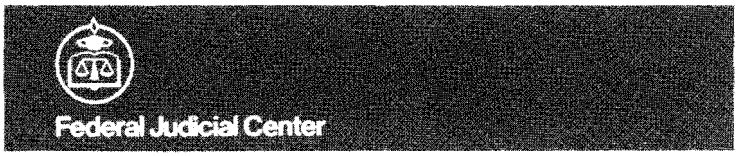
Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts



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TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS

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FOREWORD

The genesis of this report was a communication from Judge Walter R. Mansfield of the Court of Appeals for the Second Circuit, then serving as chairman of the Judicial Conference Advisory Committee on Civil Rules. He expressed the need for a study in clear terms:

> In short, Congress has saddled judges with heavy added burdens dealing with matters for which they are not particularly well qualified, unlike their traditional tasks of deciding questions of every day fact and adjudicating questions of law. I suggest that there might be others who could develop expertise rendering them better qualified to fix legal fees, performing the type of investigatory work required and applying the special knowledge needed for the task. I have in mind persons similar to English "Taxing Masters." If such experts could be employed, as are Magistrates in other fields, to take some of these time-consuming burdens off the judges' hands, the court's time could be freed to handle ever-increasing backlogs. [Letter to A. Leo Levin, Aug. 1, 1984.]

Attracted by the possibility of eliciting ideas from the long history of English practice, the Federal Judicial Center's Board approved a study of the English taxing master system and its American analogues. At the Board's suggestion, two Board members, Judges Arlin M. Adams and Howard C. Bratton, accompanied by the Center's director, met with Chief Taxing Master Frederic Thomas Horne during the American Bar Association meeting in London in June 1985. Taxing Master Horne, then and thereafter, provided unstinting cooperation from his office for the extensive inquiries that produced this report.

Even from the brief exposure in London it was apparent that the institution of a centralized taxing office would not be directly compatible with the structure and comparative decentralization of our federal courts. Nevertheless, a careful study of the operations of the taxing office seemed likely to generate ideas that might be adaptable to the needs of federal courts. This report confirms that hope. For example, the English system exemplifies, with rich detail, how a specialized system works and how specialists are able to delegate repetitive aspects of their work. These ideas and applications may prove useful, perhaps, on a districtwide basis. On the

other hand, duplication of the taxing master system on a national basis would require creation of a massive bureaucracy, an outcome that the authors of this report do not recommend.

Inclusion of the Alaskan courts in the study helps to bridge the differences between English and federal district court experiences with attorneys' fees. The Alaskan courts implement a pervasive scheme of fee shifting within a decentralized court system. The judge assigned to the case decides the fee issues. Schedules and refined, experience-based intuitions about market rates expedite the process, apparently with little or no loss of quality.

To round out the study, the authors surveyed practices in our own federal courts. Innovations produced by federal district judges faced with an influx of attorney fee petitions parallel some of the practices used in England and Alaska. The federal experience validates the observation that federal courts frequently respond creatively to thorny problems. By disseminating information about practices from a variety of sources, this report should facilitate continued innovation. In that way it will add to the supportive line of Center research on attorneys' fees beginning with publication of Professor Arthur Miller's work *Attorneys' Fees in Class Actions* (Federal Judicial Center 1980).

Combining the English, Alaskan, and federal systems for study may have a synergistic effect. Learning from one system reinforces understanding of the other two. The authors' treatment of variations allows readers to explore policy options grounded in a variety of court settings. Promoting consideration of such options is one step toward Judge Mansfield's goal.

A. Leo Levin

EXECUTIVE SUMMARY

Responding to burgeoning interest in issues arising from increased filings of attorney fee petitions, we examine methods of administration of fee petitions in the English taxing master system, the Alaskan state courts, and the U.S. district courts. Our goal is to identify the range of procedures and techniques for fee determinations and to discuss their advantages and disadvantages.

The English Taxing Master System

For centuries, the English have assigned the task of assessment of attorneys' fees to specialists within the judicial system called taxing masters. The English experience is a source both of innovative ideas and of lessons of avoidance.

Following the development of the "English rule" (i.e., the losing party pays the winner's costs, including attorneys' fees), the English devised the taxing master system as a mechanism to protect the losing party from excessive demands for costs. After centuries of decentralized taxation (i.e., determination) of costs, in the early twentieth century the English created a centralized Supreme Court Taxing Office with original or appellate jurisdiction over virtually all determinations of fees and costs. A major objective was to produce a uniform and predictable national body of principles and practices.

Even under the English rule, the winner can expect to pay a significant portion of its own costs. (This is similar to the Alaskan system.) Over the years, the English developed an elaborate set of decisional standards that drew narrow distinctions among four types of allowable costs on the basis of the source of payment. Severe criticisms from the private bar judged the system to be needlessly complex. These criticisms led to simplifications, so that there are now only two bases for taxation.

By statute, a taxing master must be a barrister or solicitor with ten years of experience. The position is considered to be a judicial appointment, and a taxing master is subject to rules regulating judicial conduct. The level of pay is substantially higher than that of a government solicitor, but below that of a lower court judge. The

pay, prestige, and security of the taxing master position have enabled the chief taxing master to recruit experienced solicitors.

The core of the taxing master's work is making judgments about the value and reasonableness of time spent by solicitors and barristers. The steps are similar to those prescribed for American federal judges under the *Lindy* lodestar or *Johnson* twelve-factor approaches. The taxing master must determine (1) who did what work, (2) whether the work was reasonable in the context of the case, and (3) the rate of remuneration, including profits, appropriate to the case. The last step includes consideration of *Johnson*-like factors.

Fixed time and rate scales had been used to set fee awards, but over the years they became minutely detailed. In the reform movement of the last decade, the scales have been curtailed and now apply only to routine cases.

Changes in the decisional standards and the use of scales seem designed to reduce the technicalities that caused solicitors to hire specialists to prepare their bills of cost. A predicted effect will be to reduce, but by no means to eliminate, the role of nonjudicial personnel in the taxing master's office.

The taxing office has a ratio of five clerical personnel to each taxing master. Clerical personnel have relatively few educational requirements and are paid considerably less than the taxing masters. Guidance is provided through manuals, checklists, case-by-case supervision, and accrual of experience.

Senior clerical personnel have statutory authority to tax costs in the first instance in cases involving relatively small amounts. Other clerical personnel perform a host of ministerial functions for the taxing master, including reviewing the papers for completeness and order, classifying cases according to complexity, checking arithmetic, preparing forms and correspondence for the master, and "reading" the file to prepare it for review by the taxing master. The last process includes examining all documents to see if they support the claims, provisionally taxing nondiscretionary items, flagging important items for review, verifying disbursements, preparing "notes" on questionable items, and organizing the papers for efficient review.

A court order defining a party's entitlement to fees is a prerequisite to taxation of costs by a taxing officer. The party entitled to costs files a standard-form bill of costs with extensive supporting documents, including receipts, correspondence, briefs, instructions to counsel, and pleadings. Hearings are permitted as a matter of right, and the norm is to have a hearing. At the hearing, the parties and the taxing master go through the bill line by line and

mark reductions in a column on the original bill. Any party may file written objections, which are a prerequisite to an appeal to the courts. Judicial review is on an abuse-of-discretion standard, but it is reported that the courts sometimes scrutinize factual issues more closely than that standard suggests.

Several alternative procedures have been developed to avoid the need for a formal hearing on the fees matter. They include (1) summary assessment of costs by the trial court at the conclusion of the case, (2) allowing fixed costs for a specific legal procedure such as processing an undefended divorce case, and (3) use of provisional taxation, which gives the parties a choice of accepting a proposed reduction in the bill of costs.

One positive effect of centralization in the English system appears to be that the vast majority of issues relating to costs are settled by agreement of the parties, who find the rules and their application to be predictable.

The expenses of the taxing office are supportable from filing fees, which are subject to fee shifting and taxation.

Taxation in Alaskan State Courts

Alaska has enacted a comprehensive fee-shifting schema that authorizes the prevailing party to recover attorneys' fees in virtually all civil cases. Like the English system, the Alaskan system normally provides only partial compensation to prevailing parties.

A fee schedule, based on the amount recovered by the winning party and on whether or not the matter was contested and tried, governs most fee awards. In some situations, such as cases in which the schedule-based fee would not accurately reflect the services rendered or in which there was no monetary recovery on which to base an award, the court bypasses the schedule and awards a "reasonable" attorney's fee. To set a reasonable fee, the court considers *Johnson*-type factors. Alaskan law does not require the trial court to make findings of fact and conclusions of law with regard to fee awards. However, if the fee schedule is not used, the trial court must provide a rationale for departing from it. Lower court determinations are granted wide deference on appeal and are not disturbed unless the trial court abused its discretion.

Taxation practices in Alaska proceed in the format of a routine motion, with a limited amount of paperwork (about five pages). Petitions for schedule-based fees (about 80 percent of the total) are invariably routine calculations and require little judicial time. Non-schedule-based fees are more likely to be contested and consume

more judicial time. Some judges use a detailed, item-by-item approach to establish a reasonable fee, treating the process like a summary judgment motion. Others use an intuitive approach, grounded in experience, to estimate the time and rate for a case and compare the estimate to the amount sought. Under either system, the reasonable-fee figure is reduced anywhere from 20 percent to 80 percent so that the final fee award conforms to the partial-compensation requirement.

Alaska judges use virtually no nonjudicial personnel to assist in fee determinations. Like their counterparts in the federal system, Alaska judges also tend not to make use of their law clerks for fee determinations.

Taxation in Federal District Courts

Faced with increasing numbers of cases involving exceptions to the American rule regarding fees (in which parties simply "pay their own way"), federal courts have adopted various techniques and procedures for the taxation of attorneys' fees. The trend in all federal circuits has been to set forth a specific methodology for district courts to follow. A *Lindy* lodestar calculation (compensable hours times reasonable rate) constitutes the core of the process. Nevertheless, the methodology requirements have not constrained the development of numerous and diverse case management and administrative practices throughout the district courts.

Reports from federal judges and magistrates indicate that rate determinations are more time-consuming when the matter is contested, when a hearing must be held, or when distinctions are made among rates on the basis of the type of fee earner, the type of activity, the location of the attorneys' offices, and the time period of the services. General market rates are easier to establish than individual rates for each attorney. Adjustments to the lodestar for contingency and quality factors are possible in exceptional cases and add to the complexity of the process.

Appellate review of district court fee awards is based on an abuse-of-discretion standard. Critics have claimed that in practice appellate courts have given little deference to fee determinations at the trial level. These critics call for maximum deference through strict application of an abuse-of-discretion standard of review for the fee judgment and a "clearly erroneous" standard of review for any underlying factual determinations.

Frequency of fee petitions varies from less than one case per month for some judges to more than fifteen cases per month for

others. Opposition to fee awards, especially when they do not come from the recovery, is more frequent than in the Alaskan system, where fee requests have become routine.

Time spent on fee requests varies widely. Criminal Justice Act and Social Security Act fee determinations take little time; those in class action cases take a large amount of time. Civil rights cases and cases involving imposition of sanctions appear to account for most of the fees activity. Even within these case types, judicial time varies considerably. External factors, such as the intransigence of the litigants or the quality of the attorney fee petition, affect the time demands. Internal factors, such as the judge's or magistrate's assessment of the value of fee litigation in comparison with litigation involving substantive rights or the judicial officer's view of the role of the court in monitoring the costs of litigation, also have an impact on the time demands. The more experience that a judicial officer has had in law practice and on the bench, the less time he or she seems to need for fee taxations. Overall, federal judges suggested that they spend up to 10 percent of their time on fee matters.

