate. *Jenkins*, 491 U.S. at 279.

53. 437 U.S. 678 (1978).

54. *Jenkins*, 491 U.S. at 279; (citing *Hutto*, 437 U.S. at 695 (holding that section 1988's fee shifting provision is completely consistent with time tested practice of awarding cost against states)).

55. *Jenkins*, 491 U.S. at 279. The *Jenkins* Court concluded that the same principles which make the decision of whether to award attorney fees beyond the auspices of the Eleventh Amendment also make the question of how to calculate reasonable fees beyond the reach of the Eleventh Amendment. *Id.*

56. *Id.* at 284-89. The Court rejected the theory that an award based on the market and not on cost would be in direct derogation of the legislative history which provides that an award should not be a "windfall" for the attorneys. *Id.* at 284.

Finally, two recent Supreme Court cases have attempted to clarify section 1988(b)'s application with respect to pro se litigants and the prevailing party concept.⁵⁷ First, the Supreme Court in *Kay v. Ehrler*,⁵⁸ held that a pro se litigant may not invoke section 1988's fee shifting provision.⁵⁹ The Court reasoned that a pro se litigant, even if a member of the bar, would be at a disadvantage during the litigation.⁶⁰ Accordingly, the *Kay* Court concluded that Congress did not intend for section 1988(b) to award the plaintiff additional compensation; rather, Congress intended for this provision to attract counsel in order to increase the chances of success.⁶¹ Second, in *Farrar v. Hobby*,⁶² the Court clarified the meaning of "prevailing party" by explaining that a party "prevails 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."⁶³

The Court explained that "[c]learly, a 'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar." *Id.* at 285. Accordingly, if it is the custom of the community to bill paralegals and law clerks separately, then such an award is necessary under section 1988(b). *Id.* at 288. Conversely, if the community incorporates the cost of law clerks and paralegals into the attorney fee, then that is the process on which the district court should base an award upon. *Id.*

For the relevant legislative history of section 1988(b), see *supra* notes 25, 27.

57. See *Farrar v. Hobby*, 506 U.S. 103 (1992) (involving prevailing parties); *Kay v. Ehrler*, 499 U.S. 432 (1991) (involving pro se litigants).

58. 499 U.S. 432 (1991).

59. *Id.* at 438. BLACK'S LAW DICTIONARY defines "pro se" as: "[f]or one's own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

60. *Kay*, 499 U.S. at 438. The Supreme Court emphasized that even skilled lawyers are at a disadvantage if they represents themselves in contested litigation. *Id.* Furthermore, the *Kay* Court looked to the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY which explained: "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." *Id.* at 437 n.9 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1977)).

61. *Id.* at 437. The *Kay* Court followed the wisdom of the time-tested adage stating that "a lawyer who represents himself has a fool for a client." *Id.* at 438; see *White v. Armontrout*, 29 F.3d 357, 361-62 (8th Cir. 1994) (applying *Kay*); *Benavides v. Bureau of Prisons*, 993 F.2d 257, 258-60 (D.C. Cir. 1993) (abandoning practice of allowing pro se litigants attorney fees in light of *Kay*); *Celeste v. Sullivan*, 988 F.2d 1069, 1070 (11th Cir. 1992) (explaining Supreme Court's reasoning in *Kay*); *Chowanec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 130 (7th Cir. 1991) (following *Kay* Court's reasoning); see also *S.E.C. v. Price Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994) (relying on *Kay* when denying pro se applicant fees sought under Equal Access to Justice Act, 28 U.S.C. § 2412); *Demarest v. Manspeaker*, 948 F.2d 655, 656 (10th Cir. 1991) (same).

62. 506 U.S. 103 (1992).

63. *Id.* at 111-12 (noting that party must obtain at minimum, some relief on merits of claim for prevailing party status to attach). In addition, the Court held that a party who recovers nominal damages is the prevailing party for section 1988(b) purposes. *Id.* at 573; see *A.J. v. Kierst*, 56 F.3d 849, 865 (8th Cir. 1995) (explaining *Farrar's* holding regarding prevailing parties); *Baumgartner v. Harris*

C. *The Quest for "A Reasonable Rate" in the United States Courts of Appeals*

The determination of a "reasonable rate" constitutes one half of the calculation necessary for a district court's computation of a "lodestar."⁶⁴ Generally, a court can easily make this determination as parties tend not to dispute the applicable rates.⁶⁵ As a result, most legal principles regarding awards of attorney fees under section 1988(b) focus on aspects other than the determination of a reasonable hourly rate.⁶⁶ This Section examines the different approaches adopted by the circuits in an attempt to determine the applicable reasonable hourly rate.⁶⁷ In particular, this

burg Housing Auth., 21 F.3d 541, 547 (3d Cir. 1993) (same); American Council of the Blind v. Romer, 992 F.2d 249, 250 (10th Cir. 1993) (distinguishing *Farrar* because "case at bar did not involve a judicial determination on the merits of the claims asserted in Plaintiffs' lawsuit"); Craig v. Gregg County, 988 F.2d 18, 20 (5th Cir. 1993) (explaining *Farrar's* holding regarding prevailing parties); see also Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1359 (4th Cir. 1995) (following *Farrar* Court's holding); United States v. 27.09 Acres of Land, 43 F.3d 769, 773 (2d Cir. 1994) (applying *Farrar*); Alexander v. Gerhardt Enter., Inc., 40 F.3d 187, 194 (7th Cir. 1994) (same); Cameron v. Seitz, 38 F.3d 264, 276 (6th Cir. 1994) (same); Forrester v. City of San Diego, 25 F.3d 804, 808-09 (9th Cir. 1994) (same), cert. denied, 115 S. Ct. 1104 (1995); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1583 (11th Cir. 1994) (same).

64. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (implicitly adopting "lodestar" approach). For a discussion of the function and calculation of a "lodestar," see *supra* notes 7-9, 41-42 and accompanying text.

65. See John E. Kirklin, *The Recovery of Attorney's Fees in Civil Rights Cases Pursuant to 42 U.S.C. Section 1988*, in SECTION 1983 CIVIL RIGHTS LITIGATION & ATTORNEY'S FEES 1994, 455, 592-93 (PLI Litig. & Admin. Practice Course Handbook Series No. H-512, 1994) (noting how courts have "labored . . . to determine whether the hours claimed in the fee application should be reduced"). In *Covington v. District of Columbia*, 839 F. Supp. 894, 896 (D.D.C. 1993), *aff'd*, 57 F.3d 1101 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 916 (1996). While they stipulated the number of hours reasonably worked, they could not agree on a reasonable hourly rate. *Id.*

66. See Kirklin, *supra* note 65, at 494 (discussing "numerous and complex" issues involving fee award under section 1988(b)). In particular, Kirklin examines the need for a party to qualify as a successful plaintiff in order to involve section 1988's fee shifting provision. *Id.* at 497-99. Kirklin details the extensive rules regarding this qualification, including *inter alia*: "who may be considered a prevailing party," the need for success on the merits, the appellate method, the concept of prevailing without judicial relief, and prevailing on interlocutory success. *Id.* at 497-568.

In addition, much case law has been devoted to the determination of the amount of hours reasonably worked. See *Hensley*, 461 U.S. at 434 (stating that district courts must exclude hours not reasonably expended); DiFilippo v. Morizio, 759 F.2d 231, 235 (2d Cir. 1985) (emphasizing that party must exercise good "billing judgment") (citing *Hensley*, 461 U.S. at 434).

For an extensive review of legal principles involving the determination of a reasonable number of hours expended, see Kirklin, *supra* note 65, at 591-622.

67. For a discussion of the circuits' approaches to the determination of "reasonable rates," see *infra* notes 70-122 and accompanying text.

This Section presents a comprehensive review of the methods employed by both the Seventh Circuit and District of Columbia Circuit in determining a "reasonable hourly rate." In addition, this Section notes case law from other circuits

Section focuses on the United States Court of Appeals for the Seventh Circuit's comprehensive and, for the most part, representative sample of prevailing "reasonable rate" law.⁶⁸ Finally, this Section concludes with an examination of the District of Columbia Circuit's approach, depicting the state of the law just prior to the circuit's decision in *Covington v. District of Columbia*.⁶⁹

1. Court of Appeals for the Seventh Circuit

In 1992, the Seventh Circuit critically reviewed a district court's reduction of an applicant's requested hourly rate in *Pressley v. Haeger*.⁷⁰ The *Pressley* court reaffirmed the position that courts must award prevailing parties at the market rate for legal services, and not at "just" or "fair" rates.⁷¹ The court reasoned that a fee award under section 1988(b) must resemble what the market rate actually is, rather than what the judge or litigants think the market rate is or ought to be.⁷²

indicative of specific intricacies not covered in case law emanating from either of these two circuits. See, e.g., *Standley v. Chilhowee R-IV School Dist.*, 5 F.3d 319, 325 (8th Cir. 1993) (stating that "computer-based legal research must be factored into the attorneys' hourly rate, hence the cost of the computer time may not be added to the fee award").

68. For a discussion of the Seventh Circuit's approach to the determination of "reasonable rates," see *infra* notes 70-92 and accompanying text.

69. For a discussion on the District of Columbia Circuit's approach to the determination of "reasonable rates," see *infra* notes 93-122 and accompanying text.

70. 977 F.2d 295, 299 (7th Cir. 1992). The case underlying this litigation for attorney's fees involved racial discrimination against a city's first and only black police officer. *Id.* at 296. Officer Pressley faced the endless task of competently performing his job while the Police Chief conducted administrative policies against him. *Id.*; see also ANDREW P. SUTOR, POLICE OPERATIONS: TACTICAL APPROACHES TO CRIMES IN PROGRESS, at vii (1976) (noting first "street-cop," St. Michael the Archangel, and his "endless task"). Subsequently, a jury found that the Wheeling, Illinois, Police Chief discriminated against Mr. Pressley, and as a result awarded him \$40,000 in compensatory damages. *Pressley*, 977 F.2d at 296.

71. *Pressley*, 977 F.2d at 299. The court explained that "[i]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price," but it is the judge's function "to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *Id.* (quoting *Continental Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (noting that judge was mistaken in thinking that he knew value of attorney's services better than market did)); see also *Kurowski v. Krajewski*, 848 F.2d 767, 776-77 (7th Cir. 1988) (same); *Kirchoff v. Flynn*, 786 F.2d 320, 330-31 (7th Cir. 1986) (Eschbach, J., dissenting) (same); *Bohen v. City of East Chicago*, 666 F. Supp. 154, 156-57 (N.D. Ind. 1987) (same).

