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Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines

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COMPUTING ATTORNEY'S FEES IN CLASS ACTIONS: RECENT JUDICIAL GUIDELINES

INTRODUCTION

Concomitant with the increase of public interest litigation in recent years, particularly in the fields of antitrust, environmental, and civil rights law, has been an increase in attorney's fee awards. Such awards represent legislative and judicial departures from the traditional American rule that no attorney's fees will be awarded in a civil suit.[1] In awarding attorney's fees, courts have relied upon the directives of mandatory[2] or discretionary[3] statutes, or upon one of the judicially-created exceptions to the American rule.[4] The judicially-created exceptions are the vexatious conduct rule,[5] which is simply a punitive sanction,[6] the common fund doctrine,[7] and the private attorney general theory.[8] The rationale underlying judicial recognition of the common fund and the private attorney general exceptions to the American rule has been expressed by the Supreme

[1] See Fleischmann Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967); C. McCormick, Law of Damages § 60, at 234-46 (1935); Comment, Liability for Attorney's Fees in the Federal Courts—The Private Attorney General Exception, 16 B.C. Ind. & Com. L. Rev. 201 (1975).

[2] E.g., Clayton Act § 4, 15 U.S.C. § 15 (1970); Interstate Commerce Act § 16(2), 49 U.S.C. § 16(2) (1970); Railway Labor Act § 3(p), 45 U.S.C. § 153(p) (1970).

[3] E.g., Securities Act of 1933 § 11k(e), 15 U.S.C. § 77k(e) (1970); Civil Rights Act of 1964, Title VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1970); Fair Housing Act, Title VIII, § 812, 42 U.S.C. § 3612(c) (1970).

[4] The power of the court to grant such fees derives from its power to do equity. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).

[5] A court may award attorney's fees under the vexatious conduct rule where a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1974) and see cases cited therein. However, recent decisions indicate that courts prefer to justify a grant of counsel fees on a benefit conferred upon the public—the private attorney general theory. Thus, in Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), although the court found that the defendants' failure to correct the conditions at two state institutions for the mentally retarded, when they should have known that such conditions were unconstitutionally substandard, would warrant an award of attorney's fees under the vexatious conduct rule, the court determined that the private attorney general theory was a more appropriate justification for the award. Id. at 408-09.

[6] See Hall v. Cole, 412 U.S. 1, 5 (1973).

[7] Under this theory, a plaintiff whose suit has resulted in the establishment of a fund for the benefit of others beside himself may recover his counsel fees from the common fund, thus preventing the unjust enrichment of the other beneficiaries at the plaintiff's expense. Trustees v. Greenough, 105 U.S. 527, 532 (1881). Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), expanded the common fund theory as a basis for recovery of attorney's fees. The Supreme Court indicated that the crucial factor was the conferring of substantial benefit on a certain class, whether or not that benefit could be measured in pecuniary terms. Id. at 392. See Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733, 740-41 (1973).

[8] This exception, established by the Supreme Court in Newman v. Piggie Park Enterps., Inc., 390 U.S. 400 (1968), is based on the theory that a litigant who has brought a suit, which has the ultimate effect of vindicating a strong congressional policy, acts as a "private attorney general" and is entitled to recover his counsel fees from the defendant "unless special circumstances would render such an award unjust." Id. at 402.

Court: (1) the cost of litigation which has conferred substantial benefit upon a particular class should be spread among the members of that class lest they be unjustly enriched at the litigant's expense;[9] (2) certain laws expressing strong congressional policy may be enforced most effectively through private actions;[10] and (3) few public interest suits would be instituted if the individual plaintiffs were burdened with sole responsibility for the payment of their attorneys' fees.[11]

Beyond the issue as to whether an award of attorney's fees is appropriate,[12] there arises the problem of determining the amount of the award. This comment will focus exclusively upon this problem—the process of computing an appropriate fee and the issues involved in assessing the value of an attorney's service in class actions. Following a discussion of the traditional rule recognizing wide discretion in the trial judge to determine a reasonable fee, recent rules and decisions which have established criteria to guide the trial court, and which have thus limited the trial judge's discretion in setting a reasonable fee, will be examined. Finally, the emphasis which should be accorded the following factors will be analyzed: the amount recovered and the results obtained from the efforts of the attorney; the number of hours spent by the attorney on a particular case; and the proper standard by which those hours should be valued.

I. FASHIONING THE AWARD: TRIAL COURT DISCRETION

The Supreme Court in the landmark case of *Trustees v. Greenough*[13] mandated that attorney's fee allowances should be "made with moderation and a jealous regard to the rights of those who are interested in the fund."[14] This standard has been incorporated in statutes authorizing such fees[15] and in many decisions[16] by a requirement that the fee awards be "reasonable." The test of reasonableness had been relied upon both as a guide to fixing the amount of the fee and as a source of judicial discretion.[17] The determination of a reasonable fee has been traditionally left to the

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[9] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

[10] See Newman v. Piggie Park Enterps., Inc., 390 U.S. 400, 402 (1968).

[11] Id.

[12] See id. at 391-92. For an analysis of the problems faced by the courts in determining whether an award of attorney's fees is warranted, see Comment, Liability for Attorney's Fees in the Federal Courts—The Private Attorney General Exception, 16 B.C. Ind. & Com. L. Rev. 201 (1975).

[13] 105 U.S. 527 (1881).

[14] Id. at 536-37.

[15] E.g., 15 U.S.C. § 15 (1970); 42 U.S.C. § 2000e-5(k) (1970).

[16] E.g., *Piggie Park*, 390 U.S. at 402; Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1971); Miller v. Amusement Enterps., Inc., 426 F.2d 534, 539 (5th Cir. 1970).

[17] See Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202, 211 (1966).

discretion of the trial judge,[18] and the standard for reversal has been clear abuse of that discretion.[19] The trial judge is considered, by virtue of his experience and knowledge, an expert on the question of reasonableness.[20]

One reason for adherence to the American rule generally prohibiting an award of attorney's fees in a civil suit seems to have been the reluctance of the courts to involve themselves in the inevitable controversies which would surround the determination of the award.[21] Nevertheless, taking cognizance of the equitable considerations which underlie the exceptions to the American rule, courts have realized that it is their duty to delve into the "delicate, embarrassing and disturbing controversy"[22] which surrounds the evaluation process.