Generally, the format of the fee petition is left to the discretion of the petitioning attorney. Typically, fee records are submitted in chronological order, but variations include organization of hours by activity (i.e., motion for summary judgment, deposition of plaintiff) or mandatory references to the *Johnson* factors.

Many judges select fee petitions for close scrutiny on the basis of their intuitive assessment that the fees are out of line with their experience and overall judgment about the needs of the case. Otherwise, except in common fund cases, they depend on opposing counsel to point out problems.

Several judicial officers reported that they use issue-narrowing and settlement techniques to dispose of most fee disputes. They bring the attorneys together and proceed through the petition item by item to see what is disputed and why. It was reported that using this approach facilitated complete resolution of the fees matter in about three of four cases; in the remainder, it vastly reduced the number of issues for which a judicial determination was required. Several jurisdictions have adopted local rules that require the attorneys to attempt to settle fee disagreements before the district court will become involved in the matter.

Rate determinations are not disputed frequently, perhaps because of the self-interest of lawyers in establishing higher rates. Government entities, however, seek to keep the rates low. Some judicial officers scrutinize the rate requests carefully on the assump-

tion that rates in individual cases will become de facto market rates for many future cases.

Courts have increasingly taken judicial notice of market rates. There have been calls for the use of rate schedules developed outside the litigation context, such as bar association rate surveys and private reference services. Although judicial officers offered their widespread support for the use of rate schedules to avoid rate disputes, only one of the courts surveyed reported using a rate schedule.

Pretrial monitoring of fees reportedly is used sporadically and selectively. Most judicial personnel are reluctant to expend judicial resources on fee matters in cases that are likely to settle. One judge monitors fee issues beginning at the rule 16 scheduling conference; others occasionally require periodic filing of interim fee reports. Several judges assess the fee value of a case at an early stage and then use that estimate to gauge the reasonableness of a later fee request.

Delegation of fee matters varies among courts. Referrals to magistrates are the most common, and no dissatisfaction was reported concerning this practice. Often, the magistrates become "settlement masters" for fee disputes.

In extraordinary cases, special masters may be used. Judges and magistrates expressed some support for reference of fee disputes to binding arbitration, either with a professional service or with the private bar, but none of the courts surveyed presently operate such a program.

Use of nonjudicial personnel to assist in the fee process is rare and selective. Law clerks are seldom used because of their lack of experience with law practice and the subjective nature of the judicial determinations that must be made. In a major class action, however, a court used law school graduates to organize and summarize the massive fee petitions according to criteria established by the court.

One judge works closely with a deputy clerk and has educated that clerk as to standards for review of attorney fee petitions; the clerk now organizes the material and makes recommendations to the judge. Court clerks routinely review Criminal Justice Act petitions and classify the information according to categories assigned by the court; they also routinely tax nonfee costs. Nevertheless, courts are reluctant to delegate any substantial part of the fee taxation process to clerks because of the widespread feeling that fee review involves subjective judgments based on experience.

Applications for Federal Courts

Federal courts have developed, and continue to refine, an emerging and diverse set of practices for reviewing attorney fee petitions. The English and Alaskan models illustrate different approaches to a common set of issues.

Numerous policy considerations are raised by an overview of the three systems, but three deserve special attention. These considerations are the *quality of justice, procedural efficiency,* and the *uniformity* of decision making.

Concerns for the quality of justice relate primarily to the values embedded in promoting access to the courts and deterring unnecessary litigation; concerns for efficiency relate to the desirability of establishing procedures for the prompt determination of fee disputes. In many ways, a procedurally efficient system enhances access to the courts by providing prompt and certain funds to litigants. Deterrence of unnecessary litigation is likewise promoted by swift and efficient imposition of sanctions to penalize frivolous activity.

Uniformity of decision making, through use of fee schedules or scales, for example, may or may not conflict with quality-of-justice concerns such as access to the courts. In circumstances in which individualized decision making will promote the quality of justice, we think it should be used. However, we take the position that individualized decision making should be limited to those occasions. Where the quality of justice is not at stake, we believe consistency and predictability allow the judiciary to be most effective from a systemwide point of view. Nevertheless, we are cognizant that by embracing the policy of uniformity we also accept certain consequences that may not be seen as desirable.

With this background we examine the advantages and disadvantages of three primary policy issues.

1. Should standard formats and procedures be developed for filing and processing attorney fee petitions?

Use of standard formats for fee petitions would facilitate delegation of functions to nonjudicial personnel while organizing information into units that could be easily compared by the fee decision maker. Some transitional start-up costs might be incurred by attorneys if standard formats were adopted, but such an organizational structure would benefit the legal profession in the long run. Use of standard formats by single chambers or districts, however, might impose a burden of conforming fee petitions to the different formats required by different courts.

Use of standard schedules of value for attorneys' hourly rates would remove a major source of fee litigation and thus promote efficiency. Adoption of such schedules seems congruent with the decision-making practices that judicial officers already use. Schedules would need to take into account differences in attorneys' backgrounds and experience, and rate bonuses might be necessary to encourage early settlement (e.g., before a substantial number of hours had accumulated).

Disadvantages of the use of schedules include the lack of individualized attention to an issue and the elimination of case-specific information that might educate the decision maker as to the effectiveness of fee shifting. Use of rate schedules and delegation of certain tasks to nonjudicial personnel might have a synergistic effect on improving procedural efficiency.

2. Should a new decision maker be substituted for the judicial officer who hears the case on the merits?

This issue involves a fundamental policy choice. Policymakers—as well as decision makers—are likely to view the issue differently according to whether fee awards are seen as substantive matters per se whose determination by judges promotes access to the courts or whether only the availability of fees is seen as a substantive issue, with the precise calculation of fees able to be left to nonjudicial decision makers.

An advantage of the present practice of using judges as fee decision makers is that the quality and efficiency of their judgments about the value of legal services should generally be higher than those of a new decision maker starting afresh. An additional advantage is that maintaining the power to award fees is likely to enhance judicial power to control the proceeding by rewarding or punishing attorneys' conduct. These two advantages might be preserved by allowing the original judicial decision maker to instruct a delegatee as to his or her general opinion of the value of the lawyers' services. A disadvantage of using the trial judge as fees decision maker is that judgments about the exact amounts of fee awards do not necessarily demand the talents of Article III judges.

A subsidiary issue is whether a new decision maker should be a generalist or a specialist. Specialists have the advantage of promoting efficiency and producing a system that is routine, predictable, and likely to produce settlements. A disadvantage is that specialization could produce an esoteric system, comprehensible only to other specialists. If the specialization required were too refined, the task might become so mechanical as to inhibit recruitment of qualified personnel.

Another subsidiary issue is whether there is authority to delegate decision making on fee petitions. It seems clear that judges have statutory power under the Federal Magistrate Act to delegate various fee determinations to magistrates. The specific section of the act that applies to the delegation will dictate whether review of the magistrate's determination is on a de novo basis or restricted to a "clearly erroneous" review. A judge may appoint a special master under Federal Rule of Civil Procedure 53 in an extraordinary case or may invoke a court's inherent authority to appoint a master. Delegation of non-decision-making tasks to clerical personnel is permitted without question.

An advantage of delegation is that efficiency is likely to be promoted. A disadvantage is that judicial decision makers may become insulated from the process and thereby lose access to information about the operation of the attorney fee system.

3. Should the taxation of attorneys' fees be centralized and, if so, at what level of court?

As the English system shows, centralization promotes uniformity and predictability. Uniformity of outcomes for fee cases with regional or local differences, however, may be a disadvantage. Centralization at the national level would result in a large bureaucracy. Centralization at the district level appears to have more advantages than centralization at the national, statewide, or circuit levels and could probably be accomplished under the existing rulemaking and administrative powers of the district courts.

I. INTRODUCTION

Overview

Attorneys' fees, suggests Professor Arthur Miller, are "a subject fast becoming the legal profession's cottage industry of the 1980s."[1] Federal court judges are being asked to devote an increasing amount of their time to the determination of attorneys' fees.[2] It is not just trial court judges who are having to grapple with attorneys' fees; disputes concerning attorneys' fees are being litigated with increasing frequency in the appellate courts as well. Indeed, the Supreme Court issued decisions in four attorney-fee-related cases during its 1985 term[3] and the Court already has committed

1. Miller, *Justices Again Focused on Jurisdiction and Fees,* Nat'l L.J., Sept. 2, 1985, at S-16. Judge H. Lee Sarokin (D.N.J.), chair of the Third Circuit task force formed to study court-awarded attorneys' fees, recently was quoted to the same effect. *Inflated Fees?,* 72 A.B.A. J. 17 (1986).

2. The fees issue sometimes dwarfs the merits of the litigation in time, effort, complexity, and money at stake. The Supreme Court has warned against allowing the fees matter to "result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). *See* Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984) ("Parties to civil rights litigation in particular should make a conscientious effort, where a fee award is to be made, to resolve any differences."). The Court also reminds the district court that it "has a responsibility to encourage agreement" of the attorneys' fees. *Id.*

3. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 54 U.S.L.W. 5017 (U.S. July 2, 1986) (No. 85-5) (holding (1) that a prevailing plaintiff may be compensated for reasonable attorneys' fees for work conducted in state administrative rule-making proceedings and federal adjudicatory administrative proceedings where that work is related to the underlying judicial litigation, and (2) that the lodestar figure is presumptively the reasonable attorney's fee, reflecting the quality of representation, unless specific evidence is offered to demonstrate that the lodestar amount is unreasonable and, in addition, the district court makes detailed findings to support the petitioner's position; and restoring the case to the docket for reargument on whether the risk of loss justifies an upward adjustment to the lodestar amount and, if so, to what extent); Library of Congress v. Shaw, 54 U.S.L.W. 4951 (U.S. July 1, 1986) (No. 85-54) (holding that there can be no upward adjustment to the lodestar to compensate counsel for delay in receiving payment where Congress has waived the government's immunity from suit and from costs, including reasonable attorneys' fees, but has not waived the government's immunity from interest); City of Riverside v. Rivera, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224) (affirming district court's determination of reasonable attorneys' fees, calculated by the lodestar method, in the amount of $245,456.25 despite the fact that the jury awarded the plaintiffs only $33,350 in compensatory and punitive damages); Evans v. Jeff D., 106 S. Ct. 1531 (1986) (holding that the district court had no duty to

itself to review fee issues in three cases for the forthcoming, 1986 term.[4] There has been so much activity in the area within the last decade that one commentator asserts "the law of attorney's fees is now recognized as a distinct branch of American jurisprudence."[5]

The purpose of this report, however, is not to add another perspective to the general jurisprudence of attorney fee awards.[6] Although we do present some overviews of attorney fee law to provide the reader with a basic background in the area, the report focuses on issues related to the management and administration of an attorney fee request. Despite the presence of suggestions on how to enhance the efficient management of fee petitions in judicial opinions,[7] in the *Manual for Complex Litigation,*[8] in guides to attorneys from their colleagues,[9] and in the writings of other interested legal professionals,[10] federal judicial personnel report that they have not yet institutionalized methods to manage the workload created by fee matters effectively, efficiently, and expeditiously. Our goal in this report is thus to provide data and perspec-

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reject a settlement in which the plaintiffs' attorney waived their right to obtain a statutorily authorized fee from the defendant state and the state agreed to virtually all the injunctive relief sought by the plaintiff class in a civil rights suit).