72. *Pressley*, 977 F.2d at 299. Many Circuits have recently expounded this same view. See *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995) (holding that "hourly rates must" comport with applicable market rate); *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) (recognizing that "relevant legal community for determining the prevailing market rates for attorneys' fees is the community in which the forum is situated"); *Wayne v. Village of Sebring*, 36 F.3d 517, 533 (6th Cir. 1994) (explaining that district court can apply either local market rates or market rates of attorneys' home practice), *cert. denied*, 115 S. Ct. 2000 (1995); *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (stating that prevailing mar-

Following *Pressley*, the Seventh Circuit in *Barrow v. Falck* ("*Barrow I*")⁷³ reversed the district court's award under section 1988(b) because of a lack of evidence.⁷⁴ According to the *Barrow I* court, the district court erred in awarding attorney fees at an hourly rate of \$135, instead of the lower rate supported by the evidence.⁷⁵ The *Barrow I* court explained that while other lawyers in this market may have rates in the range of \$135, the record established that this particular attorney had a market rate of \$110 or less.⁷⁶ In addition, the Seventh Circuit again reaffirmed that a judge must not seek to determine a "fair" or "just" rate, but must award the applicable

ket rate must be applied in section 1988(b) fee award); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 519 (7th Cir. 1993) (explaining that "lodestar *must* be based on the market rate for the attorney's work" (emphasis added)); *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990) (noting that "market rate[s] should guide the fee inquiry"); *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (stating that reasonable hourly rate must be "calculated according to prevailing market rates"); *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (stating that "prevailing market rate in the community is indicative of a reasonable hourly rate").

73. 977 F.2d 1100 (7th Cir. 1992) ("*Barrow I*").

74. *Id.* at 1105. The case underlying this litigation for attorney fees began when a sheriff suspended a deputy sheriff without a prior hearing. *Id.* at 1101. At the trial, the district judge found that this omission was in violation of the Constitution's Due Process Clause. *Id.* Subsequently, a jury awarded \$3,700 in damages and the deputy sought an award of fees under section 1988(b). *Id.* at 1101-02.

Within one year after the Seventh Circuit remanded this case, the parties brought another appeal to the circuit. *Barrow v. Falck*, 11 F.3d 729 (7th Cir. 1993) ("*Barrow II*"). For a discussion of *Barrow II*, see *infra* notes 88-92 and accompanying text.

75. *Barrow I*, 977 F.2d at 1105. The Seventh Circuit noted that the district court relied on one affidavit from a member of the local bar that stated in a conclusory manner that the "market rate for attorneys possessing the 'experience, qualifications, reputation and ability' of plaintiff's lawyer is \$135 per hour in civil rights cases." *Id.* at 1104-05. Furthermore, the Seventh Circuit revealed that the applicant never even once received over \$120 per hour. *Id.* at 1105.

Although the court did not expressly state that the burden of proof is on the fee applicant, this case evidences the solid foundation of that rule. *Id.* Many circuits have recently reaffirmed this rule. *See, e.g., Nydam v. Lennerton*, 948 F.2d 808, 811 (1st Cir. 1991) (citing *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (stating that "burden is on the fee applicant to produce satisfactory evidence")); *Plyler*, 902 F.2d at 277 (explaining that "the burden rests with the fee applicant to establish the reasonableness of a requested rate"); *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990) (same); *Powell v. C.I.R.*, 891 F.2d 1167, 1173 (5th Cir. 1990) (same); *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1059 (2d Cir. 1989) (same); *Southerland v. International Longshoremen's and Warehousemen's Union Local 8*, 834 F.2d 790, 795 (9th Cir. 1987), *superseded*, 845 F.2d 796 (1987) (same) (citing *Jordan*, 815 F.2d at 1261-63).

76. *Barrow I*, 977 F.2d at 1105. The court reasoned that "rates vary with skill and the time a lawyer needs to accomplish a task." *Id.* The *Barrow I* court noted that the most the fee applicant has ever received for his services from a paying client was between \$80 and \$110. *Id.* As a result, the *Barrow I* court refused to award attorney's fees at an hourly rate which is higher than Mr. Barrow could command in the market. *Id.* at 1105-06.

market rate.⁷⁷ Judge Easterbrook, writing for the majority, explained that “[j]udges must stick to the market rate for the attorneys’ time—that is to say, the opportunity costs of their time, the rate they could receive in other engagements.”⁷⁸

The *Barrow I* court also analogized awarding prevailing parties in civil rights litigation at premium rates to the use of risk multipliers because both act as a bonus for winning.⁷⁹ The *Barrow I* court explained that because the Supreme Court in *City of Burlington v. Dague*⁸⁰ rejected the use of risk multipliers, the use of premium rates must also be rejected.⁸¹ Furthermore, while the court in *Barrow I* noted the possibility that the applicant attorney may have charged reduced rates for non-economic reasons, it recognized that under the Supreme Court’s decision in *Blum v. Stenson*,

77. *Id.* at 1105. The *Barrow I* court found that there was no need to examine a hypothetical because the record indicated what the market would pay this attorney. *Id.* (quoting *Continental Illinois Securities Litigation*, 962 F.2d at 568 (noting that judge’s function is to determine what attorney could receive in relevant market)).

78. *Id.* The *Barrow I* court, however, qualified its holding by explaining that “[u]nless there is evidence that attorneys receive more per hour, from their own clients, in civil rights litigation than in other kinds of litigation . . . the court must use the hourly rate for the attorney’s regular legal services.” *Id.*

Opportunity costs are “the cost of a good or service as measured by the alternative uses that are forgone by producing the good or service.” WALTER NICHOLSON, *INTERMEDIATE MICROECONOMICS* 16-17 (1990) (noting that every economic action involves opportunity cost).

79. *Barrow I*, 977 F.2d at 1105. The court concluded that if only premium rates are awarded by court, the market is not truly reflected in the award. *Id.* As a result, the premium rates compensate not only for time spent on the litigation underlying the successful fee application, but also compensation for the cases which fail on the merits. *Id.* Accordingly, the court called this effect a “disguised multiplier.” *Id.*

80. 505 U.S. 557 (1992).

81. *Barrow I*, 977 F.2d at 1105; *Burlington*, 505 U.S. at 565-66. The *Burlington* Court refused to allow a district court to enhance an attorney fee award because of added risk. *Burlington*, 505 U.S. at 565-66; see *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 381 (6th Cir. 1993) (“disavow[ing]” previous holding contrary to *Burlington*), *cert. denied*, 114 S. Ct. 1298 (1994); *Cann v. Carpenters’ Pension Trust Fund For Northern California*, 989 F.2d 313, 317-18 (9th Cir. 1993) (harmonizing *Burlington* with past Ninth Circuit opinions rejecting risk enhancements); *Shipes v. Trinity Indus.*, 987 F.2d 311, 322-23 (5th Cir. 1993) (“[a]ccepting the error of previous thinking, and following the clearly lighted path of *Burlington*” and rejecting risk multiplier enhancement); *Gilleo v. City of Ladue*, 986 F.2d 1180, 1184 (8th Cir. 1993) (applying *Burlington* and rejecting fee enhancement based on risk), *aff’d*, 114 S. Ct. 2038 (1994); *Lipsett v. Blanco*, 975 F.2d 934, 943 (1st Cir. 1992) (abandoning practice of awarding contingency enhancements in light of Supreme Court’s opinion in *Burlington*); *Broyles v. Director, Office of Workers’ Compensation Programs*, 974 F.2d 508, 510 (4th Cir. 1992) (applying *Burlington*’s no risk enhancement holding).

The *Burlington* Court reasoned that “[c]ontingency enhancements would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.” *Burlington*, 505 U.S. at 566; see *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (stating that “request for attorney’s fees should not result in a second major litigation”).

lawyers who donate their time and services at bargain rates may collect the full market value in a section 1988(b) award.⁸² The *Barrow I* court, however, refused to award attorney fees at a rate that the applicant attorney had never before received from a paying client.⁸³ In doing so, and without articulating a rationale of its own, the *Barrow I* court questioned the economic theoretical soundness of awarding attorney fees above the rate at which the attorneys actually charge their clients.⁸⁴

Just over one year after *Barrow I*, the Seventh Circuit once again decided two cases involving the determination of a "reasonable rate."⁸⁵ First, the Seventh Circuit reaffirmed its position that a district court must determine an hourly rate based on the market rate for the attorney's services in

82. *Barrow I*, 977 F.2d at 1105. The court in *Barrow I*, noted the possibility that the applicant attorney may have charged reduced rates. *Id.* The court further recognized that under the Supreme Court's decision in *Blum*, attorneys who charge reduced rates for non-economic reasons are entitled to rates "they could obtain if the charitable element were removed." *Id.* To support this, the *Barrow I* court cited a District of Columbia Circuit case which followed *Blum*. See *Barrow I*, 977 F.2d at 1105 (citing SOCM, 857 F.2d 1516 (D.C. Cir 1988) (en banc) (stating that attorneys who charge reduced hourly rates may collect market rates for their time)). For a discussion of SOCM, see *infra* notes 107-12 and accompanying text.

83. *Barrow I*, 977 F.2d at 1105-06. The *Barrow I* court explained that regardless of whether the applicant attorney charged a reduced rate, he had never charged a paying client more than \$120 per hour. *Id.* at 1106. Accordingly, the court found that the market rate could not be \$135, the rate at which the trial court awarded fees. *Id.*; see also, *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992) (stating that district court must award attorney fees at rates "established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity"), *vacated in part by*, 984 F.2d 345 (1993).

84. *Barrow I*, 977 F.2d at 1106. In dicta, the *Barrow I* court examined the economics of awarding attorney fees. *Id.* The *Barrow I* court explained that:

One might reply that if ideology leads some lawyers to favor a particular clientele, and so reduces what these persons must pay for legal services, this is the market at work. The lawyers get consumption value out of working for certain clients and so charge less, just as lawyers who flock to Arizona for the desert air and scenery receive less per hour than those who must suffer a wind chill of -50 degrees along the lakefront of the Windy City. No one would dream of saying that the market rate of a lawyer in Phoenix who bills \$200 per hour "really" is \$300 per hour, because he could get this by braving the winters (and enduring the grind) of a corporate practice in Chicago. When defendants pay corporate rates to union lawyers, counsel receive a rare treat: psychic income they can spend. Save Our Cumberland Mountains drew a vigorous dissent along these lines from judges who would have followed rather than overruled *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984).

Id. Although failing to actually use economic terms, this analytical approach appears to examine the utility an attorney receives from working for a client who has suffered a civil rights invasion. See NICHOLSON, *supra* note 78, at 62 (explaining concept of utility and indifference curves).

85. For a discussion of *McNabola v. Chicago Transit Auth.*, 10 F.3d 501 (7th Cir. 1993), see *infra* notes 86-87 and accompanying text. For a discussion of *Barrow II*, 11 F.3d 729 (7th Cir. 1994), see *infra* notes 88-92 and accompanying text.