One answer to the problem of ascertaining a reasonable fee has been proposed by the American Bar Association. In Disciplinary Rule 2-106 of the Code of Professional Responsibility, the ABA has promulgated a loose set of criteria which purport to set forth the appropriate factors for an attorney to consider in fixing a legal fee.[23] While the criteria mentioned are pertinent to the general issue of reasonableness and have served as guidelines in a number of recent

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[18] Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 97 (5th Cir. 1972); Electronics Capital Corp. v. Shepard, 439 F.2d 692, 693 (5th Cir. 1971).

[19] B-M-G Inv. Co. v. Continental/Moss Gordin, Inc., 437 F.2d 892, 893 (5th Cir. 1971).

[20] Campbell v. Green, 112 F.2d 143, 144 (5th Cir. 1940). See Wewoka, Okla. v. Banker, 117 F.2d 839, 844-45 (10th Cir. 1941).

[21] See Fleischmann v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872). The Court in *Fleischmann*, while holding that attorney's fees were not recoverable in a suit brought under the Lanham Act, 15 U.S.C. §§ 1051-1127 (1970), did not reject the established exceptions to the American rule, but construed the Lanham Act as providing an inclusive enumeration of the remedies intended by Congress. 386 U.S. at 719.

[22] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 569 (7th Cir. 1951).

[23] ABA Code of Professional Responsibility, DR 2-106, which suggests the following considerations:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
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> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.
>
> (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

cases,[24] the guidelines lack clarity of definition and fail to state the proper emphasis to be given to the various factors. Thus, the guidelines do not establish firm boundaries within which the discretion of the trial judge must be exercised, as they require little more than a cursory review of the factors included. Furthermore, without the inclusion of additional considerations, the ABA guidelines appear to be inadequate for the resolution of the problems which arise in determining appropriate fee awards in class action litigation.

A partial solution to this problem may be found in the additional considerations set forth in the Manual for Complex Litigation.[25] The Manual focuses on the problems presented by the peculiar nature of class action suits, where attorneys may be seeking a windfall recovery from unnamed plaintiffs who have benefitted from the establishment of a common fund or where a suit, brought in the public interest and having a significant effect upon the law, has resulted in no monetary judgment from which the attorneys might be compensated. The Manual suggests that the award be large enough to provide an incentive to attorneys to continue their pro bono work,[26] and yet that it should reflect the principle that class action suits involve an element of public service and should not be abused.[27] Both the Manual and ABA Disciplinary Rule 2-106 appear to be attempts to curtail groundless awards and to place curbs on unfettered discretion of the trial court.

The discretionary power exercised in determining the reasonableness of an award is not so broad as to preclude judicial review. Moreover, appellate courts seem to be increasingly aware of the potential abuses surrounding class actions.[28] Sensitive to charges that the attorneys benefit more from class actions than do the parties,[29] courts currently are scrutinizing fee awards closely, since the allowance of seemingly exorbitant awards "bring[s] both the bar and the bench into public disrepute."[30] The controversy surround-

[24] E.g., Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1322 (7th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974); Donson Stores, Inc. v. American Bakeries Co., 60 F.R.D. 417, 419-20 (S.D.N.Y. 1973); Clark v. American Marine Corp., 320 F. Supp. 709, 711-12 (E.D. La. 1970), aff'd, 437 F.2d 959 (5th Cir. 1971).

[25] 1 J. Moore, Federal Practice pt. 2, § 1.47, at 63-64 (2d ed. 1974), which provides standards applicable to class actions:

> (1) that in seeking and accepting employment as counsel for a judicially determined class an element of public service is involved; (2) the representation of the class by counsel is not a result of private enterprise but results from provision of an opportunity to represent a class by a judicial determination; and (3) the policy of the law in class actions, including antitrust actions, is to provide a motive to private counsel to represent consumers and to enforce the laws.

[26] Id. at 64.

[27] Id.

[28] Id. § 1.41, at 27-32.

[29] See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, J., dissenting) vacated, 417 U.S. 156 (1974); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits, 71 Colum. L. Rev. 1, 10 (1971). See Note, 16 B.C. Ind. & Com. L. Rev. 254 (1975).

[30] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 570 (7th Cir. 1951).

ing the determination of reasonable fees involves a discrete balancing process in which the interest of the legal profession in preserving its "integrity and independence" through the receipt of just compensation for services is weighed against the interests of the public in securing efficient legal services at less than "windfall" prices.[31]

Recent cases indicate that appellate courts, in order to scrutinize carefully the grounds upon which the trial judges have relied in arriving at an award, are insisting that such grounds be specifically expressed. For example, in *Waters v. Wisconsin Steel Works*,[32] a suit brought under Title VII of the Civil Rights Act of 1964,[33] the Seventh Circuit held that the trial court's method of computation was "so lacking of analysis that it constituted an abuse of discretion."[34] Similarly, the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[35] found that the district court's "failure to hold an evidentiary hearing and its failure to follow proper standards in awarding fees to attorneys" constituted an abuse of discretion requiring reversal on this issue.[36] Although in *Lindy* the district court noted its reliance upon four factors—the percentage amount of the settlement fund awarded to the attorneys in similar cases, the size of the recovery, the fees which the attorneys would receive from their private clients according to the terms of the contingency contracts previously executed, and the time spent on the case by the attorneys[37]—nevertheless the Third Circuit found that the award of one-third of the settlement fund[38] actually was based on a contingency theory, which it determined unsuitable to the award's purpose of providing fair compensation for the attorneys' services.[39] The Third Circuit assailed the lower court's cursory solution of the issue of reasonableness, stating that "[t]he mere listing of four factors for consideration by the court makes meaningful review difficult and gives little guidance to attorneys and claimants."[40] As these cases indicate, appellate courts are examining carefully the underpinnings of a fee determination, particularly in actions which result in large monetary recoveries.

It is evident that the appellate courts now require that the amount assessed be firmly grounded on "proper standards"[41] which

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[31] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719-20 (5th Cir. 1974).

[32] 502 F.2d 1309 (7th Cir. 1974).

[33] 42 U.S.C. § 2000e (1970).

[34] 502 F.2d at 1322. The trial judge found $5000 to be a reasonable fee, merely stating as his grounds that he had "considered the efforts expended by the plaintiffs' counsel." Waters v. Wisconsin Steel Works, 8 FEP Cases 234, 237 (N.D. Ill. 1973).

[35] 487 F.2d 161 (3d Cir. 1973), rev'g 341 F. Supp. 1077 (E.D. Pa. 1972).