4. *Delaware Valley,* 54 U.S.L.W. at 5023 (reserving decision on issue of whether risk of loss in a case justifies an enhancement to the lodestar figure in an attorney fee award and restoring case to argument docket for resolution of the issue); Helms v. Hewitt, 780 F.2d 367 (3d Cir.), *cert. granted,* 54 U.S.L.W. 3823 (U.S. June 17, 1986) (No. 85-1630) (issue was, "Is inmate in civil rights action 'prevailing party,' and thus entitled to award of attorneys' fees under 1976 Civil Rights Attorney's Fee Awards Act, even though his release from prison rendered prayers for declaratory and injunctive relief moot and defendants were found to be immune from damages award?" 54 U.S.L.W. at 3819); Crest St. Community Council, Inc. v. North Carolina Dep't of Transp., 769 F.2d 1025 (4th Cir. 1985), *cert. granted,* 106 S. Ct. 784, 54 U.S.L.W. 3460 (1986) (issues were, "(1) Are attorneys' fees recoverable under Civil Rights Attorney's Fees Award Act by prevailing parties for representation in federal administrative proceedings under Title VI, which fees are not for time expended on judicial proceeding in court? (2) Does Civil Rights Attorney's Fees Award Act give prevailing parties in administrative proceeding under Title VI right to bring independent civil action to recover attorneys' fees?" 54 U.S.L.W. at 3446).

5. Wolf, *Towards a Uniform Law of Attorney's Fees,* 8 Att'y Fee Awards Rep. 1 (1985) (citation omitted).

6. For useful examinations of the law of attorneys' fees, see especially 1 Civil Rights Litigation and Attorney Fees Annual Handbook chs. 2, 18-21 (F. Strom ed. 1985); M. F. Derfner & A. D. Wolf, Court Awarded Attorney Fees (1984); E. R. Larson, Federal Court Awards of Attorney's Fees (1981); Bartell, *Federal Court Awards of Attorney's Fees,* in ALI-ABA Resource Materials: Civil Practice and Litigation in Federal and State Courts 1203 (3d ed. 1985).

7. *See, e.g.,* Judge Grady's order in *In re* Continental Ill. Sec. Litig., 572 F. Supp. 931 (N.D. Ill. 1983).

8. Manual for Complex Litigation, Second, § 24.2 (1985).

9. *E.g.,* J. P. Bennett, Winning Attorneys' Fees from the U.S. Government app. B-1 (1985); 2-3 M. F. Derfner & A. D. Wolf, *supra* note 6, at pt. 2.

10. *E.g.,* T. E. Willging & N. A. Weeks, Attorney Fee Petitions: Suggestions for Administration and Management (Federal Judicial Center 1985).

tives that will assist the federal judiciary in the management and administration of attorney fee petitions in light of the requirements of the task.[11]

In this report, we describe the ways in which three different judicial systems—the English, the Alaskan, and the U.S. federal—handle the taxation[12] of attorneys' fees. Readers will detect convergences as well as divergences of practices and procedures across the three systems. However, we do not attempt systematically to evaluate their strengths and weaknesses in this report, since what works well in one jurisdiction may not be helpful in another. What we wish to do, instead, is to present these practices and procedures as possible options for those who wish to employ such techniques in their management of fee award petitions. In this context, district court personnel can then decide for themselves which are worthy of being adopted, adapted, or merely considered.

Structure of the Report

The next chapter consists of an examination of the taxing master system that the English legal system uses to handle attorney fee awards. Fee shifting has long been the norm in England. To deal with this part of the litigation process, the English have developed the office of the taxing master. The taxing master system uses specialists to set fee awards based on criteria articulated by the judge who presides at the hearing on the merits of the case.

Chapter 3 examines the practices of the Alaskan judiciary in their taxation of attorneys' fees. Although several states have introduced fee-shifting provisions, Alaska has as comprehensive a schema as any state, and it has been a part of Alaskan judicial practice for many years. Since virtually all civil cases result in

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11. This report is one of several Federal Judicial Center efforts in this area. *See also* T. E. Willging & N. A. Weeks, *supra* note 10; T. E. Willging, Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial (Federal Judicial Center 1984); A. R. Miller, Attorneys' Fees in Class Actions (Federal Judicial Center 1980); R. Aronson, Attorney-Client Fee Arrangements: Regulation and Review (Federal Judicial Center 1980).

12. The term *taxation* is a legal term of art that refers to the process of official determination of expenses incurred in a case that may be charged by one party to another. This use of the term should not be confused with the more familiar use of this term to refer to governmental assessment of monetary charges to raise funds for a public purpose.

Historically in the United States, taxation in the legal sense has usually referred to the court clerk's setting the amount of costs that the prevailing party is entitled to have paid by the losing party. *See* Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920. Recently, with the possibilities of recovering attorneys' fees in addition to costs, the term has also been applied to the official determination of attorney fee awards.

some fee shifting, the procedures used by Alaska's judges to handle this portion of their caseload are of particular interest to the federal judiciary.

In the wake of increasing numbers of statutory provisions authorizing fee shifting, the federal judicial system has responded with a plethora of taxation procedures and practices. As is true for most federal case management practices, each judge is free to adopt whatever techniques he or she believes will work best. This freedom has led to nonsystematic development of procedures and practices; however, it also means that the federal judiciary has developed a wide array of approaches to fee determination. Chapter 4 presents some of the different approaches to managing and deciding attorney fee requests that presently are used in twenty-five federal districts.

In chapter 5, we discuss some of the issues raised by English, Alaskan, and federal fee taxation practices. Several competing interests vie for dominance in any fee taxation schema. Various policy perspectives are implicated by differing approaches to fee setting. We focus on three primary questions. First, should standard formats and procedures be developed for filing and processing attorney fee petitions? Second, should a new decision maker be substituted for the judicial officer who hears the case on the merits? Third, should the taxation of attorneys' fees be centralized and, if so, at what level of court? Related to these primary questions are several subissues that we also address. For example, there are several legal issues that ought to be considered when thinking about the possibility of implementing certain fee taxation practices and procedures. The chapter, like the report, does not offer answers. Rather, by providing descriptions of alternative practices and procedures, and by examining some of the issues related to various fee taxation schemata, we attempt to contribute to an appreciation of the difficult policy choices and practical considerations that face the federal judiciary in developing effective management practices and procedures for the taxation of attorneys' fees.

II. TAXATION OF ATTORNEYS' FEES IN THE ENGLISH LEGAL SYSTEM[13]

Introduction

Building on centuries of experience,[14] the English have devised an elaborate system of calculating and awarding attorneys' fees and costs to the prevailing party in litigation. Taxation of costs[15] involves the procedures leading to a decision by a specialist within the judicial system, generally called a taxing master or a taxing officer,[16] as to what costs of legal services and ancillary expenses can

13. The information reported in this chapter was collected primarily through discussions and correspondence with Chief Taxing Master Frederic Thomas Horne, Chief Clerk Donald Hutchings, and members of their staffs at the Supreme Court Taxing Office in London, England. Their assistance is gratefully acknowledged. Apart from a personal meeting in Washington, D.C., with Mr. Horne, all interviews with the staff were conducted by transatlantic telephone.

14. Successful litigants were afforded a right to certain costs by the Statute of Marlborough, 52 Hen. III, ch. 6 (1267) (tenants maliciously impleaded by a lord); *see also* Statute of Gloucester, 6 Edw. I, ch. 1 (1275) (plaintiffs in specified real property actions). For a summary of the stages by which the principle that the losing litigant pays the winner's costs (known in the legal vernacular of the time as *In expensarum causa victus victori condemnandus est*) became imbedded in the common law of England, see 4 W. Holdsworth, A History of English Law 536-38 (2d ed. 1937). In equity, the chancellor had the power, dating to at least the sixteenth century, to award costs to the victor, but the common-law development was more gradual. *Id.*

Extension of the English rule on costs coincided roughly with the development of the English use of masters to resolve matters ancillary to litigation. Determination of costs, including attorneys' fees, has been assigned to masters for at least seven hundred years. Letter from Frederic Thomas Horne, chief taxing master, to Thomas E. Willging (Apr. 2, 1985). For an overview of the English use of masters, see generally Silberman, *Masters and Magistrates Part I: The English Model,* 50 N.Y.U. L. Rev. 1070 (1975).

15. The term *taxation of costs* refers to the process of official determination of the amount of costs, including attorneys' fees, incurred in a case. *See also* note 12 *supra.*

16. The term *taxing officer* includes a fully qualified taxing master who is a member of the judiciary. Rules of the Supreme Court, Order 62, rule 1.2 (1986) [hereinafter cited as "RSC O. 62, r. (1986)"]. It may also include a senior executive officer in the Supreme Court Taxing Office or in a district registry. A senior executive officer is a clerical staff member with authority to tax bills of costs up to a monetary limit set from time to time by the lord chancellor. The principal clerk of the Supreme Court Taxing Office also has authority to determine costs in civil cases up to a certain monetary limit. The term *taxing officer* also includes a senior executive officer in the Principal Registry of the Family Division, *id.* at r. 19(4), or a registrar of a court, *id.* at r. 19(3), (4). The latter has legal training and at least seven years of legal practice experience.

properly be imposed on the opposing party or a governmental fund in a given case. A taxing master is legally trained and serves as a judicial officer.[17] A taxing officer may be a clerical official in the court system who has limited authority to tax costs.

A study of the system used by the English for the taxation of costs may be instructive for courts in the United States in at least two ways. First and most important, an examination of the elements and mechanics of the English system may uncover analogues that are transferable to courts in the United States. We presume that wholesale adoption of the system is unlikely to fit our judicial customs and institutions; nonetheless, we can learn from the alternative procedures generated through centuries of experience with fee shifting and the concomitant need to determine fees. Given that the English system arose out of rules designed to shift fees among the winners and losers in litigation, it is reasonable to expect that extensive legislative and judicial activity promoting fee shifting in the United States will create similar demands for a more systematic approach to determination of attorneys' fees. Examination of the English system can stimulate our imagination and help in the development of innovative, hybrid forms adapted to American needs and resources.

Of secondary, yet substantial, importance are the lessons of avoidance we can learn. Here, at the early stages of an apparent trend toward extensive fee shifting,[18] we can look at the English experience to identify pitfalls inherent in the development of systems to structure decisions about attorneys' fees. Indeed, we are looking at the English system at a propitious time. Challenges to some traditional practices have come both from within the Supreme Court Taxing Office and from the legal profession in England. The self-study stimulated by these challenges has produced major systemic changes. English critiques of and changes in the system of taxation should alert American courts to potential problems.