McNabola v. Chicago Transit Authority.⁸⁶ The *McNabola* court explained that this rate is “the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.”⁸⁷

Second, the Seventh Circuit again heard an appeal concerning *Barrow v. Falck* (“*Barrow II*”).⁸⁸ On remand succeeding *Barrow I*, the district court failed to follow the *Barrow I* court’s instructions.⁸⁹ As a result, in *Barrow II* the Seventh Circuit vacated the awarded rate of \$135 and set the rate for the fees at \$95 per hour.⁹⁰ The *Barrow II* court reasoned that while the applicant produced “a flurry of affidavits about what other lawyers charge for their work,” he offered no evidence concerning what he actually charged for his work.⁹¹ As a result, the *Barrow II* court set the hourly rate at \$95 per hour—the “midpoint” between two rates which the record established that the applicant had actually charged.⁹²

86. *McNabola*, 10 F.3d at 518; see *Eddleman v. Switchcraft, Inc.*, 965 F.2d 422, 424 (7th Cir. 1992) (stating that district courts must apply market rate); *Leffer v. Meer*, 936 F.2d 981, 984 (7th Cir. 1991) (same).

In addition, the *McNabola* court also reaffirmed that the fee applicant has the “burden of substantiating the reasonableness of the hours expended and the hourly rate.” *McNabola*, 10 F.3d at 518. See also *Estate of Borst v. O’Brien*, 979 F.2d 511, 515 (7th Cir. 1992) (stating that burden is on fee applicant).

87. *McNabola*, 10 F.3d at 518 (citing *Eddleman*, 965 F.2d at 424 (quoting *Henry v. Wedermeier*, 738 F.2d 188, 193 (7th Cir. 1984))).

88. 11 F.3d 729 (7th Cir. 1993) (“*Barrow II*”). For a discussion of *Barrow I*, see *supra* notes 73-84 and accompanying text.

89. *Barrow II*, 11 F.3d at 730. The Seventh Circuit criticized the district court’s disposition of *Barrow I* on remand. *Id.* The district court had again awarded \$135 after the Seventh Circuit had vacated that same award in *Barrow I*. *Id.*

Unless parties can convince a district judge that Federal Rule of Civil Procedure 60(b) justifies modification of the decision, “the district judge must take the appellate decision as conclusive.” *Id.* at 731; see *Standard Oil Co. v. United States*, 429 U.S. 17, 18 (1976) (emphasizing appellate decision is conclusive); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961) (same); *Insurance Group Comm. v. Denver & Rio Grande R.R.*, 329 U.S. 607, 612 (1947) (same); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140-41 (1940) (same); *Milwaukee R.R. v. Soutter*, 69 U.S. (2 Wall.) 510, 512 (1864) (same); *West v. Brashear*, 39 U.S. (14 Pet.) 51, 53 (1840) (same); *Sibbald v. United States*, 37 U.S. (12 Pet.) 488 (1838) (same); *Cole Energy Development Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609-10 (7th Cir. 1993) (same).

90. See *Barrow II*, 11 F.3d at 730 (stating that “[s]uch flouting of our instructions leads us to vacate the district court’s judgment and set the fees ourselves”); cf. *In re Continental Illinois Sec. Litig.*, 985 F.2d 867, 867-69 (7th Cir. 1993) (failure to execute appellate instructions regarding determination of attorney fees leads to writ of mandamus).

91. *Barrow II*, 11 F.3d at 732; see *McNabola*, 10 F.3d at 518 (reaffirming that fee applicant has “burden of substantiating the reasonableness of the hours expended and the hourly rate”); *Borst*, 979 F.2d at 515 (7th Cir. 1992) (stating that burden is on fee applicant).

92. *Barrow II*, 11 F.3d at 732. The court reasoned that section 1988(b) “forbids the use of an especially high hourly rate in civil rights cases.” *Id.* at 731 (citing *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992)). Accordingly, the court found that no justification existed for the court to award the fee applicant fees at a rate above which he or she had ever previously charged. *Id.* at 732.

2. *Court of Appeals for the District of Columbia Circuit*

The District of Columbia Circuit first addressed the determination of a reasonable rate under a statute similar to section 1988(b) in *Copeland v. Marshall*.⁹³ While sitting en banc, the D.C. Circuit held that a district court must not calculate an award of attorney fees differently when the government is the losing party.⁹⁴ Further, the D.C. Circuit stated that "the reasonable hourly rate is that prevailing in the community for similar work."⁹⁵ In addition, the D.C. Circuit in *Copeland* explained that an award of market fees to salaried public interest attorneys is consistent with Congress's intent.⁹⁶ Finally, the D.C. Circuit also noted that a reasonable

93. 641 F.2d 880, 892 (D.C. Cir. 1980) (en banc). The litigation underlying this attorney fees dispute involved a successful gender-discrimination class suit against the United States Department of Labor. *Id.* Upon a petition for attorney fees under 42 U.S.C. § 2000e, the district court awarded counsel \$160,000. *Id.* at 883. A panel of the District of Columbia Circuit reversed the district court's award and remanded the case. *Id.* at 883-84. The Circuit, however, sitting en banc, ultimately rejected the panel's decision and affirmed the district court's award. *Id.* at 884.

94. *Id.* at 894. The court reasoned that the amount of an attorney's fee award should not turn on the identity of the losing party. *Id.* The court looked to Congress's intent and concluded that the "primary purpose [of this fee shifting statute] is to help persons obtain competent counsel with which to vindicate civil rights through litigation." *Id.* at 895 (citing *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968)). The court explained that:

Unlike private sector employees, federal employee complainants are not merely private attorneys general; they are the only attorneys general under the enforcement scheme adopted in Section 717, 42 U.S.C. § 2000e-16 (Supp. V 1975). Suits in behalf of federal employees by the Attorney General or EEOC are not authorized against federal agencies. Indeed, the Attorney General is frequently counsel for the other side. Also unlike private sector employees, federal employees must first bring their employment discrimination grievances, not to an independent state or local administrative body or to EEOC, but to the very agency about whose practices they are complaining.

Id. (citing *Parker v. Califano*, 561 F.2d 320, 331 (D.C. Cir. 1977)); see *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (noting that standards pertaining to statutes which contain fee shifting provision to prevailing party are generally applicable).

95. *Copeland*, 641 F.2d at 892 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974)); see *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (noting that "requested rates [must be] in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation").

96. *Copeland*, 641 F.2d at 899. The *Copeland* court noted that the legislative history cites with approval a California case, *Davis v. County of L.A.*, 8 Empl. Prac. Dec. 5047 (C.D. Cal. 1974). *Copeland*, 641 F.2d at 899. The *Davis* court held that:

It is not legally relevant that plaintiffs' counsel . . . are employed by the Center for Law In The Public Interest, a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner

Id. at 899 (quoting *Davis*, 8 Empl. Prac. Dec. at 5048-49).

hourly rate is the "product of a multiplicity of factors," and as a result, must account for skill, time limitations, reputation and undesirability.⁹⁷

Less than two years after *Copeland*, the District of Columbia Circuit clarified its holding, in *National Association of Concerned Veterans v. Secretary of Defense* ("NACV").⁹⁸ The NACV court began by reaffirming that the "key issue" in determining a "lodestar" is the calculation of the applicable reasonable hourly rate.⁹⁹ The court noted, however, that the *Copeland* decision failed to offer guidance concerning how trial courts should determine the reasonable rate.¹⁰⁰

Accordingly, and having acknowledged this void, the NACV court outlined the necessary requirements for both the fee applicant and the opposing party.¹⁰¹ First, the NACV court explained that an applicant is "required to provide specific evidence of the prevailing community rates for the type of work for which he seeks an award."¹⁰² The NACV court did

97. *Copeland*, 641 F.2d at 892.

98. 675 F.2d 1319, 1324-27 (D.C. Cir. 1982) ("NACV"). The NACV court consolidated three cases involving awards of attorney fees. See *Parker v. Secretary of Transp.*, 670 F.2d 249, 250 (D.C. Cir. 1982) (involving Title VII action, 42 U.S.C. § 2000e-5(k) (1976)); *Green v. Department of Commerce*, 489 F. Supp. 977, 978 (D.C. 1980) (involving Freedom of Information Act, 5 U.S.C. § 552 (1976)); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 487 F. Supp. 192, 194 (D.C. 1979) (involving Freedom of Information Act, 5 U.S.C. § 552).

99. *NACV*, 675 F.2d at 1324 (citing *Copeland*, 641 F.2d at 892). The NACV court further acknowledged that the hourly rate depends on the experience of the attorney, and the particular work involved. *Id.* at 1325. The NACV court further explained that determining a reasonable rate is more difficult than it appears. *Id.* The NACV court noted that an attorney's hourly rate will vary with factors such as: (1) skill necessary; (2) time limitations; (3) amount sought in the litigation; (4) reputation of attorney; (5) desirability or undesirability of the case; (6) personal professional interests; (7) ability of clients to pay. *Id.*

100. See *id.* (stating that "no guidance was provided as to the nature of the submission an applicant for a statutory fee award should make in the District Court to support the hourly rate requested"); cf. *Wojtkowski v. Cade*, 725 F.2d 127, 131 (1st Cir. 1984) (explaining that while fee applicants are not required to document prevailing community rates, they may if they choose).

101. *NACV*, 675 F.2d at 1325-26. An additional requirement which the NACV court did not discuss is qualifying as the prevailing party. See *Kirklin*, *supra* note 65, at 497-99 (examining issues courts must consider when determining whether party has reached prevailing party status). In addition, the NACV court noted that "[a]ttorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records." *NACV*, 675 F.2d at 1327; see *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983) (requiring fee applicants to maintain "meticulous, contemporaneous time records"); *New York Ass'n of Retarded Children v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983) (stating that "for the future, that contemporaneous time records are a prerequisite for attorney's fees in this Circuit").

102. *NACV*, 675 F.2d at 1325. The court gave examples of the type of specific evidence a fee applicant must produce. *Id.* These examples include: (1) affidavits detailing the precise fees that fee paying clients pay similarly qualified attorneys; and (2) recent fees district courts have awarded to attorneys of comparable reputation and experience. *Id.*; see *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987) (explaining that fee applicant may establish prevailing market "through affidavits reciting the precise fees that counsel with similar qualifications have received in

qualify this requirement, however, by explaining that "generalized" and "conclusory" evidence, including affidavits from "friendly attorneys," is insufficient to meet the burden of production.¹⁰³ Furthermore, the *NACV* court noted that the best evidence a district court can consider is the actual billing rate the applicant or the applicant's firm customarily charges their clients.¹⁰⁴ Arising at this conclusion, the *NACV* court reasoned that this evidence offers "substantiating evidence" and is highly relevant in proving the prevailing community rate.¹⁰⁵ The second requirement outlined by the *NACV* court was that once a fee applicant has sufficiently supported the requested rate, the burden shifts to the other party to offer equally "specific countervailing evidence" as to why the proposed rate is erroneous.¹⁰⁶

Six years after the *NACV* court clarified *Copeland*, an en banc District of Columbia Circuit revisited its determination of a reasonable hourly rate in *Save Our Cumberland Mountains, Inc. v. Hodel* ("*SOCM*").¹⁰⁷ In *SOCM*,

comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market").