[36] 487 F.2d at 170.

[37] Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 341 F. Supp. 1077, 1089-90 (E.D. Pa. 1972).

[38] Id. at 1089.

[39] 487 F.2d at 167.

[40] Id. at 166-67.

[41] Detroit v. Grinnell Corp., 495 F.2d 448, 474 (2d Cir. 1974); *Lindy*, 487 F.2d at 170.

indicate the relationship of the amount of the award to the performance of the attorney as well as to the benefits actually conferred by the suit. The trial courts are no longer free to excercise unsubstantiated discretion. Furthermore, it appears that the growing view is that the trial court may not gauge the amount of the award by reference solely to the monetary recovery gained by the client.

II. Appellate Review of the Reasonableness of Class Action Awards

The recent decisions of the Second Circuit, in *Detroit v. Grinnell Corp.*,[42] and the Fifth Circuit, in *Johnson v. Georgia Highway Express, Inc.*,[43] are representative of judicial attempts to establish guidelines for the application of the elusive concept of reasonableness to the computation of attorney's fee awards. The aim of both the Fifth and the Second Circuits was to formulate guidelines to serve as reference points in the trial court's exercise of discretion. Both courts established criteria which, although differing in certain aspects, evince similar concern with the policy considerations surrounding an award of attorney's fees.

In its discussion of the proper standards to be applied in formulating a fee award, the Second Circuit in *Detroit,* manifested its concern not only over the potential abuses surrounding awards of attorney's fees in class actions, but also over the effects which the apparent abuses would have on the tarnishable image of the legal profession.[44] In *Detroit,* three national class actions were consolidated as a private antitrust action. A settlement agreement, executed after a three year period of pendency and pre-trial preparation, provided for the establishment of a settlement fund of $10 million, payable with interest to the plaintiff classes.[45] The federal district court approved the settlement agreement and awarded attorneys' fees of $1.5 million and expenses of $14,918.73, payable out of the settlement fund.[46] One group of appellants attacked the large counsel fee allowance on the ground that the $1.5 million award evinced the district court's reliance on a contingent fee approach which, it was contended, was unsuitable in a class action case as a flat percentage award bears no rational relationship to the value of an attorney's services.[47] The Second Circuit held that the failure of the trial judge to hold an evidentiary hearing on the issue of the attorneys' fees award and his failure to base the award on "proper standards" constituted an abuse of discretion requiring reversal.[48]

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[42] 495 F.2d 448 (2d Cir. 1974).
[43] 488 F.2d 714 (5th Cir. 1974).
[44] 495 F.2d at 469.
[45] Id. at 453-54.
[46] Id. at 454.
[47] Id. at 468.
[48] Id. at 473-74.

The court in *Detroit* commenced the evaluation of the trial court's award with the observation that the initial duty of the trial court is to ascertain the number of hours which the attorney and his firm have expended on the particular case.[49] The next step is to place a value on that time. The Second Circuit indicated that the computation of the monetary value of time spent requires consideration of the manner in which the time was spent and the professional status of the person whose services were involved—senior or junior partner, associate, or paralegal. The Second Circuit suggested that a proper index would be the hourly rate to which "attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation."[50]

As a consequence of its recognition that this mathematical computation would not necessarily render the resulting fee reasonable, the *Detroit* court also considered several "less objective factors."[51] The first of these was the "risk of litigation" which the attorney undertook in representing the party. *Detroit* indicated that the determination of the risk factor should be based upon the novelty and complexity of the issues and the existence of other civil or criminal cases which might have predicted the result of the instant litigation.[52] The evaluation of these "tangible" elements of the risk of litigation factor along with "intangible" elements such as the probability of ultimate success either on the merits or by settlement would, the court expected, reduce the speculation: "Thus determined, the litigation risk factor might well be translated into mathematical terms."[53]

The Second Circuit in *Detroit* was aware that the feasibility of implementing such a quasi-mathematical formula as a gauge for the reasonableness of fees depends upon the amount of relevant facts which the trial judge has at his disposal. Therefore, it concluded that an evidentiary hearing on the fee issue was a necessity.[54] It appears that the *Detroit* court attempted to distill the various factors which enter into a proper definition of reasonableness into a formula which might be applied with objective precision, and in this way, to provide the trial court with a foothold on the somewhat nebulous requirement of reasonableness.

In contrast to the Second Circuit's attempt in *Detroit* to devise an objective formula for the computation of an attorney's fee, the Fifth Circuit, in *Johnson v. Georgia Highway Express, Inc.*,[55] looked to twelve flexible factors to set the boundaries of reasonableness. The *Johnson* decision, while grounded in the guidelines of the

[49] Id. at 470.
[50] Id. at 471.
[51] Id.
[52] Id.
[53] Id.
[54] Id. at 472, 473.
[55] 488 F.2d 714 (5th Cir. 1974).

Code of Professional Responsibility, elaborates upon those considerations and relates them to public interest class actions. The Fifth Circuit set aside, as inadequate, an order allowing attorneys' fees of $13,500 to plaintiffs who had prevailed in a Title VII class action.[56] In reviewing the award, the court noted that the trial judge's order did not indicate which factors he had considered in fixing the sum, and that the amount of the award did not bear any relationship to the number of hours alleged by plaintiffs' counsel to have been spent on the case.[57] Although the plaintiffs' attorneys had submitted to the district court affidavits indicating that a total of 659.5 hours, exclusive of three days spent in trial, had been expended upon the case, as well as a schedule of fees for those hours, the lower court had apparently disregarded such figures and had based its award on sixty working days of six or seven hours each, at $200 per day and three days of trial at $500 per day ($250 for each of two attorneys). The judge, without explanation, then reduced the hours by an amount that was between 299.5 and 239.5 hours.[58] The appellate court, while reserving comment as to the adequacy of the sum, held that the failure of the lower court to observe proper guidelines in its determination was sufficient to constitute an abuse of discretion.[59]

The Fifth Circuit set forth twelve significant factors which should be weighed by a court attempting to fix a reasonable fee: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the instant case; (5) the customary fee received for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount of the recovery 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; (12) awards in similar cases.[60]

Although most of these factors are self-explanatory, some of them warrant further comment. The time and labor quotient is not intended as the decisive factor; its purpose is to discern the number of hours actually expended, and to sift out duplicated work and unproductive time.[61] The Fifth Circuit, preserving the theory of the trial judge's expertise,[62] stated that "[t]he trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities."[63] Reli-

[56] Id. at 720.