Historical Origins and Purposes

After fee shifting was established in England, "it became necessary in the interests of justice to devise a means whereby unsuccessful defendants could be protected from excessive demands for costs by avaricious plaintiffs"[19] or their counsel. After successful

17. Supreme Court Act, 1981, Schedule 2.

18. *See* notes 161-164 and accompanying text *infra.*

19. Letter from Frederic Thomas Horne, chief taxing master, to Thomas E. Willging (Apr. 2, 1985) [hereinafter cited as Horne letter]; *see also* Royal Commission

defendants became entitled to fees during the reign of Henry VIII in the sixteenth century,[20] each division of the High Court of Justice developed its own system for using masters as judicial officers to tax costs. Centuries of experience with this decentralized organization of the taxation function led to the creation of a central Supreme Court (of Judicature) Taxing Office in 1901. The main reason for this change was that the system had become "time consuming and technically complex."[21]

As currently organized, the Supreme Court Taxing Office has original or appellate jurisdiction over almost all determinations of costs and fees in almost all courts and types of cases. Indeed, jurisdiction extends to disputes between solicitors and their clients arising from matters not involving litigation,[22] such as conveying property, and to arbitration proceedings.[23] Although taxations originate outside of the Supreme Court Taxing Office, most notably taxations by "registrars" in the Family Division[24] and taxations by registrars in the county courts,[25] these taxations, nevertheless, can be appealed to a judge in the same way as decisions by a taxing master. Clearly, a central objective of the taxing master system is to produce a uniform and predictable national body of principles and practices regarding taxation, regardless of whether the taxation occurs within or without the Supreme Court Taxing Office.

The need for the taxing master system arose directly from the decision to expand fee shifting. Even as the rule developed that "the costs follow the event"[26] (i.e., the successful litigant is entitled to an award of costs), policymakers were concerned that giving full control over the accumulation of costs to the successful party would produce unfair and excessive fees. Requiring the loser to pay the full amount of fees might encourage the winner to prolong the litigation; on the other hand, requiring the winner to absorb a portion of the fees might encourage settlement or, at least, serve as a brake against dilatory tactics, harassment, or other abusive litiga-

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on Legal Services, 1 Final Rep. 550 (1979) [hereinafter cited as Royal Comm'n Rep.]; Working Party on Simplification of Taxation, Report to the Chief Taxing Master and the Senior Registrar, Family Division 17 (1983) [hereinafter cited as Horne Rep.].

20. Statutes of 1531 (23 Henry VIII, ch. 15) and 1565 (8 Eliz., ch. 2) allowed successful defendants to recover costs in certain specified actions and courts; in 1607 (4 James I, ch. 3), defendants became entitled to recover costs in all cases in which plaintiffs were so entitled. 4 W. Holdsworth, *supra* note 14, at 538.

21. Horne letter, *supra* note 19.

22. The English call this noncontentious business.

23. RSC O. 62, r. 19(1), (3) (1986).

24. Horne letter, *supra* note 19.

25. County courts are courts of limited jurisdiction.

26. RSC O. 62, r. 3(3) (1986). *See also* R. Walker, The English Legal System 315 (4th ed. 1976).

tion practices.[27] The latter function has recently been more explicitly recognized. Under the April 1986 revisions in the Supreme Court of Judicature rules, taxing officers were granted authority to shift costs in response to misconduct or neglect in the litigation.[28]

Under the current English system, the winner can expect to pay a significant portion of its own costs. Items deemed by the taxing master to be "luxuries or costs thrown away by neglect or extreme caution"[29] are excluded from taxation. A rough aggregate measure of the percentage of fees that must be absorbed by the winner is the amount by which bills of costs are reduced during the taxation process. In 1984 the amount of costs claimed in civil "actions and matters" in the Supreme Court Taxing Office for the Queen's Bench and Chancery Divisions was reduced by an average of 20 percent.[30] Excluded costs can be as high as one-third of the solicitor's bill.[31]

In sum, the two major interrelated functions served by the taxing master system are to protect the unsuccessful litigant from abuses and to deter all parties from unnecessary filings and unnecessary activity during litigation. These functions, however, must be viewed in the context of the dual purposes of fee shifting, namely, to give citizens with strong legal claims access to the legal system and to discourage unnecessary litigation. These objectives are promoted by ensuring that prevailing litigants will not be forced to bear the major portion of their attorneys' fees and litigation expenses. Shifting of reasonable costs fosters this objective, and the denial of compensation for unreasonable costs provides a mechanism to discourage and correct abuses by prevailing parties. These

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27. R. Jackson, The Machinery of Justice in England 329-33 (5th ed. 1967). Promotion of settlement, however, is not uniformly supported by taxation rules. Charges to a client for "reviewing the situation and advising the client as to the wisdom of letting a case proceed or negotiating" cannot be taxed against the opposing party. R. Walker, *supra* note 26, at 330.

28. RSC O. 62, r. 10(1) and r. 28 (1986). Apparently, individual cost items can be shifted even against a party who prevailed generally. In addition to denying costs, the taxing official can assess the cost to the opposing party of the misconduct or neglect against the offending party.

29. R. Walker, *supra* note 26, at 319; *see also* R. Jackson, *supra* note 27, at 328-29 (costs taxed against opposing party are "never as high" as costs allowed to a solicitor against a client); Goodhart, *Costs*, 38 Yale L.J. 849, 856 (1929) ("English costs rarely include the whole payment made to the barrister and solicitor.").

30. Lord Chancellor's Department, Judicial Statistics 1984, Cmd. 5, no. 9599, at 100 (table 10.1) (1985).

31. An example of costs that might be excluded are costs that the solicitor incurred, out of an excess of caution, to deal with issues that did not arise at trial. R. Jackson, *supra* note 27, at 329-30. Presumably those charges are only billable to a client who has consented to pursuit of the case in a specific manner. The English practice of not compensating for total fees is somewhat similar to the Alaskan practice of awarding partial fees. *See* notes 123-125 and accompanying text *infra*.

objectives seem to coincide with the goals and limits of typical federal fee-shifting statutes in the United States.

Taxing Masters' Background and Hiring

Statutory qualifications for the position of taxing master provide that an applicant must be a "barrister or solicitor of not less than ten years standing,"[32] the same as the requirement for appointment as an entry-level English circuit (trial) judge. As a matter of practice, judicial candidates, including taxing masters, are normally between the ages of forty and sixty-two at the time of selection.[33]

The age limit (seventy-two) is sufficiently high that it affords the opportunity to hire retired lawyers as taxing masters. Apparently, the position of taxing master is attractive to experienced solicitors; two of the taxing masters interviewed for this study had retired from private law practice after fifteen or more years. The taxing masters interviewed for this report believe that the position is second in prestige only to a judicial appointment as a circuit judge and that it carries more prestige than the position of a solicitor in private practice. While the pay does not rival that of the private practitioner, remuneration is considerably above that of solicitors in government service. Solicitors and barristers in private practice earn more; they also work longer and less controllable hours. Moreover, job security is much better for a taxing master than for a private practitioner.

The chief taxing master is appointed by the lord chancellor from the ranks of taxing masters and is, like chief judges of U.S. federal courts, *primus inter pares.*[34] The lord chancellor appoints a chief taxing master only after consultation with senior members of the judiciary.

Openings for the position of taxing master are advertised in the national press. The lord chancellor controls the appointment process and generally consults with professional associations during that process to identify any professional disciplinary problems. The chief taxing master sits with a board of senior officials who interview candidates and make recommendations to the lord chancellor. Chief Taxing Master Horne reported that "it is essential that a

32. Supreme Court Act, 1981, Schedule 2.

33. Letter from Lord Chancellor's Department to Thomas E. Willging (Apr. 17, 1985). The description of the appointment process draws primarily from this letter and the Horne letter, *supra* note 19.

34. Horne letter, *supra* note 19; Supreme Court Act, 1981, Sec. 89.

Taxing Master shall have a wide knowledge and experience of the practice and procedure in the Supreme Court, the management and the running of a solicitor's practice and of the general practice of the Bar."[35] The master needs to "have a high degree of specialized knowledge in the highly technical, though narrow, field of taxation."[36] Most masters, however, do not have this expertise prior to starting their work; their knowledge of the intricacies of taxation of costs is generally acquired on the job. Knowledge based on experience in the practice of law, certainly, is indispensable.

In recent years, public advertisements for the position of taxing master have not attracted highly qualified candidates. Personal recruitment by the chief taxing master among practitioners has, however, generated applications from well-qualified candidates.

Taxing masters are full-time members of the judiciary and, as such, are prohibited from private law practice, politics, and private business. Indeed, like all English judges, they are prohibited from returning to private practice even after retirement or resignation. They can be removed from office only on the grounds of misbehavior in office, inability to perform the duties of the office, or attainment of the age of seventy-two.[37] Procedures for discipline and removal of taxing masters are the same as for other members of the judiciary. Like the impeachment process applicable to U.S. federal judges, these procedures are rarely used. In recent years only one taxing master has resigned from the office prior to retirement age, and none have been removed from office.

As of April 1986 the rate of pay for the office is 41,500 pounds per annum (plus 1,300 pounds for working in London) for the chief taxing master and 31,500 pounds for a taxing master. By comparison, the April 1985 pay scale for an assistant solicitor working for the government ranged from 20,853 to 24,317 pounds per annum.[38] A High Court judge receives 62,100 pounds and a Crown (criminal) Court judge receives 41,500 pounds, the same as the chief taxing master. Taxing masters are covered by a contributory government pension that begins to vest after five years.

In sum, the position of taxing master demands the background and qualifications of a judge. The appointment process suggests a similar level of importance, as does the pay and tenure of the office. Significantly, the position is the substantial equivalent of a

35. Horne letter, *supra* note 19.

36. *Id.*

37. Supreme Court Act, 1981, Sec. 92. The lord chancellor has discretion to extend the mandatory retirement age to seventy-five.

38. Letter from Lord Chancellor's Department, *supra* note 33; personal communication with Donald Hutchings, chief clerk, Supreme Court Taxing Office (June 6, 1986).

lifetime appointment. Life tenure and the prohibition on returning to private practice serve to insulate taxing masters from the potential conflicts of interest that might be created by short-term ("revolving door") appointments.

Decisional Standards Applied by Taxing Masters

The English have developed an elaborate set of decisional standards for awarding costs and attorneys' fees at different levels, depending on the type of case. Before outlining the complexities of these standards, we wish to reiterate a cautionary note. We do not recommend, or even suggest, that federal or state courts in the United States transport the entire taxing master system across the ocean. Indeed, our review of the decisional standards may serve as a warning that fine distinctions among types of cases and types of functions performed by attorneys lead to complex administrative systems. Recent English reforms and simplifications call attention to troublesome issues and should alert American courts to the dangers of building an elaborate process for determining attorneys' fees and costs.

Until changes to the Rules of the Supreme Court went into effect on April 28, 1986, taxing masters in the Supreme Court Taxing Office applied four different decisional standards to four major types of taxation of costs. The main difference in each area appears to be the source of the funds rather than the subject matter of the dispute, the type of legal work being compensated, or the skill and experience of the solicitors and barristers. The types of costs and the decisional standards applied to them were as follows:

1. *Party and party costs.* This type of costs represents the largest portion of the work of the taxing office and is the equivalent of attorney fee petitions in contested U.S. federal civil cases. In general, the decisional standard guiding assessment of "party and party" costs was whether each item was "necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."[39] Of the four standards, this was the most parsimonious.[40]

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39. RSC O. 62, r. 28(2) (1965 & Dec. 1980 Supp.). This decisional standard has been superseded by a new rule, called the "standard basis," which applies to both "party and party" costs and common fund costs (*see* description in text *supra*). Under the standard basis "there shall be allowed a reasonable amount in respect of all costs reasonably incurred." RSC O. 62, r. 12(1) (1986). All doubts are to be resolved in favor of the party who is liable to pay. *Id.*

40. Royal Comm'n Rep., *supra* note 19, at para. 37.31; *see also* Horne Rep., *supra* note 19, at 17, para. 44, for an outline of the decisional standards applied to costs and their generosity in relation to each other.