103. *NACV*, 675 F.2d at 1325. The *NACV* court explained that "[t]o be useful, an affidavit stating an attorney's opinion as to the market rate should be *as specific as possible*." *Id.* (emphasis added). The *NACV* court then defined this specificity requirement. *Id.* The *NACV* court noted that for an affidavit to be considered specific, it should include: (1) whether the rate is for present work, or past work; (2) whether the rate is a general rate or for a specific type of litigation; and (3) whether the rate is an average rate or a rate charged specifically for an attorney with a certain amount of experience. *Id.*

104. *Id.* The *NACV* court held that in some cases the district court may require the applicant to produce his or her actual billing practice during the relevant time period. *Id.* at 1326. The *NACV* court, however, did note that if the applicant is a public interest attorney "who does not do *any work for fees*," the applicant need not submit this type of evidence. *Id.* at 1326 n.7a (citing *Copeland*, 641 F.2d at 898) (emphasis added).

105. *Id.* at 1326. "Accordingly, the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate." *Id.* The *NACV* court further explained that this evidence may be essential to a district court when determining the award. *Id.* The *NACV* court noted that the district court may require the fee applicant to even produce the billing schedule for cases worked on during the period of the litigation at hand. *Id.* The *NACV* court explained that this evidence will ensure that the amount of the fee award is not just what the attorney would like to receive, but what on average that attorney has received. *Id.*

106. *Id.* Once the applicant has satisfied his or her initial burden, the pendulum swings back to the other party to present evidence which rebuts the requested rate and proves why the rate is not the market rate. *Id.* The *NACV* court noted, however, that if the fee applicant has presented evidence which is so weak, the other party may without more simply challenge the rate as unsubstantiated. *Id.*

107. 857 F.2d 1516, 1518-20 (D.C. Cir. 1988) ("*SOCM*") (en banc). Following a suit based on the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d), the district court awarded the prevailing party attorney fees. *SOCM*, 857 F.2d at 1517, 1519 n.1. While the Circuit in *SOCM* noted that the panel of the District of Columbia Circuit applied the correct three-part analysis of attorney fees, it concluded that the panel applied the second prong incorrectly. *See id.* at 1517

the D.C. Circuit had to determine whether to overrule a case decided four years earlier, *Laffey v. Northwest Airlines*.¹⁰⁸ In *Laffey*, the court held that district courts should calculate the reasonable hourly rate for an attorney who customarily charges below market rates in order to serve the public, according to the rate charged in similar cases by that attorney's firm.¹⁰⁹ The D.C. Circuit in *SOCM*, declined to subscribe to the *Laffey* formulation, finding it wholly inconsistent with Supreme Court precedent and Congress's intent.¹¹⁰ The D.C. Circuit in *SOCM* emphasized its rationale by depicting numerous hypothetical situations in which the *Laffey* approach would lead to an anomalous result.¹¹¹ In its conclusion, however, the D.C. Circuit in *SOCM* did offer a degree of support to the matrix of reasonable rates developed in *Laffey* (the *Laffey* Matrix), which classify hourly rates based on the number of years since the attorney graduated law school.¹¹²

(noting that "the District Court applied the correct three-part analysis to determine the appropriate award: (1) determination of the number of hours reasonably expended in litigation; (2) determination of a reasonable hourly rate or 'lodestar'; and (3) the use of multipliers as merited").

108. 746 F. Supp. 374 (D.C. Cir. 1984) (involving award of \$5 million in attorneys fees arising out of litigation continuing for more than one decade); see *SOCM*, 857 F.2d at 1517 (revisiting *Laffey*).

109. See *Laffey*, 746 F. Supp. at 374 (rejecting argument that "because Plaintiff's counsel is 'union-oriented labor law firm,' its rates for litigating this action should be determined by the market for legal services 'in the recognized "labor law" specialty'" (citations omitted)).

110. See *SOCM*, 857 F.2d at 1521 (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 (1984)). The *SOCM* court noted that Congress intended not only to attract counsel, but competent counsel. *Id.* Accordingly, the *SOCM* court concluded that "[i]t is not inconsistent with the avoidance of windfalls to pay attorneys at rates commensurate with prevailing community standards of attorneys of like expertise doing the same sort of work in the same area." *Id.*; see S. REP. NO. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.A.N. 5908, 5913 (rejecting "windfalls" for attorneys); see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (emphasizing that Congress did not intend for section 1988(b) to improve financial lot of attorneys, acting as form of economic relief).

111. *SOCM*, 857 F.2d at 1520. The *SOCM* court first explained that under section 1988(b), highly paid private practice attorneys receive their "usual handsome rates." *Id.* Next, the *SOCM* court noted that a legal aid attorney, will also receive the higher rates as per the Supreme Court's decision in *Blum*. *Id.* The anomaly occurs when an attorney's practice cannot be neatly categorized into either group. *Id.* In particular, the attorneys who charge lower rates to some clients for non-economic reasons will "receive fee awards often significantly smaller than those calculated" in the other two categories. *Id.*

112. See *id.* at 1525 (commending fee schedule established in *Laffey*). The court explained that "[w]e do not intend . . . to diminish the value of the fee schedule compiled in . . . *Laffey* Indeed, we commend its use for the year to which it applies." *Id.* This fee schedule, the *Laffey* Matrix, proposes the following fee rates:

- \$175 an hour for very experienced federal court litigators, *i.e.*, lawyers in their 20th year or more after graduation from law school;
- \$150 an hour for experienced federal court litigators in their 11th through 19th years after law school graduation;
- \$125 an hour for experienced federal court litigators in their 8th through 10th years after graduation from law school;

In the year following the District of Columbia Circuit's decision in *SOCM*, the Circuit decided two additional cases impacting the interpretation of the "reasonable hourly rate."¹¹³ In the first instance, the court held in *In re Donovan*¹¹⁴ that because the fee applicants requested their usual hourly rates, these rates were reasonable.¹¹⁵ In the second case, the court in *In re Olson*¹¹⁶ rejected the use of premium rates instead of an attorney's usual billing rate.¹¹⁷ While concluding that the district court must apply the lower rates, the court in *Olson* focused on the fee applicant's two alleged reasons for seeking the higher rates.¹¹⁸ First, the *Olson* court rejected the higher rates, noting that they appeared "to be a contingency fee argument."¹¹⁹ Second, the *Olson* court discarded the higher rates based on the Supreme Court's holding that a delay in payment does not justify fee enhancement against the United States.¹²⁰

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- \$100 an hour for senior associates, *i.e.*, 4 to 7 years after graduation from law school;
 - \$75 an hour for junior associates, *i.e.*, 1 to 3 years after law school graduation;

Laffey, 572 F. Supp. at 371.

113. *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989); *In re Donovan*, 877 F.2d 982 (D.C. Cir. 1989). During this same year, a district court in the District of Columbia Circuit also addressed the reasonable rates under section 1988(b). *See* *Thompson v. Kennickell*, 710 F. Supp. 1, 5 (D.D.C. 1989) (ruling that because government "offered no 'specific contrary evidence,'" plaintiff is entitled to award at requested rates); *see also* *NACV*, 675 F.2d 1319, 1326 (D.C. Cir. 1982) (stating that "in the normal case the Government must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate").

114. 877 F.2d 982 (D.C. Cir. 1989).

115. *Id.* at 993. The fee applicants also submitted supporting affidavits from independent qualified counsel, which asserted that these requested rates were within the range of rates charged by similar attorneys. *Id.*

116. 884 F.2d 1415 (D.C. Cir. 1989).

117. *Id.* at 1424 (finding "fault with . . . [fee applicant counsel's] practice of billing Olson at its premium 'C' rate as opposed to its normal 'A' rate").

118. *Id.* The applicant first contended that they charged Olson the higher rates because "he was unable to meet his financial obligations to the firm on a basis consistent with the firm's normal requirements." *Id.* And second, because the "C" rate was an offset for the "necessarily . . . significant delay." *Id.*

119. *Id.* The *Olson* court explained that the Supreme Court had just held "that a risk of nonpayment is not present where an attorney preserves a right of recourse against a client for unpaid fees." *Id.*; *see* *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (stating that "when the plaintiff has agreed to pay its attorney, win or lose, the attorney has not assumed the risk of nonpayment and there is no occasion to adjust the lodestar fee because the case was a risky one"); *see also* *Jones v. Central Soya Co.*, 748 F.2d 586, 593 (11th Cir. 1984) (holding that "[a] lawyer may not preserve a right of recourse against his client for fees and still expect to be compensated as if he had sacrificed completely his right to payment in the event of an unsuccessful outcome").

120. *Olson*, 884 F.2d at 1425 (citing *Library of Congress v. Shaw*, 478 U.S. 310, 316 (1986)). The *Olson* court analogized an enhancement because of a delay in payment of interest. *Id.* Then, the *Olson* court explained that recovering prejudgment interest against the United States is prohibited absent express congressional waiver. *Id.*; *see* *Angarica v. Bayard*, 127 U.S. 251, 260-61 (1888) (holding that it is

During the early 1990s, the District of Columbia Circuit addressed relatively few cases concerning reasonable rate determination under section 1988(b).¹²¹ This decade was not to pass, however, without the D.C. Circuit again revisiting this issue. On June 23, 1995, the court did just that, and again revisited the determination of reasonable rates for legal services in *Covington v. District of Columbia*.¹²²

III. FACTS: *COVINGTON V. DISTRICT OF COLUMBIA*

In *Covington v. District of Columbia*, the United States Court of Appeals for the District of Columbia consolidated three district court cases, *Covington v. District of Columbia*,¹²³ *Sexcius v. District of Columbia*¹²⁴ and *Galloway v. Superior Court*,¹²⁵ all of which challenged the shifting of fees under section 1988(b).¹²⁶ In the district court's *Covington* decision, ten inmates from a

"well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provisions to that effect"); *Tillson v. United States*, 100 U.S. 43, 47 (1879) (stating that "interest, however, would have been recoverable . . . if the payments were unreasonably delayed. But with the government the rule is different . . . the practice which has long prevailed in the departments of not allowing interest on claims presented, except in some way specifically provided for").

121. *But see* *Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1569 (D.C. Cir. 1993) (holding that without evidence that fee applicant charged reduced rate, district court properly applied usual billing rate); *Kattan v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) (stating that "district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for record evidence") (citing *King v. Palmer*, 950 F.2d 771, 786 (D.C. Cir. 1991) (en banc)).