[57] Id. at 717.

[58] Id. at 715-17.

[59] Id. at 720.

[60] Id. at 717-19. These factors are similar to those set forth in the ABA Code, DR 2-106. See note 23 supra.

[61] 488 F.2d at 717.

[62] See text at notes 19-20 supra.

[63] 488 F.2d at 717.

ance upon the trial judge's expertise pervades the twelve criteria expressed in *Johnson* since it is the trial judge who must assess the skill demanded by the case and the attorney's ability.

In setting the particular hourly rate to be awarded for the work, the Fifth Circuit has adopted a community standard—the fee typically awarded for similar work in the locality—and insisted that minimum fee schedules issued by the local bar association also be considered. In addition, the court suggested that the rates prescribed in the Criminal Justice Act[64] be implemented as establishing the minimum hourly rates for cases other than those within the scope of the Act itself.[65]

Johnson further indicates that an agreement between attorney and client for either a fixed or contingent fee is another factor to be considered in determining the appropriate award, though it is not controlling.[66] Such agreements should be employed as aids in establishing the pecuniary expectations of the attorney and in fixing an upper limit for the fee which, the court noted, should not exceed the amount a client may have contracted to pay.[67] While not promoting a contingency theory of computation, the Fifth Circuit nevertheless reasoned that the attorney award should reflect the amount of the recovery to the extent that the recovery sum reflects the result achieved, or overall success of the suit. The court thus appeared to give official recognition to an element of "reward," an approach which may be evident from the *Johnson* court's directions that counsel "should be appropriately compensated for accepting the challenge"[68] when the issue presented is novel or so "undesirable" as to present the possibility of unfavorable repercussions within the community.[69] On the other hand, the *Johnson* guidelines are also designed to discourage the trial judge from granting an exorbitant attorney's fee.[70]

Both the *Detroit* and *Johnson* opinions demonstrate the sensitive balancing process inherent in awarding a reasonable compensation for an attorney's services in class action litigation. While the guidelines suggested by each court differ slightly, such variations in emphasis derive not from diverse philosophical definitions of a reasonable fee, but from the particular nature of each case and of the plaintiffs' claims on appeal. In *Johnson,* the plaintiff appealed to the Fifth Circuit on the ground that the fee award, allowed by the district court upon successful resolution of the Title VII class action case, was inadequate.[71] In *Detroit,* the appellants, members of the

[64] 18 U.S.C. § 3006A(d)(1) (1970).
[65] 488 F.2d at 718.
[66] Id.
[67] Id.
[68] Id.
[69] Id. at 719.
[70] Id. at 719-20.
[71] Id. at 715.

plaintiff class contending that the common fund created by the settlement of the antitrust action had been dispensed too generously by the trial judge, challenged the fee award as excessive.[72] Consequently, in *Johnson* the court looked to numerous factors, such as the amount recovered and the results obtained, whereas in *Detroit,* the court emphasized consideration of the time and labor required, which would guard against excessive awards. In discussing its criteria, the Second Circuit skirted any mention of the amount recovered as a factor which should bear on the size of the counsel fee, perhaps in reaction to the argument that the $1.5 million figure evidenced a de facto contingency approach.[73]

The emphasis in *Detroit* upon devising a quasi-mathematical formula for the computation of fees is in some ways antithetical to the twelve loose directives of *Johnson*, in which the Fifth Circuit emphasized that it did "not attempt to reduce the calculation of a reasonable fee to mathematical precision."[74] The Second Circuit's formula, however, is not fully objective—use of the risk of litigation factor allows the court to make subjective evaluations of the likelihood of success and the novelty of the issues. In computing the value of an attorney's time, it will be incumbent upon the judge in both the Second and Fifth Circuits to make subjective evaluations of the lawyer's skill and reputation. These evaluations will affect the judge's determination of the compensation to which a lawyer of like ability in the community would be entitled. Although the *Detroit* court eschewed cumbersome and imprecise standards in setting fees,[75] and, one surmises, would react similarly to the *Johnson* criteria, the Second Circuit's attempt to devise a simple, objective formula precludes reliance upon five considerations enumerated in *Johnson*. Failure to include as relevant factors awards in similar cases, preclusion of other employment, an agreement with the client for a fixed or contingent fee, the existence of an established professional relationship with the client, and the undesirability of the case in view of community sentiment may present a quandry for the Second Circuit when faced with a *Johnson*-like pro bono suit. While it is possible that courts might construe the risk of litigation factor enunciated in *Detroit* as encompassing the *Johnson* factors where they are relevant to a particular case, the *Detroit* opinion does not clearly provide for such flexibility. Another weakness of the *Detroit* opinion is its failure to explicitly mention the importance of the results achieved, perhaps since it might necessitate consideration of the amount recovered, as bearing on the success of the litigation, although it is implied in the risk of litigation factor. It appears that the aim of the *Detroit* court was to hone down an apparently

[72] 495 F.2d at 452.
[73] Id. at 468.
[74] 488 F.2d at 720.
[75] 495 F.2d at 470.

excessive fee by formulating strict, objective guidelines emphasizing the time expended by the attorneys. While the *Detroit* criteria were well-suited to the antitrust suit at issue, their rigidity makes them, as opposed to the *Johnson* criteria, of doubtful universal applicability.

In *Johnson*, the court considered, among other factors, the amount recovered, the result achieved, and the need to reward an attorney who has successfully litigated a pro bono suit. The Fifth Circuit, though aware of the danger of excessive fees, seemed equally concerned that the attorney be justly compensated for the risks he has taken and the perhaps unpopular causes he has championed.[76] The intent of the Fifth Circuit, like that of the Second Circuit, is to provide the trial courts with concrete guidelines as an aid in determining attorney's fees while preserving the traditional discretion of the lower courts. While the approaches adopted by the Second and Fifth Circuits differ in emphasis, it is evident that both courts are engaged in a similar balancing process in formulating criteria which will ensure a fee rationally related to the services performed by the attorney.

III. Specific Factors in Computing the Award

In the final section of this comment, the ways various courts have treated the pertinent considerations and the major policy issues underlying the standards will be examined. The issues of the appropriateness of a contingency approach, the proper emphasis to be placed upon the amount recovered or the results obtained, the importance of the number of hours expended by counsel, and the proper standard of evaluation of those hours will be analyzed.