2. *Common fund costs.* This category includes costs covered by government funds such as the Legal Aid in Criminal Proceedings Act and the Legal Aid Act of 1974 and should not be confused with American common fund cases, which involve the creation of a common fund primarily through class action litigation. (In England, such costs would be treated as "party and party" costs unless the court exercised its authority to treat them as common fund costs.[41]) The historical standard for assessing these costs was that "a reasonable amount [is allowed] in respect of all costs reasonably incurred,"[42] a standard more generous than that for "party and party" costs.

3. *Solicitor and own client costs.* The Supreme Court Taxing Office has jurisdiction, at the behest of a client, to review bills submitted by solicitors to their clients. The standard was that "all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred."[43] All costs incurred with the express or implied approval of the client were "conclusively presumed to have been reasonably incurred."[44]

4. *Trustee costs.* These costs relate to claims by a trustee or a personal representative against a fund for costs that are to be paid from that fund. Under the former decisional standard, they were not "disallowed unless they . . . should not, in accordance with the duty of the trustee or personal representative as such, have been incurred or paid."[45] In other words, if they were outside the authority of the trustee, they should not have been allowed.[46]

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41. RSC O. 62, r. 28(3) (1965 & Dec. 1980 Supp.). The decisional standard applied to common fund costs has been superseded by the standard basis that is also applicable to "party and party" costs. *See* note 39 *supra.*

42. RSC O. 62, r. 28(4) (1965 & Dec. 1980 Supp.).

43. RSC O. 62, r. 29(1) (1965 & June 1985 Supp.). These exact words are used to describe the "indemnity basis" under the new rules. RSC O. 62, r. 12(2) (1986). The indemnity basis applies to "solicitor and own client" costs and to trustee costs. *Id.* at r. 15(1) and r. 14(2).

44. RSC O. 62, r. 29(2) (1965 & June 1985 Supp.). Under the new rules, express or implied approval by the client leads to a presumption (not stated to be conclusive) that the costs are reasonable in amount and reasonably incurred. RSC O. 62, r. 15(2) (1986). Unusual costs are presumed to be unreasonably incurred unless the solicitor can show that "he informed his client that they might not be allowed on a taxation of costs." *Id.* at r. 15(2)(c).

45. *Id.* at r. 31(2). Under the revised rules, trustee costs are taxed on the indemnity basis. *See* notes 43-44 *supra.* They are presumed to be unreasonable if incurred contrary to the duty of the trustee. RSC O. 62, r. 14(2) (1986).

46. Some commentators listed a fifth decisional standard, called the "indemnity basis," whereby all costs would be paid except those that the paying party showed to be of an unreasonable amount or to have been unreasonably incurred. E. Williams, ABC Guide to the Practice of the Supreme Court 1983-84 (1983). Under the revised rules, this basis became the standard applicable to "solicitor and own client" taxations and trustee taxations.

Under the standards as revised in April 1986 there are now two primary bases for taxation of costs: the standard basis and the indemnity basis.[47] These two bases implement the distinction between the amount payable by a client to a solicitor and the amount payable by the losing party. Together, they account for the fact that the prevailing party cannot expect to recover full attorneys' fees.[48] Different presumptions in application of the indemnity basis serve to accommodate preexisting differences between trustee costs and "solicitor and own client" costs.[49]

Criticisms of the former decisional standards were forcefully stated. For example, the vice-chancellor referred to the "invincible repugnance" with which some practitioners approached the taxation process[50] and in another case used Oliver Cromwell's phrase "an ungodly jumble" to describe the rules governing taxation.[51] One solicitor saw the distinction between the common fund standard (no. 2) and the "solicitor and own client" standard (no. 3) as "a distinction so subtle that I have never been able to detect it."[52] As evidenced by that solicitor's comment, even veteran students of the taxing process confessed perplexity at the differences among the four standards.

Despite the ambiguities and criticisms of the standards prior to their recent reform, two things are clear. First, the English have developed an elaborate system that attempts to differentiate subtly among various types of cases based primarily on the sources of funds. Second, and most important, under all of the standards, including the new ones, the major work of the taxing master consists of making judgments about the value and reasonableness of time spent by solicitors and barristers in specific activities. Differences among the standards seem to be unnecessary incrustations on the system. The recent simplification of the bases of taxation reinforces that conclusion. As stated in the Horne Report, "The level of costs is not something that can be determined with scientific precision; it is an exercise of experience and judgment."[53] Let us now turn to consideration of how those judgments are made.

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47. *See* notes 39 (standard basis) and 43 (indemnity basis) *supra*.
48. *See* discussion at notes 29-31 *supra*.
49. For a summary of the revised 1986 rules, see notes 39 and 43-45 *supra*.
50. Chapman v. Chapman, [1985] 1 W.L.R. 599, 612 (Ch.).
51. EMI Records, Ltd. v. Ian Cameron Wallace Ltd., [1983] 59 Ch. 245. This phrase is quoted in the Horne Report, *supra* note 19, at 4.
52. M. J. Cook, *The Assessment of High Court Costs,* in College of Law, Costs in Contentious Cases, at 9 (1978). The new rules abolish the subtle distinction that was the target of that comment.
53. Horne Rep., *supra* note 19, at 21.

Descriptions of the English process of setting rates for legal work exhibit marked similarities to the assessment of attorneys' fees in U.S. federal courts under the *Lindy* lodestar[54] and *Johnson v. Georgia Highway Express, Inc.*[55] approaches. One commentator describes a three-step process that includes all of the elements of the combined lodestar–*Johnson* factors applied by federal courts in the United States. The steps are (1) determine "who did what work"; (2) ascertain whether each item of work was "necessary and proper" (party and party), "reasonable" (common fund), "not unreasonable" (solicitor and own client), or "within the duty of the trustee" (trustee); and (3) "assess fair and reasonable remuneration for the solicitor," including a profit level.[56]

The first step has an impact on the hourly rate because the experience and reputation of the fee earners are primary determinants of the hourly rate, if the tasks justify use of a solicitor or barrister who commands such a rate. The second step constitutes the core of the taxation function—the determination of whether the work was appropriate.[57] The third task apparently incorporates features of the hourly rate and multiplier judgments. This task includes application of *Johnson*-type factors such as (1) complexity, difficulty, or novelty of the case; (2) skill and specialized knowledge required; (3) number and importance of the documents (however brief) prepared or perused; (4) place and circumstances in which the business was transacted; (5) importance of the matter to the client; (6) amount of any money or property involved; and (7) any other fees in the same matter that may have reduced the costs to the solicitor.[58]

The taxing master applies hourly rates to each lawyer listed in the bill of costs based on the contentions of the parties as to the applicable rate and on the master's own specialized knowledge as to whether the rate sought conforms with market rates. He or she also applies "uplifts" (multipliers) that are intended to take into account the above seven factors. A normal uplift is 50 percent of the

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54. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); *see generally* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1986); T. E. Willging & N. A. Weeks, *supra* note 10, at 29-56; *see also* note 169 *infra*. *Cf.* notes 137-138 and accompanying text *infra* (Alaskan guidelines for determining reasonable attorneys' fees).

55. 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* criteria are set out in note 170 *infra*.

56. Cook, *supra* note 52, at 11-12.

57. *Cf.* Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (exclude "hours that were not 'reasonably expended' ").

58. RSC O. 62, app. 2, pt. I(2) (1986). Recent developments in U.S. federal law indicate a movement away from using this type of factor to adjust the lodestar. *See* ch. 4, "Adjustments to the Lodestar" section, *infra*.

"profit items" (generally, the lawyer's time, but not disbursements to third parties).[59] The uplifts, however, may be substantially increased above 50 percent to reward extraordinarily efficient and brilliant performance.[60]

Until the April 1986 revisions to the Rules of the Supreme Court, the taxing office used fixed time and rate scales, established by rule, to determine the amount of time allowed for specific items that recur in most cases.[61] As we discuss more fully below, these scales could be administered by clerical staff, leaving the discretionary items to the judgment of a taxing officer.[62] The time and rate scales have recently been simplified. Until 1979, they included more than one hundred items, an arrangement the Royal Commission on Legal Services found to be generally "recognized as unsatisfactory and time-consuming."[63] Initial revisions reduced the number of items to about twelve,[64] and effective April 28, 1986, most of the scales have been abolished. Under the new rules, scales are used only for determination of costs on recovery of a liquidated sum without trial and for actions for possession of land.[65]

An example of a set of items covered by the pre-1986 scales is "preparing, issuing, filing and service of writ of summons, including statement of claim . . . originating summons, notice of originating motion or third party notice: 4-14 [pounds]."[66] Attending the interlocutory trial or hearing of a cause was compensable at 5-21 pounds per day or part of a day.[67] The taxing master, however, had discretion to allow more than the maximum for each item.[68] Pre-1986 revisions resulted in major categories of costs, such as all preparations for trial, being labeled discretionary in compensable amount. The net effect of such changes is to transfer responsibility

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59. Telephone interview with Taxing Master Prince (Dec. 10, 1985).

60. Cook cites an example of a solicitor who negotiated a substantial settlement of two injury cases without filing suit and was rewarded with a "200% profit mark up on the time he had spent." Cook, *supra* note 52, at 13.

61. RSC O. 62, app. 2(b), pt. I (1965 & May 1979 Supp.). *Cf. id.* at app. 3(A) (1986) (scales for basic costs on recovery of a liquidated sum without trial).

62. RSC O. 62, app. 2(b), pt. (a)VII (Feb. 1985 Supp.). The term *taxing officer* is defined in note 16 *supra*.

63. Royal Comm'n Rep., *supra* note 19, at 554, para. 37.39. The commission found that the items "relate[d] mainly to work carried out by typists, messengers and other junior staff and represent[ed] overhead expense incurred in normal professional work on the case . . . [and that] such overhead expenditures should be included in the charging rates which are fixed for the work necessarily carried out by a solicitor and other fee-earning staff." *Id.*

64. RSC O. 62, app. 2 (1965 & May 1979 Supp.).

65. RSC O. 62, app. 3, pts. I & II (1986).

66. RSC O. 62, app. 2(b), pt. I(1)(a) (1965 & May 1979 Supp.).

67. *Id.* at pt. III, 8.

68. *Id.* at pt. (a)VII (Feb. 1985 Supp.).

for initial decision making from clerical personnel to the taxing officer.

The English experience with efforts to make the entire system of taxation of costs objective resulted in the creation of a highly technical system.[69] Few solicitors understood the arcane niceties, if they may be so called. Solicitors employed independent drafters to prepare bills of costs, and their charges could be as high as 7 percent of the amount taxed.[70] These charges were to be paid by the solicitors and were not taxable against the opposing party. As a result of "pressure for change . . . applied over many years by the solicitors' profession and the taxing masters,"[71] a major revision of rules and procedures governing taxation of costs was announced in April 1986. The direction is toward simplification of the format of bills of costs and toward less formal procedures for resolving disputes about the bills. We now turn to a review of those procedures.