122. *See Covington v. District of Columbia*, 57 F.3d 1101, 1107-10 (D.C. Cir. 1995) (examining reasonable rate case law). For a discussion of the facts of *Covington*, see *infra* notes 123-38 and accompanying text. For a discussion of the *Covington* court's analysis, see *infra* notes 142-77 and accompanying text. For a critical examination of the *Covington* court's analysis, see *infra* notes 178-201 and accompanying text. For the probable impact *Covington* will have on future litigation of attorney fee awards, see *infra* notes 202-17 and accompanying text.

123. 839 F. Supp. 894 (D.D.C. 1993).

124. 839 F. Supp. 919 (D.D.C. 1993).

125. No. CIV.A.91-0644, 1994 WL 162410 (D.D.C. Apr. 21, 1994).

126. *Covington*, 57 F.3d at 1103. Rule 42(a) of the Federal Rules of Civil Procedure allows for the consolidation of cases involving, inter alia, a common question of law. FED. R. Civ. P. 42(a). Rule 42(a) provides the district court with broad discretion when deciding whether to consolidate. *Investors Research Co. v. United States Dist. Court*, 877 F.2d 777, 777 (1989).

The *Covington* court, however, only reviewed the evidence presented to the district court in *Covington*. *Covington*, 57 F.3d at 1103. The litigation underlying the two other attorney fees petitions which the District of Columbia Circuit subsequently condensed into *Covington* involved two very different causes of action. First, *Sexcius* involved an action alleging a violation of the First and Fourteenth Amendments. *Sexcius*, 839 F. Supp. at 920. In *Sexcius*, two teachers in the District of Columbia spoke out against certain educational practices. *Id.* At trial, the teachers won a permanent injunction against, inter alia, the District of Columbia, prohibiting them from retaliating against the teachers in their workplace. *Id.* at 921. The district court, in ruling upon the teachers' motion for attorney fees,

District of Columbia correctional facility alleged that the District of Columbia ("District") deprived them of their civil rights when several correctional officers severely beat them while they were handcuffed and shackled.¹²⁷ After a jury found for the inmates on all of the tried issues, the District moved for a judgment notwithstanding the verdict.¹²⁸ The United States District Court for the District of Columbia, however, summarily denied the District's motion.¹²⁹ Subsequently, the District decided not to pursue an appeal, but agreed to settle and pay each of the inmates \$25,000.00.¹³⁰

After the parties settled the underlying litigation, the inmates' attorneys sought to invoke section 1988's fee shifting provision.¹³¹ Both parties agreed that the District owed attorney fees.¹³² The parties, however, could not come to an agreement on the applicable reasonable rates.¹³³

While ruling upon the inmates' motion for attorney fees, the district court in *Covington* held that the plaintiffs' counsel, acting in the "public interest but [as] private practice lawyers, . . . [were] entitled to receive prevailing market rates for their services."¹³⁴ The *Covington* district court

applied the *Laffey* Matrix, and awarded them \$247,809.87 in fees and costs. *Id.* at 920 (applying matrix developed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984)). The District of Columbia Circuit subsequently consolidated this appeal with the appeals from *Covington* and *Galloway*. *Covington*, 57 F.3d at 1103.

Next, the litigation underlying the claim for attorney fees in *Galloway* centered around a handicap discrimination suit. *Id.* In *Galloway*, the district court, also applied the *Laffey* Matrix and awarded \$81,105.20 in costs and fees. *Galloway*, 1994 WL 162410, at *2. For a detailed discussion of the *Laffey* Matrix, see *supra* note 112.

127. *Covington*, 839 F. Supp. at 895. In addition to beating the prisoners while they were shackled, the prisoners also alleged that they were "sent to a maximum security facility without proper hearings." *Covington*, 57 F.3d at 1103-04.

128. *Covington*, 839 F. Supp. at 895. Under Rule 50(b) of the Federal Rules of Civil Procedure, a party may renew a motion for judgment after the trial. FED. R. Civ. P. 50(b). In the event a party motions under Rule 50(b), the trial court, at its discretion, may direct entry of judgment as a matter of law. *Id.* This entry is commonly referred to as "judgment notwithstanding the verdict." STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 41 (1992).

129. See *Covington*, 839 F. Supp. at 895 (noting that initially, District sought to appeal verdict).

130. *Id.* In addition to agreeing to pay each of the inmates monetary compensation, the District agreed to concede that the plaintiffs were prevailing parties for 42 U.S.C. § 1988(b) purposes. *Id.*

131. *Covington*, 57 F.3d at 1102-03. For the relevant text of 42 U.S.C. § 1988(b), see *supra* note 4.

132. *Covington*, 839 F. Supp. at 895-96.

133. *Id.* at 896. Although a "lodestar" calculation requires establishing both a reasonable hourly rate and a reasonable number of hours spent, the *Covington* district court only examined the former. *Id.* Because the parties stipulated as to the number of hours reasonably worked, the *Covington* district court's analysis solely examined the reasonable hourly rate prong. *Id.*

134. *Id.* at 897. In order to determine "prevailing market rates," the district court first examined the scope of the "relevant market." *Id.* The *Covington* district

explained that a "survey" of attorneys' rates within the relevant market is the "ideal" process through which a court may determine the applicable rates.¹³⁵ While the fee applicants in *Covington* did not produce such a survey, however, the district court found their fee matrix sufficient.¹³⁶ Ac-

court rejected the District of Columbia's argument that the "relevant market should be narrowly defined as that market of lawyers who represent plaintiffs in civil rights, employment, or discrimination actions." *Id.* The court rationalized that, although the District of Columbia's position "may be plausible," the District did not produce enough evidence to persuade the court. *Id.* at 897-98.

Second, the *Covington* district court considered the prevailing market rate for complex federal litigation. *Id.* at 900. Here, while noting the *Laffey* Matrix, the court held that only the inmates, the plaintiffs, had produced sufficient evidence. *Id.* Accordingly, the *Covington* district court awarded the inmates attorney fees at the rate which they requested, the *Laffey* Matrix rate. *Id.* (citing *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985)).

In addition, the *Covington* district court addressed three issues which were not fully examined by the District of Columbia Circuit in *Covington*. *Id.* at 900-03; see *Covington*, 57 F.3d at 1110 (discussing fees, but not addressing other two issues). First, the *Covington* district court examined the contingency plan according to which the plaintiffs arranged to compensate the law students. *Id.* at 901. Here, the court found that regardless of any contingency plan, the law students' time should be included in an award. *Id.* The court agreed that the contingency plan only differed "in degree," and thus was similar to any other program which pays a law student a salary. *Id.*

Next, the *Covington* district court examined whether to award fees at the current or historic rates. *Id.* at 902. The *Covington* court held that the District of Columbia implicitly "conceded" to the use of current rates by not requesting an annual breakdown of the number of hours expended. *Id.* The court reasoned that without these figures, an award of attorney fees using historic rates would be impossible to compute. *Id.*

Finally, the *Covington* district court also reached a decision concerning attorney fees for litigation involving attorney fees. *Id.* at 903. The court held that the plaintiffs were entitled to compensation for all hours reasonably spent on the petition for fees. *Id.*

135. *Id.* at 899. The court explained that:

A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)

Id.

136. *Id.* at 898-90. *But see Covington*, 57 F.3d at 1113 (Henderson, J., dissenting) (citing entire "survey" passage from district court's opinion in *Covington* in

cordingly, the district court in *Covington* awarded the applicants a total of \$363,117.25 in attorney fees.¹³⁷ As a result, the District appealed.¹³⁸

IV. ANALYSIS: *COVINGTON V. DISTRICT OF COLUMBIA*

This Part examines the District of Columbia Circuit's analysis in *Covington*.¹³⁹ In particular, the Section A of this Part offers a narrative review of the reasoning applied by the *Covington* court in reaching its conclusions.¹⁴⁰ Alternatively, Section B critically examines the *Covington* court's analysis.¹⁴¹

A. Covington's Determination of a Reasonable Rate

In *Covington*, the Court of Appeals for the District of Columbia, upon appeal by the District of Columbia, affirmed three different attorney fees award motions in one consolidated case.¹⁴² Before beginning its analysis, however, the circuit court first noted some "principles" of attorney fee awards emanating from *Blum* and *SOCM*.¹⁴³ The court then explained

support of conclusion that district court applied correct law, but came to wrong conclusion).

137. *Covington*, 839 F. Supp. at 903 (awarding \$363,117.25 for litigating merits of case and \$21,380.00 for litigating fee petition). The district court applied the following rates: the two lead attorneys at a rate of \$260.00 per hour; two assisting attorneys at a rate of \$160.00 an hour; the law graduates work at a rate of \$85.00 an hour; and the law students at a rate of \$70.00 an hour. *Id.*

138. *Covington*, 57 F.3d at 1102; *cf.* *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (stating that "request for attorney's fees should not result in a second major litigation"); *NACV*, 675 F.2d 1319, 1324 (D.C. Cir. 1982) (noting that "contests over fees should not be permitted to evolve into exhaustive trial-type proceedings").

139. For a review of the circuit court's analysis in *Covington*, see *infra* notes 142-201 and accompanying text.

140. For a narrative analysis of the circuit court's decision in *Covington*, see *infra* notes 142-77 and accompanying text.

141. For a critical analysis of the circuit court's decision in *Covington*, see *infra* notes 178-201 and accompanying text.

142. *Covington*, 57 F.3d at 1107. The *Covington* court based this decision on an analysis of Supreme Court precedent, *Blum*, District of Columbia precedent, *SOCM*, and statutory interpretation of 42 U.S.C. § 1988 (1994). *Id.* at 1107-12; see *Blum v. Stenson*, 465 U.S. 886 (1984) (interpreting 42 U.S.C 1988(b)); *SOCM*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc) (same). For the text of section 1988(b), see *supra* note 4.

143. *Covington*, 57 F.3d at 1107. The court cited two cases as sources for these "principles." *Id.* First, the *Covington* court cited to the Supreme Court's decision in *Blum*. See *Covington*, 57 F.3d at 1107 (citing *Blum*, 465 U.S. at 895 (explaining that Congress intended that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel")). Next, the *Covington* court cited to the District of Columbia's en banc decision in *SOCM*. *Id.* (citing *SOCM*, 857 F.2d at 1524 (en banc) (holding that "prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals")).

that *Covington* involved a “relatively straightforward application of these principles.”¹⁴⁴ Ultimately, the court summarily concluded that under the Supreme Court’s *Blum* decision and the District of Columbia Circuit’s *SOCM* decision, “it is quite clear” that the applicants were entitled to an award.¹⁴⁵ Thus, in *Covington* the circuit court held that the district judges in the three cases below did not abuse their discretion.¹⁴⁶

In reaching this conclusion, the *Covington* court utilized a two prong approach in structuring its analysis.¹⁴⁷ First, the court examined “The Attorneys’ Fee Case.”¹⁴⁸ Second, the court considered the “Claims in this Case.”¹⁴⁹

1. *The Attorneys’ Fee Case*

In this section of the circuit court’s opinion, the *Covington* court explained that as a “general matter,” the District of Columbia Circuit characterized the Supreme Court’s *Blum* decision as constituting a three-part analysis.¹⁵⁰ The circuit court noted, however, that the facts in *Covington* only required an examination as to the second part—“determination of a reasonable hourly rate.”¹⁵¹ The court further explained that to establish a

144. See *Covington*, 57 F.3d at 1107 (noting that attorneys in present case requested market rates).

145. See *id.* (concluding that while attorneys at hand either practice privately, but at reduced rate for non-economic reasons, or have no billing histories, both are entitled to prevailing market rates).