A. *Amount of Recovery*

The importance to be accorded the amount of the recovery is a controversial issue, particularly in the context of antitrust actions, which often result in substantial monetary recoveries. Recent cases have assailed the percentage method of computing fees, whereby the attorney is awarded a flat percentage of the recovery. Consequently, they have refused to enforce contingency contracts between the attorney and the client where an award of attorneys' fees is warranted.[77] While contingency agreements relieve the courts of the

[76] 488 F.2d at 719.

[77] E.g., Kiser v. Miller, 364 F. Supp. 1311, 1319 (D.D.C. 1973), aff'd in part, rev'd in part sub nom. Kiser v. Huge, No. 73-1393 (D.C. Cir. Aug. 5, 1974); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 223 (N.D. Ill. 1972). As one court emphatically stated: "Whether or not [the litigant] agreed to pay a fee and in what amount is not decisive. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed but what is reasonable." Clark v. American Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), aff'd, 437 F.2d 959 (5th Cir. 1971). That courts will not automatically set aside as contrary to public policy such fee agreements between attorney and client when they have been entered into prior to the litigation is evinced by the court's acquiescence

burden of assessing the value of each attorney's services,[78] it is clear that the amounts agreed upon are not necessarily reflective of a reasonable fee. As one court noted:

> A percentage fee gives undue weight to the size of the recovery. In cases with small recoveries, it completely ignores professional skill and the complexity of the work involved, and could result in an insufficient award for services rendered. . . . Conversely, where the recovery is extraordinarily high, it could result in an excessive award.[79]

Besides being divorced from any concept of true reasonableness, fee awards computed on a contingency basis may be totally inappropriate in class action suits.[80] This was demonstrated in *Kiser v. Miller,*[81] where the court considered the issue of awarding a fee as a percentage of the recovery. In *Kiser,* a class action was brought to determine the pension rights of retired miners.[82] Three days after the entry of a summary judgment order in their favor, the plaintiffs' attorneys had mailed out consent forms in which they informed the recipients of the award that counsel would seek one-third of the total recovery as attorneys' fees.[83] In refusing to enforce the agreements,[84] the district court declared that the contingency contracts were void as a matter of public policy and, in any case, the percentage requested was "excessive in light of the actual legal services necessary to succeed in this public interest suit."[85] Instead, the court computed the basic award by multiplying the number of hours spent on the suit, discounted by 35%,[86] times an hourly rate of $40, and then added a premium equal to 10% of the hourly compensation.[87]

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to such contracts in Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), rev'g 341 F. Supp. 1077 (E.D. Pa. 1972), where the attorneys had prior agreements with the clients. 487 F.2d at 164; 341 F. Supp. at 1085.

[78] See Donson Stores, Inc. v. American Bakeries Co., 60 F.R.D. 417, 419 (S.D.N.Y. 1973); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 223 (N.D. Ill. 1972).

[79] Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 484 (S.D.N.Y. 1970), modified on appeal, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds sub nom. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

[80] See Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972).

[81] 364 F. Supp. 1311 (D.D.C. 1973), aff'd in part, rev'd in part sub nom. Kiser v. Huge, No. 73-1393 (D.C. Cir., Aug. 5, 1974).

[82] 364 F. Supp. at 1313.

[83] Id. at 1314.

[84] The court found that it could not "in good conscience, enforce a contract made with class members, who more likely than not, lack the sophistication, experience and education to act understandingly and deal with their attorneys on an equal basis at arms length." Id. at 1319.

[85] Id.

[86] The discount reflected the time spent by the attorneys on the telephone, in conference among themselves, or on the attorney fee issue, and took into account discrepancies between the individual lawyers' accounts of the number of hours spent in court hearings. Id. at 1318.

[87] That the premium awarded was a percentage of the hourly compensation is sig-

The criteria relied upon by the court in *Kiser* in setting the amount (although it is not clear whether such criteria were considered in fixing the hourly rate, the premium percentage, or both) were: (1) that the questions involved were not novel or complex; (2) that little risk was undertaken, since an analysis of prior decisions reasonably predicted the result; and (3) that the actual recovery was small.[88] Most important, however, were the court's judgments that membership of the plaintiff-class was "the most underprivileged and impoverished group in the nation"[89] and that the attorneys had undertaken the litigation "in the spirit of humanitarianism."[90] The court's considerations in *Kiser*, which reflected those enumerated in the Manual for Complex Litigation,[91] indicate the court's awareness that class action litigation presents the danger of abuse by unscrupulous attorneys whose sole interests lie in receiving windfall fees.[92] Some tension, however, underlies the award of the premium. This was demonstrated by the court's attempt to recognize the need for furnishing incentive to counsel in order to encourage class action representation, while limiting the amount awarded on account of the humanitarian motives of counsel and the indigency of their clients.

As *Detroit* indicates, the de facto use of a contingency approach by the judge in the evaluation process may also be proscribed. There, the court found that the district court judge had not considered the proper standards[93] where, although he professed to have considered such factors as the work done, the risks taken, and the public interest nature of the suit,[94] the counsel fee amounted to 15% of the class recovery. The Second Circuit did recognize that the traditional contingent fee approach tended to serve as an incentive for efforts to achieve as large a recovery as possible. Furthermore, the court noted that emphasizing the time element rather than the size of the recovery might discourage settlements, since the attorney might seek to accumulate a high number of billable hours.[95] The Second Circuit, however, concluded that the inequities of the contingent fee syndrome outweighed the danger of potential abuse of the legal process and that close scrutiny by the court would reveal any unscrupulous practices.[96]

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nificant. In Pete v. UMW Welfare & Retirement Fund of 1950, No. 73-1270 (D.C. Cir., Aug. 5, 1974), a companion case to *Kiser*, the court found excessive a premium of 5% of the total recovery and remanded the case for consideration in light of *Kiser*. Slip opinion at 9.

[88] 364 F. Supp. at 1318. See text at note 101 infra.

[89] 364 F. Supp. at 1318.

[90] Id.

[91] 1 J. Moore, Federal Practice pt. 2, § 1.47, at 63-64 (2d ed. 1974) [hereinafter cited as Manual for Complex Litigation].

[92] Manual for Complex Litigation, supra note 91, § 1.41, at 27-32.

[93] 495 F.2d at 470.

[94] 356 F. Supp. 1380, 1392 (S.D.N.Y. 1972).