Taxing Office Procedures and Judicial Review

Ordinarily, the costs follow the event (i.e., the loser pays the winner's costs); however, English courts retain limited discretion to decline to order an award of costs. For example, if the winner has refused an offer of contribution or payment of money into court, then the winner will not necessarily be entitled to receive costs from the loser.[72] A judicial order awarding costs is a prerequisite to taxation of costs by a taxing officer.[73] The taxation must be conducted within the terms of the order. Interlocutory awards may be announced, but costs are taxed only at the conclusion of the action unless otherwise ordered.[74]

The Supreme Court Taxing Office

A few words about the Supreme Court Taxing Office will help to give a perspective for its procedures. The office is located in London and comprises the offices of the eight taxing masters and

69. *See also* notes 50-52 and accompanying text *supra*.
70. Royal Comm'n Rep., *supra* note 19, at 553, para. 37.36.
71. Horne letter, *supra* note 19, at 6.
72. RSC O. 62, r. 9 (1986). The discretion to decline to award costs to the prevailing party is a limited judicial discretion that must be justified by some action of that party connected with or leading up to the litigation. 37 Halsbury's Laws of England para. 714 (1982).
73. RSC O. 62, r. 3(2), (3) (1986). There are minor exceptions to this rule, such as the withdrawal of a counterclaim or the plaintiff's acceptance of money into court from a defendant who counterclaimed. Under either of these circumstances, a plaintiff is entitled to seek costs without a court order. *See also id.* at r. 5.
74. RSC O. 62, r. 8 (1986).

approximately forty supporting staff members. This 5:1 ratio of supporting to judicial personnel permits delegation of many functions, including decision making in small cases, to clerical staff. With this level of support, the office was able to tax 11,820 bills of costs during the year ending December 1984. Of these cases, only about 3,200 were taxed by taxing masters, at a rate of approximately 400 per year per master. Approximately 8,400 were taxed by senior clerical personnel, at a rate of about 800 per person.

Format and Filing

The taxation process begins with the filing of a bill of costs in the taxing office by the solicitor who has received a judicial order for costs. The bill of costs is in a standard format on a printed form designed to elicit details about the legal work and disbursements to third parties at all the standard pretrial, trial, and appellate stages of the litigation.[75] The form contains columns for the amount claimed for each item and a blank column for the amount deducted by the taxing officer. This format allows the form to serve as a record of the taxation process; the taxing officer simply records the amount deducted in the proper column.

By rule, the solicitor is required to submit the bill of costs within three months after entry of the order for costs.[76] Apparently, however, this rule has received scant attention because of the absence of sanctions for its enforcement and the common understanding that the system was, at least prior to 1986, too complex to permit strict enforcement.[77] The average filing date for a sample of legal aid bills of costs in uncontested divorces in three jurisdictions was 305 days; such delays are a powerful testament to the complexity of the system, given the economic self-interest of solicitors in prompt payment.[78]

Complete supporting documentation, including confidential information from the solicitor's files, must accompany each bill of costs. These documents include the order awarding costs, a statement of parties (listing information about each party's representation and interest in the proceedings), all pleadings, instructions to the barrister regarding the case, attendance entries for court appearances, interview memorandums, expert-witness reports, and the correspondence file.[79]

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75. For examples of the traditional and simplified bills of costs, see annexes 37.2 and 37.4 to the Royal Comm'n Rep., *supra* note 19; *see also* RSC O. 62, r. 29(1) (1986).
76. RSC O. 62, r. 29(1) (1986).
77. *See, e.g.,* Royal Comm'n Rep., *supra* note 19, at 572-74.
78. *Id.*
79. RSC O. 62, r. 29(7) (1986).

Assignment by Rota Clerks

The bill is filed with a "rota clerk" who gives the papers a cursory glance to see that there is an appropriate court order awarding costs. If any papers appear to be missing or if the order is not appropriate (e.g., the order reads "costs in any event" and the event, generally the end of the case, has not occurred), the papers are rejected (but may be resubmitted). If all of the necessary parties are not included, the solicitor is instructed to include all the parties before the papers will be filed.

If the filing is proper, the rota clerk records the filing of the case in a docket book. After classifying the case according to amount of costs, subject matter of case, and type of fees sought, the clerk pulls a "ballot" from the appropriate box and assigns the case to the person named on the ballot. If the case is within one of three specialty areas—commercial cases, value-added-tax proceedings, and election petitions—it is assigned to the single taxing master specialist in that area.

Taxation by Senior Clerks

Principal clerks and senior executive officers are experienced members of the civil service staff of the taxing office with express authority to tax bills of costs.[80] A party may object to taxation by these officers, however, and if sufficient cause is shown, the taxing master is directed to order that the bill be taxed by a taxing master.[81]

If the amount claimed is less than four thousand pounds, the case is assigned, by random ballot, to one of ten senior executive officers. If the amount claimed is between four thousand and seven thousand pounds, the case is assigned to a principal clerk. All taxations involving a solicitor and the solicitor's own client, however, must be taxed by a taxing master.

Provisional Taxation

If the case is assigned to a senior executive officer or a principal clerk, that official taxes the bill of costs. The first step is either a provisional taxation or the scheduling of a taxation hearing. A pro-

80. RSC O. 62, r. 19 (1986).

81. *Id.* Prior to April 1986 an objection by a party had been sufficient to require taxation by a taxing master. The Working Party on Simplification of Taxation, after objection from the Law Society, decided not to recommend elimination of the power to object to taxation by a senior executive officer or a principal clerk. Horne Rep., *supra* note 19, at 14-15. Nevertheless, the revised Order 62 requires written reasons, showing sufficient cause, for the objection. RSC O. 62, r. 19(5) (1986).

visional taxation may be conducted when only the party who commenced the proceeding is entitled to a hearing, generally in a common fund/legal aid taxation. In a provisional taxation, the taxing officer marks the bill of costs, indicating specific reductions, and sends it to the parties concerned. If no party requests a hearing, the proposed reductions become final. In all other cases, the officer schedules a hearing during which the bill will be marked in the presence of the parties.

Review in Chambers

If the case is assigned to a taxing master, the solicitor or a clerk delivers the bill of costs to the chambers of the master. It is received and docketed by a clerical officer who reviews it carefully to see that all documents are included. Once satisfied that the papers are complete, the clerical officer delivers them to a higher executive officer who reviews the case to determine if it is complex or simple. Indications of complexity include the number of defendants or intervenors, mixed bases of taxation (most commonly because some plaintiffs were eligible for legal aid and others were not), the amount claimed, the size of the file, or the presence of interlocutory orders or appeals. Sometimes, the subject matter of the case or the reputation of the solicitor can signal ease or complexity.

Reading the File

If the case is simple or routine, the higher executive officer passes it down the hierarchy to an executive officer. The higher executive officer keeps all "solicitor and own client" cases. Once the assignment is made, the executive officer or higher executive officer engages in a process of "reading" the file, marking up the bill of costs as to nondiscretionary items, and writing "notes" in memorandum form to guide the taxing master in preparing for the taxation hearing.

Reading is designed to simplify the work of the taxing master and yet preserve the decision-making function in that office. Following are some of the components of reading and other preparatory work:

- Advising solicitors, frequently before filing of the bill of costs, about the appropriate format and technical requirements (including identification of necessary parties)
- Examining the supporting documents, such as pleadings and correspondence files, to verify that the items claimed were in fact performed

- Identifying additional documents needed and requesting them from the solicitor
- Uncovering any technical defects in the form of the bill, contacting the solicitor to remedy them, and noting all such contacts
- Checking to see if the use of experts was authorized under the legal aid certificate
- Examining interlocutory orders for interlocutory allocations of costs (e.g., discovery sanctions or interlocutory appeals) and checking the conformity of the bill of costs with those orders
- Provisionally taxing nondiscretionary items—using scales of permissible charges—and "taxing off" (disallowing) the excess
- Ensuring that the fee earner and an appropriate billing rate are identified for each function
- Preparing notes for the taxing master, calling attention to questionable items such as duplicative claims, work for the client outside the scope of the underlying case, work that was done prematurely and had to be repeated, work that seems to be unnecessary in the context of the case, work of poor quality, and work that was omitted or neglected
- Flagging items for the taxing master's attention, such as important pleadings, correspondence, and notes on attendance at court (the latter are automatically flagged)
- Verifying that disbursements for particular items, such as expert reports, relate to the items used in the case
- Placing all the papers in a set order (pleadings in chronological order, instructions to the barrister, reports of experts, correspondence, court attendance notes, and "spare papers" not directly relevant to the taxation).

Miscellaneous Supporting Tasks

Clerical personnel perform other tasks that do not demand the skills of a taxing master, for example:

- Scheduling hearings for the taxing master and notifying the parties (some masters schedule their own hearings)
- Handling correspondence for the taxing master
- Attending the taxation hearing, if necessary (rare)
- Reviewing objections filed after the taxation and discussing them with the taxing master (occasional)

- Drafting the certificate of costs, which is the final order in a taxation.

Taxation Hearings

Parties are given notice of the proceedings, but they need not appear to protect their right to object. The paying party receives a copy of the original bill of costs (without the supporting documents and correspondence, to protect confidentiality), but does not have to file written objections before the hearing. The taxing master has power to take evidence and to order the production of relevant documents.[82] The party seeking costs must prove all disbursements other than court fees by attaching receipts to the bill of costs. "Party and party" proceedings are adversarial, at least to the degree described above; common fund/legal aid proceedings are inquisitorial.

In "party and party" proceedings, the paying party generally has the obligation to "make the running," that is, to raise points in opposition to the bill and to question specific items. Nevertheless, if supporting documents that are not available to the paying party suggest issues for discussion, the taxing officer should raise the issues and arguments, if any.

In legal aid cases, the government is the paying party and is not represented except through the taxing master, who acts as a watchdog. During the proceedings, the taxing master marks the bill of costs as each amount is accepted or reduced.

Certifying the Results

After the close of the proceedings, if none of the parties have objected to the decisions made at the hearing, the bill of costs is relodged as amended to include the results of the taxation hearing. A clerical officer checks the arithmetic and verifies that there is a voucher for each disbursement. Depending on the complexity, a clerical, executive, or higher executive officer prepares a certificate of costs that is also noted on the original judgment. The certificate itself is an enforceable judgment.

Objections

A party who is dissatisfied with any allowance has twenty-one days within which to apply for review of specific items by the same taxing master who issued the certificate.[83] Even a party who failed

82. RSC O. 62, r. 20 (1986).

83. RSC O. 62, r. 33 (1986). If the original taxing officer was a principal clerk or a senior executive officer, the review must be conducted by a taxing master. *Id.* at r. 34(1).

to appear at the taxation hearing may file written objections. The taxing master may receive additional evidence at this stage. A party may request specific responses to each objection.[84]

Judicial Review

A request for review by the taxing master is a prerequisite to further appeal. An appeal is undertaken by way of an application to a judge for an order to review the taxation. All of the documents, objections, and answers are then filed with the court. Such review is generally on the evidence and objections generated during the taxation proceedings.[85] The standard of review was designed to give full authority to taxing masters to resolve factual issues.[86] At one time the rule was that "the court will not interfere with the decision of a taxing officer on a question relating to fact or to the amount of costs" and that a court would intervene only when "some question of principle is involved."[87] Currently, however, the court does not hesitate to interfere even when the question is solely one relating to the amount of costs.[88]

Judicial review may be ordered when the taxing officer

> has not had reasonably sufficient material before him, or has taken into account matters which he should not have considered, or has not taken into account matters that he should have considered, or perhaps has given reasons that are incorrect, or where the matter is not purely one for his discretion, or where he has acted upon a wrong principle or adopted the wrong approach.[89]

On review, the judge has discretion to appoint two assessors, one of whom must be a taxing officer, to assist in the proceedings.[90]

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84. *Id.* at r. 34(4).