146. *Id.*; see *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc) (stating that “[i]t is common learning that an attorney’s fee award by the District Court will be upset on appeal only if it represents an *abuse of discretion*” (emphasis added)).

147. *Covington*, 57 F.3d at 1107-12. This section is structured in the same manner as the *Covington* court’s analysis. For a discussion of the circuit court’s two prong analysis in *Covington*, see *infra* notes 152-77 and accompanying text.

148. See *Covington*, 57 F.3d at 1107-10 (offering macro-analysis of attorney fee awards in general). For a discussion of the *Covington* courts macro-analysis of attorney fee awards, see *infra* notes 150-69 and accompanying text.

149. See *Covington*, 57 F.3d at 1110-12 (conducting a micro-analysis of district court’s attorney fee award in *Covington*). For a discussion of the *Covington* court’s micro-analysis of attorney fee awards, see *infra* notes 170-79 and accompanying text.

150. *Covington*, 57 F.3d at 1107. This three prong analysis includes: “(1) determination of the number of hours reasonably expended in litigation; (2) determination of a reasonable hourly rate or ‘lodestar’; and (3) the use of multipliers as merited.” *Id.* (quoting *SOCM*, 857 F.2d 1516, 1517 (D.C. Cir. 1988) (en banc)); see also *In re Olson*, 884 F.2d 1415, 1423 (D.C. Cir. 1989) (applying same analysis); *In re Donovan*, 877 F.2d 982, 992 (D.C. Cir. 1989) (applying same analysis). For a discussion of the lodestar attorney fees analysis, see *supra* notes 7-9, 41-42, 64 and accompanying text.

151. *Covington*, 57 F.3d at 1107. The *Covington* court only needed to examine the reasonable hourly rate prong because the other two prongs were not in dispute. *Id.* The first prong, determination of the number of hours reasonably expended was moot because the parties stipulated on this number. *Id.* at 1106; see *Covington v. District of Columbia*, 839 F. Supp. 894, 896 (D.D.C. 1993) (noting that “parties in this case have already stipulated as to the number of hours counsel

reasonable hourly rate, fee applicants must show at least three elements: "the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community."¹⁵²

Next, the *Covington* court illustrated the requirements needed to establish each of these three elements.¹⁵³ With respect to the first element, the *Covington* court held that attorneys who request fees at rates greater than those they normally charge must produce evidence to show that their rates are reduced for non-economic or public-spirited reasons.¹⁵⁴ The *Covington* court reasoned that this requirement ensures that district courts will not penalize private, rate-cutting attorneys for their public-spiritedness.¹⁵⁵ In addition, the *Covington* court explained that the burden is on the fee applicant to produce evidence that the rates in question are in fact reduced.¹⁵⁶ Finally, while warning that some attorneys "who cannot command market rates invariably will have a 'custom' of charging rates below market," the *Covington* court held that it is ultimately up to the district courts to resolve this issue.¹⁵⁷

Continuing its examination, the *Covington* court next reviewed the second element—requiring fee applicants to show their skill, experience and reputation.¹⁵⁸ Here, the *Covington* court held that the "prevailing parties must offer evidence to demonstrate their attorneys' experience, skill, reputation, and the complexity of the case they handled."¹⁵⁹ The *Covington*

have reasonably worked on this litigation"). And the third prong, the use of multipliers, was not raised by the petitioning party. See *Covington*, 839 F. Supp. at 896 (stating that "plaintiffs are not seeking any enhancement of the lodestar figure").

152. *Covington*, 57 F.3d at 1107; see *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (noting requirements necessary to establish reasonable hourly rate); *SOCM*, 857 F.2d at 1519 (same).

153. *Covington*, 57 F.3d at 1107-10. For a discussion of the burden on a fee applicant, see *supra* notes 35-37, 101-05 and accompanying text.

154. *Covington*, 57 F.3d at 1107; see *SOCM*, 857 F.2d at 1519 (reviewing claim of attorneys who "adjusted fee schedules downward from pro bono or quasi public interest motives to reflect the reduced ability of the client to pay or what the attorney saw as the importance and justice of the client's cause").

155. *Covington*, 57 F.3d at 1108. The *Covington* court explained that the en banc District of Columbia Circuit in *SOCM* held that: "Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic." *Id.* (quoting *SOCM*, 857 F.2d at 1524).

156. See *id.* (explaining that "attorney must show that his or her custom of charging reduced rates is in fact attributable to 'public spiritedness'").

157. *Id.* The *Covington* court explained that a district court must weigh the competing evidence and "determine whether an attorney customarily charges reduced rates for non-economic reasons." *Id.* The court in *Covington* concluded that this question is within the "sound discretion of the district court." *Id.*

158. *Id.*; see also *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (explaining factors court should consider in determining attorney fees awards).

159. *Covington*, 57 F.3d at 1108; see *SOCM*, 857 F.2d at 1521 n.4 (explaining that District of Columbia Circuit does "not propose . . . that all attorneys be remunerated at the same rate, regardless of their competence, experience, and market-

ton court explained that the Supreme Court required fee applicants to exhibit evidence to establish that the requested rates are consistent with rates that similarly skilled and experienced attorneys charge their clients.¹⁶⁰

The *Covington* court then addressed the third element—compelling fee applicants to show the “prevailing market rates in the relevant community.”¹⁶¹ The *Covington* court noted that the framework for this analysis requires fee applicants to produce satisfactory evidence, including their own affidavits, which establish “that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.”¹⁶² Importantly, the *Covington* court determined that fee applicants may submit updated ver-

ability, . . . [rather, the Circuit] only aim[s] to provide that their experience, competence, and marketability . . . be reflected in the rate at which they are in fact remunerated”).

160. *Covington*, 57 F.3d at 1108; see *Blum*, 465 U.S. at 895 n.11 (noting fee applicants are required to “produce satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation”).

161. *Covington*, 57 F.3d at 1108. The *Covington* court noted that the Supreme Court, in *Blum*, acknowledged that the determination of the market rate is a difficult assessment. *Id.* The Court in *Blum* explained that it recognized that:

[D]etermining an appropriate “market rate” for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely.

Blum, 465 U.S. at 895 n.11; see also *NACV*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (stating that “complexity of the market for legal services does not . . . reduce the importance of fixing the prevailing hourly rate in each particular case with a fair degree of accuracy”).

162. *Covington*, 57 F.3d at 1109 (citing *Blum*, 465 U.S. at 895 n.11). The *Covington* court explained that the Supreme Court established this framework, in *Blum*. *Id.* The Supreme Court in *Blum* explained that:

To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Blum, 465 U.S. at 895 n.11 (noting that “rates charged in private representations may afford relevant comparisons”); see also *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (stating that “reasonable attorney’s fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market . . . and one that grants the successful civil rights plaintiff a ‘fully compensatory fee,’ . . . comparable to what ‘is traditional with attorneys compensated by a fee-paying client’” (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983))).

sions of the *Laffey* Matrix¹⁶³ or the United States Attorney's Office Matrix¹⁶⁴ to demonstrate this element.¹⁶⁵ The *Covington* court reasoned that while matrices are "crude," they still provide a useful starting point.¹⁶⁶

Finally, the *Covington* court explained that once the fee applicants meet their burden, the defendants may challenge the fee application.¹⁶⁷ Arriving at this conclusion, however, the *Covington* court noted that the defendant's burden is just as stringent as the fee applicant's burden.¹⁶⁸ Thus, the *Covington* court reaffirmed that the defendant must "provide specific contrary evidence tending to show that a lower rate would be appropriate."¹⁶⁹

2. *The Claims in Covington*

The circuit court in *Covington* began its analysis by explaining that its "review function in this case is limited" because "district courts act with a

163. See *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983) (citing with approval proposed fee matrix). For a discussion of *Laffey* and the *Laffey* Matrix, see *supra* note 112 and accompanying text.

164. See *Covington*, 57 F.3d at 1105 n.14 (noting that "U.S. Attorney's Office developed its fee matrix by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate and rounding upwards if the sum is within \$3 of the next \$5 multiple").

165. *Id.* at 1109. But see *NACV*, 675 F.2d at 1325 (explaining that "[t]o be useful an affidavit stating an attorney's opinion as to the market rate should be as specific as possible" (emphasis added)).

166. *Covington*, 57 F.3d at 1109. The *Covington* court noted the district court's dissatisfaction with the *Laffey* Matrix in *Galloway v. Superior Court*. *Id.* at 1109 n.18; see *Galloway v. Superior Court*, No. CIV.A.91-0644, 1994 WL 162410, at *3 n.1 (D.D.C. Apr. 21, 1994) (stating that "[t]he Court accepts as credible evidence the [*Laffey*] Matrix, but nonetheless would hope that a more complete breakdown and study of rates could be compiled for future use in attorneys' fee awards").

167. *Covington*, 57 F.3d at 1109; see *Blum*, 465 U.S. at 897 (emphasizing that "[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988").

168. *Covington*, 57 F.3d at 1109-10. For a discussion of the burden on the party opposing an attorney fees application, see *supra* note 106 and accompanying text.

169. *Covington*, 57 F.3d at 1110 (quoting *NACV*, 675 F.2d at 1326). The *Covington* court explained that the "Government's burden in rebuttal is not without demands." *Id.* at 1109. The *Covington* court reiterated the explanation of the District of Columbia Circuit in *National Ass'n of Concerned Veterans v. Secretary of Defense*. *Id.* The *NACV* court held that:

Once the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence. Although there may be occasions in which the applicant's showing is so weak that the Government may without more simply challenge the rate as unsubstantiated, in the normal case the Government must either accede to the applicant's requested rate or provide *specific contrary evidence* tending to show that a lower rate would be appropriate.