[95] 495 F.2d at 471.

[96] Id.

While it is clear that any amount is going to reflect some percentage of the recovery, it is equally clear that an award substantially based on a contingency approach disregards the other relevant considerations necessary in formulating a reasonable fee, and overlooks the real value of the benefits conferred by the action.[97] Although a strict contingency approach vitiates any effective inquiry into a truly reasonable award, the amount recovered and the result achieved necessarily determine the overall success of the suit. Several courts have considered the amount of the recovery as one of the indices of benefit conferred on the litigants and thus as a factor to be weighed in the evaluation process.[98] The Second Circuit in *Detroit*, faced with an award apparently computed by a percentage approach, avoided any mention of the amount recovered as a factor in its guidelines. However, the amount recovered is enumerated among the twelve *Johnson* criteria, although it is viewed as a subsidiary category of the total results achieved.[99] More specifically, the Fifth Circuit, in *Johnson,* directed its discussion to cases where the monetary damages tend to be incidental to the equitable relief afforded to the plaintiffs. Thus the court concluded that the important factor was the "decision's effect on the law," and that the total results obtained, not only the amount awarded, should be considered.[100]

The *Kiser* court took an approach similar to *Johnson* in that it focused on the specific results of that suit. In *Kiser,* plaintiffs were ensured of success due to the resolution of a prior suit; accordingly, the court deemed the benefit conferred on the members of the class to be the difference between the recovery in the prior suit and that in *Kiser*, and it was that extra amount which was treated as the "actual recovery" in the case.[101] The *Kiser* and *Johnson* approaches are desirable in that they distill from the absolute recovery the actual benefit which has been conferred upon the class by virtue of the particular suit. While the analysis of benefit conferred, measured in part by the amount recovered, is related to a contingency theory

[97] Reference to the considerations given weight by the trial court in Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 341 F. Supp. 1077 (E.D. Pa. 1972), rev'd, 487 F.2d 161 (3d Cir. 1973), illustrates this assertion. Predicated on the propriety of a percentage approach, the factors mentioned by the court, with one exception, bear no relationship to the performance of the attorneys, the nature of the action, or the actual benefits obtained. The exception was the amount of time spent by the attorneys, but the court employed this factor solely to compute the hourly rate the attorneys would have received had their request for one-third of the settlement fund been allowed. 341 F. Supp. at 1090.

[98] E.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974); Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 224 (N.D. Ill. 1972). In *Lindy,* the Third Circuit noted that the amount of the recovery "may be the only means by which the quality of an attorney's performance can be judged where a suit is settled before any significant in-court proceedings." 487 F.2d at 168.

[99] 488 F.2d at 718.

[100] Id.

[101] 364 F. Supp. at 1318.

in that the focus is often on the amount of the award, the recovery is not the sole determinative factor, but merely one of the various considerations which necessarily enter into the award of a reasonable fee.

B. *Novelty or Complexity of the Issues*

Related to the consideration of the amount recovered and the result achieved is the theory that the fee award should reflect the novelty or complexity of the issues. In *Detroit*, the court, though purportedly adhering to a strict time/value approach, included the novelty factor as one element bearing upon the risk of litigation.[102] In *Johnson*, the novelty and difficulty of the issues was one of the twelve enumerated guidelines to be weighed in view of the particular circumstances of the case.[103]

On the other hand, the Seventh Circuit in *Milwaukee Towne Corp. v. Loew's Inc.*,[104] an antitrust suit, rejected the contention that the award should be augmented because of the novelty of the issues and stated: "Many cases are unique in one form or another, and many are extremely complicated and difficult for a trial lawyer or a court to fathom, and certainly it cannot be contended that the charge of conspiracy is difficult to prove . . . ."[105] However, an examination of the case indicates that the rationale underlying the court's position was its antagonism toward the excessive amount of the fee award.[106] It expressed its concern that antitrust litigation "might develop into a racketeering practice."[107] Moreover, it is evident that the court did not in fact consider the conspiracy issue a novel one. Thus, where an issue is hackneyed and there is little risk of unfavorable resolution, the novelty factor should not enter into the consideration.[108]

From a policy viewpoint, it seems important that the novelty and complexity of the issues be taken into account in the same way as the amount of recovery. The novelty factor is most crucial in public interest cases which result in little or no monetary recovery. In civil rights or environmental suits, the favorable resolution of a novel question may be the primary result sought. Moreover, it is fitting that attorneys who demonstrate the initiative to tackle an original problem be rewarded for their creative efforts, even though

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[102] 495 F.2d at 471.

[103] 488 F.2d at 718; accord, Blankenship v. Boyle, 337 F. Supp. 296, 302 (D.D.C. 1972). See Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 98 (5th Cir. 1972) (Wisdom, J., dissenting).

[104] 190 F.2d 561 (7th Cir. 1951).

[105] Id. at 570.

[106] See id. at 569.

[107] Id. at 570.

[108] Accord, Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), where the court specifically noted that the issues were "neither novel nor complex" and that there was little risk involved on account of the prior favorable resolution of *Blankenship*. Id. at 1318.

there may be no monetary recovery. It may be argued that the novelty and complexity of the issues will be reflected in an award based on the number of hours the attorney must devote to the suit, as it is likely that the more difficult issues will require more time than would well-settled ones. However, *Johnson* seems to reject such a contention with the suggestion that the attorney "should not be penalized for undertaking a case which 'may make new law.' Instead, he should be appropriately compensated for accepting the challenge."[109] Such a positive approach seems desirable, for what is reasonable in a particular case depends upon the nature of the issues, be they novelty or well-settled, complex or exceedingly simple.

C. *Time Expended*

A third consideration in the fee determination process is the importance which should be accorded the number of hours the attorney expended on the case. Courts have often disagreed as to the importance of the time factor. Some courts, such as the Second Circuit in *Detroit*, where the time element was the objective starting point in the calculation,[110] stress the importance of the time logged by counsel.[111] For other courts, including the Fifth Circuit in *Johnson*, the time factor is not deemed most crucial,[112] although it is viewed as one of the factors to be weighed.[113]

While undue emphasis on the number of hours spent as the controlling factor would seem to set a premium on inefficiency,[114] it is certainly a necessary consideration in establishing standards by which to determine fees. The reason underlying the court's emphasis on time in *Detroit*[115] and *Illinois v. Harper & Row Publishers, Inc.*[116] may be the fact that the courts in those cases were attempting to formulate alternatives to the contingency theory as a standard for attorney fee awards. Thus the court in *Harper & Row* refused to apply a contingent fee formula.[117] The *Kiser* solution to the problems engendered by greatly emphasizing the number of hours devoted to the case was to discount the hours duplicated or spent on

[109] 488 F.2d at 718.