85. *Id.* at r. 35.

86. 37 Halsbury's Laws of England paras. 757-850 (1982). This rule appears to be somewhat similar to the abuse-of-discretion review standard applied to fee determinations under American law. *Cf.* notes 139-140 and accompanying text *infra* (re Alaskan law) and ch. 4, "Standard of Appellate Review" section, *infra* (re U.S. federal law).

87. 37 Halsbury's Laws of England paras. 757-850 (1982). For example, a matter of principle would be whether a particular type of witness qualifies as an expert witness (and is therefore entitled to a larger fee than an ordinary witness). A matter of principle is generally distinguished from a matter of quantum, such as the reasonableness of the amount paid to an expert.

88. Personal communication from Donald Hutchings, chief clerk, Supreme Court Taxing Office, to Thomas E. Willging (Jan. 30, 1986.)

89. 37 Halsbury's Laws of England paras. 757-850 (1982).

90. RSC O. 62, r. 35 (1986).

The judge also has the choice of either changing the award by amending the certificate or ordering the disputed items to be remitted to a taxing officer for taxation.[91] Appeals from the order of the judge are to the Court of Appeal, with leave of the judge.[92]

Chief Taxing Master Horne reported that judicial review was "comparatively rare" before inflationary pressures increased in the early 1970s and that there has been a "marked and progressive increase" in appeals since that time.[93] Without precise statistics, he estimated that approximately 5 percent of all taxations proceed to the first step of review by written objections. Of these, not more than one in five goes to a judicial review. Thus, even with recent increases in the number of appeals, less than 1 percent of all taxations are reviewed by the courts.[94]

Alternative Procedures

Over the years, the English have developed alternative procedures to full taxation of bills of costs. In the typical taxation of bills, an informal hearing in the chambers of the taxing master is considered a routine element. However, several alternative practices and procedures have evolved to avoid the necessity of a hearing.

Assessment in Court

In the (lower) county courts, the successful litigant may ask the court for a summary assessment of costs without taxation. Within fixed limits, the court may award a sum it deems reasonable.[95] The procedure avoids the necessity of filing a bill of costs as well as taxation of that bill. The court simply relies on its knowledge of the proceedings to award an appropriate amount. This procedure was extended to all courts as part of the April 1986 changes in Order 62.[96]

Fixed Costs

A fixed sum is allowed for "undefended" divorce cases if the solicitor chooses to accept the figure in lieu of applying for actual costs. This procedure, if the solicitor elects to follow it, dispenses

91. 37 Halsbury's Laws of England, para. 756 (1982).
92. *Id.*
93. Horne letter, *supra* note 19, at 6.
94. *Id.* at 7.
95. Royal Comm'n Rep., *supra* note 19, at 555, para. 37.46.
96. RSC O. 62, r. 7(4) (1986).

with the need for any judgments, hearings, or bills of cost. When the scales are realistic and up-to-date, it is used frequently.[97]

Provisional Taxation

An emerging alternative to formal taxation is a procedure that dispenses with a hearing. As currently used in the Principal Registry of the Family Division, after a bill of costs is filed, it is marked up by the taxing officer on a provisional basis and sent to the solicitor. If the solicitor does not object, the provisional reductions become final.[98] Provisional taxation is permitted only in cases involving the legal aid fund because those cases are single-party taxations.

Another form of provisional taxation is available for undefended divorce cases in the county courts. A notice is sent to the defendant offering an opportunity for a hearing on the issue of costs. If no hearing is requested within fourteen days, the bill is provisionally taxed and a copy is sent to each party. Formal taxation is conducted only if the provisional taxation is rejected by one of the parties.[99]

On the basis of experience with provisional taxation, the Royal Commission on Legal Services and the Working Party on Simplification of Taxation both recommend its expanded use in the form presently used in uncontested divorce cases in county courts.[100] The working party concluded that provisional taxation should become the norm in single-party taxations and should be available for other taxations selected by taxing masters.[101]

Settlement

Perhaps as a result of the consistency with which the centralized Supreme Court Taxing Office applies its standards for awarding costs and attorneys' fees, the vast majority of issues relating to costs settle through agreement of the parties. One experienced solicitor, the senior assistant secretary to the Remuneration Committee of the Law Society, reported that "a high proportion of all bills eligible for taxation have always been agreed to avoid taxation."[102]

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97. Royal Comm'n Rep., *supra* note 19, at 555, para. 37.47.
98. *Id.* at para. 37.48. Authority for use of this procedure in the Supreme Court Taxing Office was granted in the recent Order 62 changes. RSC O. 62, r. 31 (1986).
99. Royal Comm'n Rep., *supra* note 19, at para. 37.49.
100. *Id.* at para. 37.50; Horne Rep., *supra* note 19, at 37-38.
101. Horne Rep., *supra* note 19, at 37-38.
102. Letter from Eric Hiley to Thomas E. Willging (Jan. 22, 1985).

The chief taxing master indicated that "no statistical evidence is available but the number of cases in which parties agree on costs vastly exceeds the number in which the taxation process is involved."[103] The Royal Commission on Legal Services observed that agreements regarding costs "are made in the knowledge that the alternative is taxation in which costs will be assessed on well-established principles."[104]

Filing Fees

Filing fees for taxation approximate 5 percent of the amount taxed. In 1984, 1,144,187 pounds were received in fees, and Chief Taxing Master Horne estimates that the office is self-supporting. The budget of the office, however, is not directly linked to these fees, avoiding any incentive to tax at a higher level to support the office.

The filing fees for the taxation process are taxable. Fee-shifting rules applicable to these costs of taxation have been developed in "solicitor and own client" taxations under the Solicitors Act of 1974. If the client demands a hearing or attends the hearing and if less than 20 percent of the bill is "taxed off" (reduced), the client is liable for the costs of taxation. Conversely, if more than 20 percent is taxed off, the solicitor pays the costs. It is interesting that the average percentage reduction of bills of costs during 1984 was exactly 20 percent. The Supreme Court Taxing Office normally allows from fifty to seventy-five pounds for costs of the solicitor's attendance at a taxation hearing.

Nonjudicial Personnel

As we have seen in our consideration of the procedures for taxation, the Supreme Court Taxing Office relies heavily on the use of nonjudicial personnel. These civil servants have varying levels of education and experience. The specialized nature of their work apparently permits them to learn the intricacies of the system sufficiently to monitor the work of solicitors and their drafting firms. Civil servants serve two primary functions:

1. Deciding fees in cases involving relatively small amounts of fees and disbursements (up to seven thousand pounds), subject

103. Horne letter, *supra* note 19, at 7.
104. Royal Comm'n Rep., *supra* note 19, at 551, para. 37.29.

to a prior objection to their decision making or an appeal of their award; and

2. Performing all of the ministerial work involved in communicating with solicitors' offices, applying rules regarding the proper form of bills of costs, reading the bill to prepare it for taxation by a master, and filling out the requisite forms.

Who are these civil servants and how are they trained to perform these functions?

Background and Education

The lowest position in the taxing office's hierarchy is that of clerical officer. These civil servants may be hired at the age of sixteen to eighteen years, upon certification of completion of five "O" (ordinary) levels of school subjects. Prior to the application of civil service requirements to clerks approximately ten years ago, clerical officers were required to have experience working in a solicitors' firm for at least two years. Many of the senior officers in the taxing office have such a background.

An executive officer should have at least five "O" levels and two "A" (advanced) levels. A clerical officer may be promoted to this position from within the office after three or four years. If hired at the entry level, a higher executive officer must have a university degree. If promoted from within the office, experience can serve as a substitute for the university degree. Generally, a higher executive officer will have worked in the office for seven to eight years at the clerical officer and executive officer levels.

The positions of senior executive officer and principal clerk are reserved for people with more than ten years of experience in the taxing office. In other words, they must have at least the same length of experience with taxation as the taxing masters have had in the practice of law. A senior executive officer generally has worked ten to thirteen years in the taxing office; a principal clerk has seven to eight years of experience as a senior executive officer.

Pay Scales

As of October 1984, the yearly pay scales of the various positions were as follows (in pounds):

Principal clerk	14,319-19,465
Senior executive officer	11,639-14,629
Higher executive officer	9,430-11,941
Executive officer	5,250-9,452
Clerical officer	3,306-6,671

A London "weighting" (cost of living) allowance of 1,300 pounds per annum is added to the base rate.

By way of comparison, as we have noted, the taxing masters are paid 31,500 pounds per year, and the chief taxing master 41,500 pounds. Other things being equal, it is clearly in the interests of economic efficiency to assign clerical staff to as much work as possible, and this seems to be a guiding principle within the office.

Structure of the Office

The organizing subunit of the taxing office is the "chambers" of the eight taxing masters. Each chambers consists of a taxing master, a half-time higher executive officer (each serves two chambers), an executive officer, and a clerical officer. The taxing masters, however, do not provide direct supervision to the clerical staff. Any supervision by the taxing masters is incidental to the fact that they hear appeals from decisions of the senior executive officers and principal clerks and use the "notes" prepared by the higher executive officers and executive officers.

The principal clerk is the chief administrative officer. The executive officers supervise the clerical officers, and the higher executive officers divide the work of the chambers between themselves and the executive officers. The senior executive officers and the principal clerks operate as independent decision makers on cases within their jurisdiction. They do not delegate reading functions to executive officers.

Guidance to the Clerks

The process described above does not mean that the taxing masters do not guide the decision making of the clerical staff. The office has a written manual, notes for guidance of the staff, and a checklist for readers. The manual is organized so that it can be updated as new rules or interpretations are identified.

The taxing masters meet on a regular basis to discuss novel situations and decide on a common approach. In matters of legal principle and in matters such as standards relating to hourly rates of fee earners, they think it important to have a uniform practice within the office. Because the courts will ultimately resolve disputes about legal principles, the taxing office frames a rule (e.g., all experts on damages to paraplegics will be compensated) and follows it until a court decides the principle. The masters' decision is then communicated throughout the office in the form of "masters' minutes." Some decisions on agreed practices are also communicated publicly in the form of "Notes for Guidance" or "Practice Direc-

tions." All of these practices and communications are designed to promote uniformity of outcome regardless of who performs the taxation.

The taxing office manual also includes scales of fees (applicable only to barristers) relating to particular types of cases and particular courts. For example, a fee (in pounds per hour) will be set for a "statement of claim" for a nonautomobile personal injury case, and a lower fee will be set for a "running down" (automobile accident) case. These fees are established by the chief taxing master in consultation with the organized bar. The scale fees operate as base rates that may be raised or lowered if sufficient justification is presented. They also apply as base rates for other types of actions. For example, landlord and tenant cases are equivalent to "running down" cases, whereas contract cases are much more complex and would command a rate two or three times greater than the base.