NACV, 675 F.2d at 1326 (emphasis added).

real measure of discretion in granting a fee award under section 1988.”¹⁷⁰ The *Covington* court then determined that the plaintiffs “clearly met their burden and their requested rates were properly accorded a presumption of reasonableness.”¹⁷¹ In addition, the *Covington* court explained that the District offered insufficient evidence to meet their burden of refuting the proposed reasonable rate.¹⁷²

The circuit court in *Covington* rejected the District’s position that the district court erred for three reasons.¹⁷³ First, the *Covington* court held that the District offered insufficient evidence to support its claim that the requested rates were higher than the established rate for attorneys experienced in litigating complex federal cases.¹⁷⁴ Second, the *Covington* court discarded the District’s claim that the fee applicants were only entitled to rates they regularly charge.¹⁷⁵ Third, the *Covington* court found that the district court correctly rejected the District’s position that the prevailing

170. *Covington*, 57 F.3d at 1110; see *Blum*, 465 U.S. at 902 n.19 (noting that “district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness”); *Kattan v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) (explaining that “district court’s discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence”); *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc) (stating that “[i]t is common learning that an attorney’s fee award by the District Court will be upset on appeal only if it represents an abuse of discretion”); see also *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting that limited standard of review is “appropriate in view of the district court’s superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters”).

171. *Covington*, 57 F.3d at 1110; see *Blum*, 465 U.S. at 897 (emphasizing that “[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988”).

172. *Covington*, 57 F.3d at 1110-12. For a discussion of the burden on the party opposing an attorney fees application, see *supra* note 106 and accompanying text.

173. *Covington*, 57 F.3d at 1110-12. For a discussion of the these reasons, see *infra* notes 174-76 and accompanying text.

174. *Covington*, 57 F.3d at 1110-11. The *Covington* court noted that the District only submitted one declaration, from an assistant deputy, in support of its claim. *Id.* at 1111. The *Covington* court found that this affidavit only recounted cases “inapposite to the case at bar.” *Id.* Furthermore, the *Covington* court stressed that that majority of the cases in the affidavit never even requested prevailing market rates. *Id.*

175. *Id.* The *Covington* court summarized the District’s argument as: the “plaintiffs are only entitled to the rates they regularly charge, *i.e.*, that these rates are in fact the prevailing market rates.” *Id.* The *Covington* court, however, then explained that the District of Columbia Circuit rejected this line of approach in *SOCM. Id.*; see *SOCM*, 857 F.2d 1516, 1521 (D.C. Cir. 1988) (holding that “result sought by plaintiffs, that is a fee award based on prevailing market rates rather than the actual rates of [plaintiffs’ attorneys], is not only not inconsistent with the express intent of Congress, but rather accomplishes Congress’ express goals”).

market only includes civil rights, employment or discrimination actions.¹⁷⁶ The *Covington* court reasoned that these conclusions were consistent with Congress's intent in enacting section 1988(b).¹⁷⁷

B. *Critical Analysis: Covington Clouds the Once Clear Burden of Proof Under 42 U.S.C. Section 1988*

In *Covington*, the District of Columbia Circuit failed to articulate a sound opinion for three reasons.¹⁷⁸ First, the *Covington* court erroneously applied existing Supreme Court and District of Columbia Circuit precedent.¹⁷⁹ Second, the *Covington* court failed to consider precedent from other circuits which have faced similar issues.¹⁸⁰ Third, the *Covington* court erred in the manner in which it consolidated the three lower court cases.¹⁸¹ This Section examines each of these areas, and attempts to provide more guidance than did the *Covington* court.

First, while the *Covington* court correctly reaffirmed *Blum's* holding that reasonable fees are based on the prevailing market rate, the court erred in its determination of the market rate.¹⁸² In particular, the *Covington* court properly isolated the three elements necessary to determine the market rate, but failed to require the type of specific evidence that the Supreme Court necessitated in *Blum*.¹⁸³ In short, *Blum* requires specific

176. See *Covington*, 57 F.3d at 1111 (noting that even "assuming, *arguendo*, the existence of such a submarket, the trial court found no evidence that submarket rates are lower than the prevailing rates in the broader legal market").

177. *Id.*; see *Blum*, 465 U.S. at 893 (quoting S. REP. NO. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913 (stating that "[i]t is intended that the amount of fees awarded under [section 1988(b)] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights may be nonpecuniary in nature")); see also *SOCM*, 857 F.2d at 1521 (stating that "Congress after all did not simply express its intent that the fees would attract counsel, but rather that they would be 'adequate to attract competent counsel'" (quoting S. REP. NO. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913))).

178. For the Seventh Circuit's disposition of *Barrow I*, an opinion that clearly articulates the issues, see *supra* notes 73-84 and accompanying text.

179. For a discussion of the *Covington* court's misapplication of Supreme Court and District of Columbia Circuit precedent, see *infra* notes 185-88 and accompanying text.

180. For a discussion of the potential application of other circuit precedent on the *Covington* facts, see *infra* notes 189-93 and accompanying text.

181. For a discussion of the court's failure to recognize facts distinguishing the three consolidated cases, see *infra* notes 194-201 and accompanying text.

182. *Covington*, 57 F.3d at 1107; see *Blum*, 465 U.S. at 895 (stating that Congress intended "'reasonable fees' under section 1988(b) . . . to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel").

183. See *Covington*, 57 F.3d at 1107 (noting that "fee applicant's burden in establishing a reasonable hourly rate entails a showing of at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community").

evidence, not the existence of a matrix that rigidly stratifies rates according to years of practice.¹⁸⁴

In addition, the *Covington* court failed to correctly apply existing District of Columbia case law.¹⁸⁵ Specifically, under NACV “[a]n applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award.”¹⁸⁶ The fee applicant’s motion in *Covington*, however, rested entirely on the merits of matrices depicting rates in the expansive “complex federal litigation” market, and failed to articulate the specific evidence required by NACV.¹⁸⁷ Accordingly, because the fee applicants in *Covington* offered only generalized evidence, it appears as though they failed to satisfy their burden of producing “specific evidence.”¹⁸⁸

Second, the District of Columbia Circuit’s opinion in *Covington* is noticeably void of any precedent from other circuits that may have afforded the court guidance.¹⁸⁹ For example, without specific evidence to support

184. See *Blum*, 465 U.S. at 895 n.11 (noting that fee applicants can meet burden by submitting their own affidavits to show that “requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation” (emphasis added)). Thus, while consideration of an attorney’s years out of law school may help a trial court to determine an attorney’s reasonable hourly rate, this consideration cannot be a substitute for an examination of attorney’s rates with comparable skill, experience and reputation. The *Covington* court, however, did in fact substitute this one facet inquiry, when it relied on a matrix which structured rates based on years out of law school, in lieu of *Blum*’s three prong analysis. See *Covington*, 57 F.3d at 1109 (relying on *Laffey Matrix*).

185. *Covington*, 57 F.3d at 1109. While the District of Columbia in NACV required fee applicants to produce specific evidence, the *Covington* court does not mention specific evidence until referencing the District’s burden of rebuttal. *Id.*; see NACV, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (noting that applicant’s affidavit should be “as specific as possible”).

186. NACV, 675 F.2d at 1325. In addition to requiring specific evidence, the NACV court expressly rejected the use of “generalized and conclusory” evidence. *Id.*; see *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980 (en banc) (stating that “reasonable hourly rate is that prevailing in the community for similar work”). The *Covington* court, however, employed and relied on the very type of evidence the NACV court specifically discounted; a generalized matrix offering conclusory evidence that an attorney’s time is worth so many dollars per year out of law school. See *Covington*, 57 F.3d at 1109 (relying on *Laffey Matrix*). For a discussion of the NACV court’s decision, see *supra* notes 98-106 and accompanying text.

187. See *Covington*, 57 F.3d at 1112 (Henderson, J., dissenting) (emphasizing that “applicants have not met this burden because they rest their applications entirely on evidence of rates in the broad market of ‘complex federal litigation’ that provides no basis for the district court to determine the rate prevailing for the specific type of work performed by them”).

188. See NACV, 675 F.2d at 1325 (rejecting fee applicant’s employment of “generalized and conclusory” evidence). For a discussion of the type of evidence necessary to support an attorney’s fees application, see *supra* notes 101-05 and accompanying text.

189. See *Covington*, 57 F.3d at 1106-12 (analyzing District of Columbia reasonable rate case law, but not considering other circuit case law). Although case law from other circuits was not binding on the *Covington* court, this case law could have

their claim, it appears as though the fee applicants were seeking premium rates.¹⁹⁰ The Seventh Circuit had already addressed a similar issue, however, in *Barrow I*, and rejected the award of such premium rates.¹⁹¹ In doing so, the *Barrow I* court explained that an award of fees at a "premium rate for civil rights cases, applicable only when the other side is paying, looks like nothing so much as a disguised multiplier."¹⁹² The *Barrow I* court concluded that because the Supreme Court in *City of Burlington v. Dague* rejected the use of risk multipliers, the use of premium rates must also be rejected.¹⁹³ The *Covington* court, however, declined to even mention the Seventh Circuit's decision in *Barrow I*, and thus neglected to take advantage of this persuasive authority.

Finally, because the *Covington* court failed to recognize material factual differences in the three consolidated cases, the court erred in limiting its review to the facts of the district court's decision in *Covington*, while ignoring the facts of *Sexcius* and *Galloway*.¹⁹⁴ Specifically, the *Covington* analysis operated under the assertion that because the fee applicants in all three cases charged reduced rates, their billing histories were irrelevant.¹⁹⁵ This assertion, however, is unsupported and inconsistent with the records in *Sexcius* and *Galloway*.¹⁹⁶ Specifically, in *Sexcius*, the fee applicant quoted a maximum rate of \$187.50 per hour, while in *Galloway* the applicant proved that she had commanded \$200 per hour.¹⁹⁷ Yet, neither

offered persuasive guidance. *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1490 n.17 (D.C. Cir. 1984). As the *Kreuzer* court explained:

When this court first considers a particular legal issue it will look to discover whether another circuit court has already resolved the issue. Prior resolution of an issue by another court will be taken into account. Such prior resolution of an issue by another circuit, however, is not binding on this circuit. It is, though, *persuasive authority* which should not be completely ignored.

Id. (emphasis added).

190. See *Barrow I*, 977 F.2d 1100, 1105 (7th Cir. 1992) (rejecting use of premium rates); see also *NACV*, 675 F.2d at 1325 (requiring specific evidence). For a discussion of the specific evidence requirement of the *NACV* court, see *supra* notes 101-05 and accompanying text.

191. *Barrow I*, 977 F.2d at 1105. For a discussion of the Seventh Circuit's disposition of *Barrow I*, see *supra* notes 73-84 and accompanying text.

192. *Barrow I*, 977 F.2d at 1105.

193. *Id.*; see *City of Burlington v. Dague*, 550 U.S. 557, 565-66 (1992) (refusing to allow district court to enhance attorney's fee award because of added risk); see also *Hensley v. Eckerhart*, 461 U.S. 424, 437 (stating that "request for attorney's fees should not result in a second major litigation").

194. See *Covington*, 57 F.3d at 1103 (consolidating three lower court rulings into one appeal). But see *id.* at 1114 (Henderson, J., dissenting) (criticizing *Covington* court's failure to examine all relevant facts).