[110] 495 F.2d at 470.

[111] E.g., Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973); In re Hudson & Manhattan R.R., 339 F.2d 114, 115 (2d Cir. 1964); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 224 (N.D. Ill. 1972).

[112] 488 F.2d at 717.

[113] E.g., Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 98 (5th Cir. 1972); Electronics Capital Corp. v. Shepard, 439 F.2d 692, 693 (5th Cir. 1971); Donson Stores, Inc. v. American Bakeries Co., 60 F.R.D. 417, 419 (S.D.N.Y. 1973).

[114] One critic questioned the value of placing too much importance on the number of hours expended: "[W]hen hours become a criterion, economy of time may cease to be a virtue. Inexperience, inefficiency, even incompetence will be rewarded." Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 660-61 (1956).

[115] 495 F.2d at 41.

[116] 55 F.R.D. at 224.

[117] Id.

the telephone.[118] Although such an approach may be undesirable to the extent that it places an additional burden on the trial judge, who must not only ascertain the total number of hours worked but must also evaluate the productivity and efficiency of those hours, it provides a useful input to the fee determination process.

The time element is one ascertainable indication of the degree of effort the attorney has expended on the case. While it is a crucial factor which must enter into the balancing process, it is submitted that time spent should not be considered determinative. A reasonable fee ought to be a function of the time factor, but the functional relationship can only be defined in terms of that particular circumstances of the case.

D. *Rate of Compensation*

Once the number of hours actually spent on the case has been ascertained, the court must confront the related problem of what value should be assigned as an hourly rate of compensation. As related to public interest litigation, the problem is two-fold: (1) whether counsel in a pro bono action should command the same rate per hour as a "private" attorney; and (2) what standard should apply in fixing the hourly rate—the free market value of the attorney's services, a local standard, or the rates suggested by minimum fee schedules or by the Criminal Justice Act.[119]

While the basic factors which enter into fee determination are primarily the same whether the client is a single private corporation or a large indigent class, the problem of compensating pro bono attorneys requires an analysis of the rationale behind the attorney fee award; resolution of that analysis hinges upon whether the attorney should be fully compensated for his services. Though it may seem obvious that the proper recompense is one which fully and fairly rewards the attorney for his efforts, several cases have voiced the opinion that it is not the aim of an attorney fee award to put the attorney in the same financial position in which he would be were he employed by a "private" client.[120] Stressing the public service element of pro bono work, however, seems to penalize the attorney for his activities in public interest actions and might result in a less than thorough job on the part of an unscrupulous lawyer. A better approach is to award the attorney in a public interest suit an

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[118] 364 F. Supp. at 1318.

[119] 18 U.S.C. § 3006A (1970). The Criminal Justice Act sets the rate for court-appointed attorneys' fees at $30 per hour for in-court work and $20 an hour for work done outside of court. 18 U.S.C. § 3006A(d)(1) (1970).

[120] See, e.g., Sierra Club v. Lynn, 364 F. Supp. 834, 851 (W.D. Tex. 1973); Wyatt v. Stickney, 344 F. Supp. 387, 410 (M.D. Ala. 1972). Thus one court stressed the public service element of pro bono work and noted: "The award of attorneys' fees is not intended to make either the client or the attorney whole, nor by any means fully compensate counsel for the time expended in this extended and complex litigation." Sierra Club v. Lynn, 364 F. Supp. at 851.

hourly rate which approximates that received for similar work by private counsel, since in that way, the allowance will meet the test of reasonableness in the context of legal fees.

Different approaches to the problem of selecting a specific rate of compensation have been suggested. In *Cape Cod Food Products, Inc. v. National Cranberry Association,*[121] Judge Wyzanski described one standard employed: "The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer."[122] That standard, however, is nebulous and, as one commentator has noted, demands reference to "a market in which lawyers are accustomed to sharing the profits of risky litigation by express contracts for contingent fees."[123] Since it has been suggested persuasively that the contingent fee approach is unjustified in class action pro bono suits, it would be contradictory to urge that great weight be accorded the amount recovered in setting the hourly rate. The two cases cited as supporting a free market standard were, in fact, private antitrust actions not brought primarily in the public interest.[124]

Several cases, including *Detroit*[125] and *Johnson,*[126] maintain that the rate should reflect a local standard, the amount a local attorney of like skill would command for similar work.[127] While in essence a local standard is akin to the free market price since both refer to the amount a lawyer in the community might charge, the term seems to remove the bothersome speculation factor implicit in a free market approach. Basing a fee award on a local standard seems to best serve the objective of fully compensating attorneys for their professional services and would necessitate taking into account an attorney's particular specialization or the peculiar nature of an especially complex or novel case, as it includes consideration of the particular skill and knowledge required to achieve the desired ends.

A minimum fee schedule promulgated by the local bar association is one way in which the local rate might be ascertained. Although it did not urge absolute adherence to local minimum fee schedules, the *Johnson* court suggested that "[a]s long as minimum

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[121] 119 F. Supp. 242 (D. Mass. 1954).

[122] Id. at 244. A similar standard—"what it would be reasonable for counsel to charge a victorious plaintiff"—was employed in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 302-03 (M.D. Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part, rev'd in part, 392 U.S. 481 (1968).

[123] Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597, 1653 (1974).

[124] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 262 (M.D. Pa. 1965); Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. 242 (D. Mass. 1954).

[125] 495 F.2d at 471.

[126] 488 F.2d at 718.

[127] E.g., Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1322 (7th Cir. 1974); Clark v. American Marine Corp., 320 F. Supp. 709, 712 (E.D. La. 1970), aff'd, 437 F.2d 959 (5th Cir. 1971).

fee schedules are in existence and are customarily followed . . . in a given community, they should be taken into consideration."[128] Where the community does rely on the minimum fee schedule as a fee standard, it would seem that the bar association's suggestions would set forth a reasonable rate of compensation for legal work. Where the minimum fee schedule is not followed as a standard for setting fees in the community, an amount based on it would not meet the criterion of a reasonable fee in relation to a local standard. In addition, basing an award exclusively upon a minimum fee schedule would not take into account such circumstantial factors as extremely complex issues or the skill of the attorney, which would customarily be expected to increase the award. Reliance solely upon a minimum fee schedule would in those instances result in an award of an inadequate amount. One court, realizing the limitations of the area's minimum fee schedule, rejected it in favor of a more flexible local standard, voicing doubts that the plaintiff could have received similar services from a local attorney for less than that prescribed by the local standard.[129] The best solution might be to refer to the minimum fee schedules for the limited purpose of indicating the general range of area fees, but to disallow its use where the amounts suggested do not accurately reflect a local standard.

Where the award is to a plaintiff who has prevailed in a public interest suit, particularly one which has resulted in little or no monetary recovery, several courts have urged that the rate be set by the amounts prescribed in the Criminal Justice Act. While the *Johnson* court advised reliance upon the Act to establish a minimum award,[130] the courts in *Sierra Club v. Lynn*[131] and *Wyatt v. Stickney*[132] adopted it in lieu of the minimum fee schedule of the local bar associations. The *Wyatt* court found that statutory standard applicable, since counsel representing criminal defendants and those representing public interest litigants are "not motivated by desire for profit but by public spirit and sense of duty" and since "[i]t is the duty of members of the legal profession to represent clients who are unable to pay for counsel and also to bring suits in the public interest."[133]

While reference to the Criminal Justice Act does provide at least an objective basis for the award, reliance solely upon its specified rates might prove inadequate without further consideration of such factors as novelty, complexity, and the skill of the attorney. The Manual for Complex Litigation, which stresses the factor of public service involved in public interest actions, also recognizes that the fee award must be large enough to serve as an incentive to

[128] 488 F.2d at 718.
[129] Clark v. American Marine Corp., 320 F. Supp. 709, 712 (E.D. La. 1970).
[130] 488 F.2d at 718.
[131] 364 F. Supp. at 851.
[132] 344 F. Supp. 387, 410 (M.D. Ala. 1972).
[133] Id.

attorneys to continue in that field.[134] The *Kiser* court, which took note of the humanitarian spirit of counsel,[135] was nevertheless concerned with encouraging the continued endeavors of the attorneys in pro bono work. The court arrived at a compromise, most suitable in cases with substantial monetary recoveries, by awarding counsel a percentage of their total hourly-based fee as a premium.[136] While absolute adherence to the rates suggested in the Criminal Justice Act might serve to discourage involvement in public interest actions, a supplementary award determined by such variables as the excellence of the legal work, the novelty and difficulty of the case, and the results obtained would serve the dual purpose of encouraging pro bono work and mitigating the harsh effects of an across-the-board fee schedule.

CONCLUSION

As attorney fee awards, based on statutory and judicially-created exceptions to the American rule, have become increasingly common, the courts have been faced with the problem of determining what constitutes a reasonable fee. The various criteria which have been suggested as factors in the formula contribute to a common result: the allowance of a sum which is fair compensation for the attorney's services, substantial enough to encourage further work in the public interest, yet not a windfall fee bearing no relationship to the labor expended and the benefits realized. Into this consideration enter numerous factors, including the number of hours spent on the case and the value assigned to those hours, the outcome of the suit, the novelty and complexity of the issues, and the skill displayed by the attorney.

A survey of these considerations demonstrates that there is no functional relationship between a fee computed as a percentage of the amount recovered and a reasonable fee. Too often contingent fee awards result in grants which are exorbitant in light of the benefit actually conferred and the services rendered. While the result obtained—be it monetary or equitable relief—should be one consideration which enters into the evaluation process, a focus solely upon the size of the recovery vitiates a meaningful assessment of what is reasonable in a particular situation.

The amount of the fee finally awarded is the result of a balancing process in which the judge must weigh the effect of numerous factors in light of the particular circumstances of each case. This evaluation process preserves the traditional discretionary power of the trial court to set the fee, but requires that that discretion be grounded on concrete factors which ensure consideration of the pertinent elements bearing on the reasonableness of an award.

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[134] Manual for Complex Litigation, supra note 91, § 1.47, at 63-64. See note 25 supra.
[135] 364 F. Supp. at 1318.
[136] Id.

The *Johnson* criteria[137] proffer flexible guidelines encompassing a range of considerations which can be weighed and evaluated in a determination of a truly reasonable fee under any circumstances. In contrast, the *Detroit* case, with its emphasis on the time element, seems to be more suited to a case in which a large monetary award has been recovered.

The *Johnson* factors are more adaptable and seem particularly suited to civil rights or environmental actions, which may result in little monetary recovery but nevertheless may have much effect on the law. The *Johnson* court also placed importance on the time element, since the number of hours devoted to the case by the attorney provides an ascertainable basis for the award. However, the absolute value of the time factor was increased or decreased according to the relative weight of other factors such as the results obtained, the novelty of the issues and the undesirability of the case.[138] The approach suggested in *Johnson* exemplifies a solution which preserves much of the lower court's discretionary power, but enumerates concrete guidelines for the exercise of that discretion.

While it may be tempting to stress the readily ascertainable time element, the better view is that it is but one factor to be weighed in the evaluation process. It is also submitted that the better approach to setting a rate of compensation would appear to be reliance on a local standard of rates—a standard which is realistic in terms of client-attorney expectations and in terms of the customary fee for similar work in the locality.

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[137] See text at note 60 supra. The *Johnson* criteria have been found to constitute the proper guidelines for determination of attorneys' fee awards in the following cases: Evans v. Sheraton Park Hotel, 503 F.2d 177, 187-88 (D.C. Cir. 1974); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 447 n.19 (5th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 890 n.7 (9th Cir. 1974); Duhon v. Goodyear Tire & Rubber Co., 494 F.2d 817, 820 (5th Cir. 1974); Fairley v. Patterson, 493 F.2d 598, 607 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1057 (5th Cir. 1974); In re Delta Food Processing Corp., 374 F. Supp. 76, 81 (N.D. Miss. 1974) (considering the *Johnson* criteria "helpful but not controlling" in an action for fees for a bankrupt trustee and his attorney); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 945 (M.D. Ala. 1974); Morton v. Charles County Bd. of Educ., 373 F. Supp. 394, 411 (D. Md. 1974); Yelverton v. Driggers, 370 F. Supp. 612, 621 (M.D. Ala. 1974).

[138] *Johnson*, 488 F.2d at 718-19.