195. See *id.* at 1108 (noting possibility that some attorneys may have lower than market rates, but not addressing whether *Covington* attorneys had lower rates).

196. *Id.* at 1114 (Henderson, J., dissenting). For a discussion of *Galloway* and *Sexcius*, see *supra* note 126.

197. *Covington*, 57 F.3d at 1114 (Henderson, J., dissenting). Judge Henderson explained that: "Together, *NACV* and *SOCM* instruct that a lawyer's usual hourly

of these two applicants offered any evidence that these rates were reduced for non-economic reasons.¹⁹⁸

Nevertheless, the *Covington* court neglected to acknowledge that the NACV court had found that an attorney's non-reduced rate is the most probative evidence of a reasonable rate.¹⁹⁹ As Judge Henderson explained in her *Covington* dissent, resorting "to a matrix to determine a reasonable rate is . . . appropriate only if a lawyer's ordinary rate is so reduced."²⁰⁰ Accordingly, because these rates were not reduced, the *Covington* court should not have employed the *Laffey* Matrix, regardless of its questionable utility.²⁰¹

V. *COVINGTON'S* IMPACT ON FUTURE LITIGATION IN THE DISTRICT OF COLUMBIA CIRCUIT AND BEYOND

The District of Columbia Circuit's adjudication of *Covington* signals a shift of the burden of proof in all petitions for attorney fees based on fee shifting statutes.²⁰² Although *Covington* only concerned section 1988's fee shifting provisions, its holding is applicable to all fee shifting statutes requiring "reasonable fees."²⁰³ As a result, *Covington's* questionable decision will not only infect future section 1988 cases, but may also plague the entire spectrum of cases implementing "reasonable" fee shifting provisions.

Because the *Covington* court allowed the fee applicants to meet their burden of proof by submitting an updated *Laffey* Matrix, the court relieved them of their duty to supply "specific evidence."²⁰⁴ Thus, the *Cov-*

rate remains the most probative evidence of a reasonable rate to award him under a fee-shifting statute unless that rate does not fairly reflect the value of his services because it is a 'reduced rate reflecting non-economic goals.'" *Id.* (Henderson, J., dissenting) (quoting SOCM, 857 F.2d 1516, 1524 (D.C. Cir. 1988)).

198. *See id.* (Henderson, J., dissenting) (explaining that "[n]either indicated that those rates had been reduced for non-economic reasons").

199. *See* NACV, 675 F.2d 1319, 1326 (D.C. Cir. 1982) (noting that trial courts may require fee applicants to submit actual billing practice during "relevant time period"); *Kattan v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) (explaining that "attorney's usual billing rate is presumptively the reasonable rate"); *see also* *Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1569 (D.C. Cir. 1993) (relying on record of attorney's customary rate).

200. *Covington*, 57 F.3d at 1114 (Henderson, J., dissenting). Judge Henderson, however, qualified her statement by explaining that if a trial court utilizes a matrix, it "must be based on 'specific evidence' of 'the type of work' for which the lawyer seeks an award." *Id.* (quoting NACV, 675 F.2d at 1325).

201. *Id.* (Henderson, J., dissenting). For a discussion of the *Laffey* Matrix's questionable utility, see *infra* notes 211-12 and accompanying text.

202. *Covington*, 57 F.3d at 1113 (Henderson, J., dissenting) (stating that "[w]here the district court committed error, however, was in placing the burden of proof on the District, not the applicants").

203. *See* *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992) (noting that Supreme Court interpretation of what is "reasonable" under one fee shifting statute applies "uniformly to all" fee shifting statutes).

204. For a discussion of the burden on a fee applicant, see *supra* notes 35-37, 101-05 and accompanying text.

ington court established a mechanism to secure the *Laffey* Matrix's premium rates, which only requires the fee-seeking applicants to meet two simple requirements.²⁰⁵ First, attorneys seeking their fees need to claim that their rates are reduced.²⁰⁶ The *Covington* court made this requirement easy to meet because it considered the numbers in the *Laffey* Matrix as the market rate.²⁰⁷ Therefore, under the court's skewed logic, any rate below the applicable *Laffey* Matrix rate must be reduced.²⁰⁸

Second, under *Covington*, the fee-seeking applicants need to establish that their rates are reduced for non-economic reasons.²⁰⁹ Again, the *Covington* court made this requirement effortless, as the court's decision allows fee applicants to submit self-serving affidavits that assert this position.²¹⁰ Because *Covington* only requires these two readily-met conditions, the court essentially fixed the floor for determining reasonable rates at the *Laffey* Matrix figures.²¹¹

205. See Appellant's Brief at 28, *Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995) (Nos. 94-7014 & 94-7022) (noting that under *Laffey* fee applicant is only faced with two requirements).

206. *Covington*, 57 F.3d at 1114 (Henderson, J., dissenting). Judge Henderson explained that trial courts must require fee applicants to do more than just ask for an award. *Id.* She emphasized that to the contrary, the fee applicant "must meet a factually demanding burden." *Id.*

207. See Appellant's Brief at 28, *Covington* (Nos. 94-7014 & 94-7022) (explaining that "this is rather easy to do because a reduced rate is any rate below the applicable experience rate in the *Laffey* [M]atrix").

208. See *id.* The *Covington* court failed to recognize that a matrix may not properly represent each attorney's skill reputation and experience. See *Blum*, 465 U.S. 886, 895 n.11 (1984) (noting that "requested rates [must] be in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation").

209. See *Covington*, 57 F.3d at 1107 (stating that "attorneys must offer some evidence that they charge reduced rates for public-spirited or noneconomic reasons").

210. See *id.* at 1104 (relying on fee applicants own affidavits asserting that they charge reduced rates for non-economic reasons).

211. See Appellant's Brief at 28, *Covington* (Nos. 94-7014 & 94-7022). The Appellants unsuccessfully contended that:

What this means, of course, is that the rates contained in the *Laffey* matrix have become the *floor* for determining "reasonable" hourly rates in fee-shifting cases, despite the fact that attorneys will otherwise charge lower, competitive, market-based rates. All plaintiffs' attorneys litigating cases like the ones here, and whose rates are below the *Laffey* matrix rates, will now request and be awarded much higher rates based solely on the experience group into which they fall. These rates will be sought and awarded irrespective of whether counsel's qualifications, skills, and performance approximate those of lead counsel in *Laffey* and irrespective of whether their cases are as complex as *Laffey*.

This rule and its results contradict the decisions of the Supreme Court and this Court.

Id. at 29; see *Blum*, 465 U.S. at 895 n.11 (noting that while "[m]arket prices of commodities . . . are determined by supply and demand . . . there is no such thing as a prevailing market rate for the service of lawyers in a particular community").

In addition to shifting the burden of proof, the *Covington* court's decision may also increase litigation involving attorney fee shifting provisions.²¹² The prospect of recovering fees at the *Laffey* Matrix rates may induce prospective fee applicants to allege that their fees are reduced. In addition, *Covington* allows attorneys with billing histories to disregard these records and seek the higher *Laffey* Matrix rates.²¹³ As a result, because losing parties are likely to resist paying fees at these higher rates, courts may increasingly find themselves considering whether the relevant rates are actually reduced.²¹⁴

Finally, while matrices may provide probative evidence when an attorney has no billing history, their utility sharply decreases when the amount the fee applicant can command in the market is established.²¹⁵ Because the *Covington* court disregards attorneys' billing histories, however, fee applicants in the District of Columbia are afforded the benefit of recovering fees at premium rates, without the requirements imposed by the Supreme Court in *Blum*.²¹⁶ Thus, until the Supreme Court examines the ideology offered in *Covington*, fee applicants in the District of Columbia may receive the very "windfall" Congress expressly warned against.²¹⁷

212. See Shelton, *supra* note 22, at 489 (explaining that policy behind section 1988 was to increase civil rights litigation). The *Covington* decision may induce attorney's to increasingly submit the *Laffey* Matrix in order to receive the higher rates. More litigation may arise, however, as the losing parties will most likely oppose the higher *Laffey* rates. Thus, these parties will want the opportunity to show a court why the matrix rates are not appropriate. Cf. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (emphasizing that ideally parties will come to agreement on amount of fee, without need for *second major litigation*).

213. *Covington*, 57 F.3d at 1114 (Henderson, J., dissenting) (noting that majority ignored *Sexcius* and *Galloway's* fee applicant's prior billing histories).

214. See Shelton, *supra* note 22, at 489 (noting that "[t]he hart of section 1988 is that 'the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fees'"). As a result of the possible increase in litigation, courts in the future may more frequently be asked to determine whether the requested rates are reduced.

215. *Covington*, 57 F.3d at 1114 (Henderson, J., dissenting) (explaining that "lawyer's usual hourly rate remains the most probative evidence of a reasonable rate to award him under a feeshifting statute unless that rate does not fairly reflect the value of his services because it is a 'reduced rate reflecting non-economic goals'" (quoting SOCM, 857 F.2d 1516, 1524 (D.C. Cir. 1988))).

216. *Blum*, 465 U.S. at 895 n.11. The Supreme Court in *Blum* explained that: To inform and assist the court in the exercise of its discretion, the *burden is on the fee applicant* to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Id. (emphasis added).

217. S. REP. NO. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913 (explaining that Congress approved "[t]hese [particular] cases [which] have resulted in fees which are adequate to attract competent counsel, but which [have] . . . not produce[d] windfalls to attorneys").

VI. CONCLUSION

In *Covington v. District of Columbia*, the Court of Appeals for the District of Columbia attempted to follow the Supreme Court's holding in *Blum v. Stenson*,²¹⁸ and the District of Columbia Circuit's similar holding in *SOCM*,²¹⁹ in which the courts determined that public-spirited attorneys should not be penalized for their contributions to society.²²⁰ The *Covington* court, however, took this concept of protecting public-spirited attorneys to an extreme. As a result of the *Covington* court's over-zealous attempt to facilitate public-spirited attorneys, the court created a channel for other attorneys to exploit. In short, regardless of whether the particular attorneys in *Covington* were sufficiently acting in a public-spirited manner, the court's failure to require specific evidence may only serve to entice attorneys less dedicated to the public welfare to seek the same rewards once reserved for the noblest of counselors.²²¹

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218. 465 U.S. 886 (1984). For a discussion of the Supreme Court's disposition of *Blum*, see *supra* notes 39-42 and accompanying text.

219. 857 F.2d 1516, 1525 (D.C. Cir. 1988). For a discussion of the District of Columbia Circuit's decision in *SOCM*, see *supra* notes 107-12 and accompanying text.

220. For a discussion of the Supreme Court and the District of Columbia's efforts to accommodate public spirited attorneys, see *supra* notes 39-41, 107-12 and accompanying text

221. *SOCM*, 857 F.2d at 1524 (emphasizing that "Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic").