The taxing office manual further includes changes in policies initiated by the courts or the legal profession that may affect taxation of costs. For example, it includes an announcement of a resolution of the Bar Council that abrogated the "two counsel" rule whereby Queen's counsel had been able to accept a case only if junior counsel were retained. It also includes references to scales of costs adopted in lower courts, references to court rule changes, and brief summaries of the practical impact of court decisions.

Training

Clerical staff are trained at the beginning of their employment, under the guidance of a full-time training officer. Most of the training appears to be concentrated in the first month in a new position and consists largely of what one staff member called the "sitting with Nelly" method. Loosely translated, this means working side by side with an experienced worker.

Further learning takes place during informal, spontaneous gatherings of clerical staff to discuss problems. Junior and senior staff members participate and raise questions for each other. Because these sessions cut across chambers lines, they tend to promote uniformity within the office. The organization of the office seems to have the effect of promoting uniformity and discouraging separate identities for the taxing masters' chambers. Neither supervision nor training is directed primarily through the chambers.

Future Trends and Questions

The taxing office is currently in a time of transition. Pressures to change the taxing system in the direction of simplification have

come from the legal profession and from the taxing masters. One thrust of the changes has been to reduce the number of scale items and to increase the range of items that are discretionary, all of which require a decision by a taxing master.

The role of clerical staff after these changes is not clear. Certainly, the reading functions facilitate the exercise of discretion by spotlighting problems such as duplication. Nevertheless, one would expect that the ratio of taxing masters to support staff would have to increase at the taxing master end to accommodate the increased call for discretionary judgments.

On the other hand, simplification has also reduced the details of accounting, throwing many petty items into overhead.[105] Judgments left for the taxing officer relate to larger chunks of the case and can be expected to involve decisions about the overall value and quality of the legal services, the complexity and demands of the litigation, and other major components of the ultimate evaluation of the case.

In general, the major trend appears to be an increase in the responsibility of the taxing masters and a decrease in the role played by clerical staff in the taxation of larger cases. The process of delegating smaller cases to senior clerical staff seems likely to survive intact, as does the use of clerical staff to perform nontaxation functions in preparation for taxation hearings.

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105. *See* Supreme Court Taxing Office, Practice Notes of Taxation of Costs (1986).

III. STATES' TAXATION OF ATTORNEYS' FEES: THE ALASKAN PROCESS

Background

Although fee shifting in America is not nearly as comprehensive or complex as it is in England, this does not indicate a dearth of fee-shifting provisions relevant to American litigation. On the contrary, there are well over 100 federal statutes authorizing fee shifting,[106] and there are several other exceptions, in addition to statutory exceptions, to the "American rule."[107]

The federal exceptions to the American rule generally receive the bulk of press and academic attention,[108] but they pale in comparison to the total number of fee-shifting statutes enacted in the fifty states plus the District of Columbia. One examination of state fee-shifting statutes estimated that as of 1983, there were more than 1,900 such statutes.[109] And if the increase in new fee-shifting statutes during the last three years has remained even remotely close to the growth curve of the past twenty years,[110] well over 2,000 state fee-shifting statutes are presently in effect.

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106. The *Attorney Fee Awards Reporter* lists 131 fee-shifting statutes. *Federal Statutes Authorizing the Award of Attorneys' Fees,* 9 Att'y Fee Awards Rep. 2-3 (1986). These "attorney fee provisions cover[ ] more than 200 separate causes of action." 1 M. F. Derfner & A. D. Wolf, *supra* note 6, at ¶ 5.01(1).

107. Under the American rule, each party pays any attorneys' fees incurred in litigation. For a historical overview of exceptions to the American rule, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-64 (1975). *See also* 1 M. F. Derfner & A. D. Wolf, *supra* note 6, at ch. 1. Professors Derfner and Wolf identify seven exceptions to the American rule: the statutory exception, the common fund exception, the contempt exception, the diversity (i.e., state law) exception, the bad-faith exception, the substantial benefit exception, and the contractual exception. The development of the American rule is traced in Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery,* 47 Law & Contemp. Probs. 9 (1984).

108. This is unsurprising. Federal fee-shifting cases sometimes involve large amounts of money, both in recovery and in fees, *e.g., In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1346 (E.D.N.Y. 1985) (more than $10.7 million awarded in attorneys' fees).

109. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?* 47 Law & Contemp. Probs. 321, 323 (1984) [hereinafter cited as Note, *State Attorney Fee*].

110. *Id.* at 340-44.

States vary in their number of fee-shifting statutes[111] and in the types of cases to which those statutes apply,[112] but each state has enacted fee-shifting statutes. The mean number of statutes is thirty-nine per state.[113]

We decided to limit our investigation of the administration of attorney fee petitions in the states to an examination of the practices used in Alaska, which has instituted a comprehensive fee-shifting schema.[114] The state has been characterized as having "effectively legislated away the American rule"[115] because of laws that authorize the prevailing party to recover attorneys' fees in virtually all civil cases.[116] In addition to having a comprehensive fee-shifting structure, Alaska has a long-standing one:[117] Fee shifting was originally instituted in the territory of Alaska during the 1920s.[118]

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111. *Id.* at 336.

112. *See generally id.*; Zemans, *Fee Shifting and the Implementation of Public Policy,* 47 Law & Contemp. Probs. 187, 205-08 (1984); Comment, *Award of Attorneys' Fees in Alaska: An Analysis of Rule 82,* 4 U.C.L.A.-Alaska L. Rev. 129, 139-43 (1974) [hereinafter cited as Comment, *Alaska*]; *see also, e.g.,* Acoba, *Recovery of Attorney's Fees in Actions to Enforce Contracts: California Civil Code Section 1717,* 12 W. St. U.L. Rev. 751 (1985); *Attorneys' Fees,* 1984 Utah L. Rev. 533; Isom, *Attorney Fees: The English Rule in Colorado,* 13 Colo. Law. 1642 (1984); Williams, ". . . *And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law,* 46 Mont. L. Rev. 119 (1985); Comment, *Attorney Fee Assessments for Frivolous Litigation in Colorado,* 56 U. Colo. L. Rev. 663 (1985).

113. North Carolina, with 2 statutes, had the fewest fee-shifting statutes in 1983. California, with nearly 150, had the most. Note, *State Attorney Fee, supra* note 109, at 335-37; *see also* J. D. Lorenz & B. Hunter, Financing Private Enforcement Through Statutes Authorizing Awards of Attorneys' Fees Appendix (Council for Public Interest Law 1979) (unpublished manuscript) (appendix lists each state's fee-shifting statutes).

114. Alaskan fee-shifting statutes, providing for prevailing parties to recover attorneys' fees, have been in effect since 1961, Comment, *Alaska, supra* note 112, at 144-45; *see also* notes 117-118 and accompanying text *infra.*

115. Note, *State Attorney Fee, supra* note 109, at 337.

116. Alaska's fee-shifting provisions are examined in the "Legal Review" section *infra. See generally* Comment, *Alaska, supra* note 112, at 145-62; *see also* Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees,* 24 Judges' J. 4 (1985) [hereinafter cited as Kleinfeld, *Alaska*]; Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal,* 24 Judges' J. 39 (1985); Parrish, *The Alaska Rules Are a Success: Plaintiff's View,* 24 Judges' J. 8 (1985); Whiting, *The Alaska Rules Are a Success: Defendant's View,* 24 Judges' J. 9 (1985).

117. *See* McDonough v. Lee, 420 P.2d 459, 460-61 (Alaska 1966).

118. For a review of the history of fee shifting under Alaskan law, culminating with the promulgation of rule 82 by the Alaska Supreme Court, see Comment, *Alaska, supra* note 112, at 143-45.

Legal Review

Buttressed by another civil rule[119] and a statute,[120] Alaska Civil Rule 82 controls the award of attorneys' fees to prevailing litigants. Rule 82 provides:

> (1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:
>
> ATTORNEY'S FEES IN AVERAGE CASES
>
	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%
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> Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.
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> (2) In actions where the money judgment is not an accurate criteria [sic] for determining the fees to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.
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> (3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.[121]

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119. Alaska Civ. R. 54(d). The rule provides:

> Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.

120. Alaska Stat. § 09.60.010 [Costs allowed prevailing party]. The statute provides:

> Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case.

121. Alaska Civ. R. 82(a), "Attorney's Fees: Allowance to Prevailing Party as Costs." Note that the fee award schedule, Alaska Civ. R. 82(a)(1), is based on the amount of monetary award recovered. If the court determines that the monetary award does not provide an accurate criterion for the fee award (e.g., plaintiff prevails but receives only nominal damages), Alaska Civ. R. 82(a)(2), or if there is no monetary recovery by the prevailing party (e.g., the defendant prevails), Alaska Civ. R. 82(a)(1), then the trial court judge must determine a reasonable fee. *See* notes 137-138 and accompanying text *infra*. To further complicate possibilities for fee award determination, Alaska, pursuant to Alaska Civ. R. 68 and Alaska Stat. § 09.30.055, has adopted defendant and plaintiff offer-of-judgment provisions. *See generally* articles cited in note 116 *supra*.

The purpose of Alaska's fee-shifting provisions is not to reimburse the prevailing party completely for the attorneys' fees that have been incurred;[122] rather, their purpose is to compensate the prevailing party partially.[123] Indeed, under most circumstances, an award of full fees is, per se, unreasonable.[124] Thus, partial compensation is the norm under Alaskan law, and full compensation is the exception.[125]

In most circumstances in which the prevailing party recovers a monetary judgment, the attorney's fee is taxed[126] using the schedule set out in section (a)(1) of rule 82.[127] The schedule is based on a percentage of the recovery, with different percentages applicable depending on the amounts recovered, whether the matter was contested, and whether it was tried.[128]

Although most attorney fee awards are determined using the schedule, there are several situations in which fees are determined outside the schedule. For example, the schedule is not used when full compensation is allowed.[129] The schedule also is not used in cases in which a schedule-determined fee award would not accurately reflect the value of the legal services rendered.[130] A third

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122. *E.g.,* Moses v. McGarvey, 614 P.2d 1363, 1368-71 (Alaska 1980); Davis v. Hallett, 587 P.2d 1170, 1171-72 (Alaska 1978); Malvo v. J.C. Penney, 512 P.2d 575, 587-88 (Alaska 1973).

123. In most cases, the fee award amounts to between 20 percent and 80 percent of the prevailing party's actual attorneys' fees. Kleinfeld, *Alaska, supra* note 116, at 6. Alaska's partial-compensation practice appears to be somewhat similar to the compensation practices in England. *See* notes 29-31 and accompanying text *supra.*

124. *See* cases cited in note 122 *supra; see also* Davis v. Hallett, 630 P.2d 1 (Alaska 1981).

125. *E.g., Moses,* 614 P.2d at 1371 n.19. Bad-faith or vexatious actions are examples of the kinds of exceptional circumstances that justify full-compensation awards. *See, e.g.,* Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 42 (Alaska 1983), *cert. denied,* 464 U.S. 1061 (1984); Gold Bondholders Protective Council v. Atchison, Topeka, & Santa Fe Ry., 658 P.2d 776, 779 (Alaska 1983); *Davis,* 587 P.2d at 1171-72; *Malvo,* 512 P.2d at 588. Other situations supporting full compensation are public interest cases, *see* note 135 and accompanying text *infra,* and, pursuant to civil rule 72(k), condemnation actions that are brought by the state and in which the defendant prevails, *e.g.,* Badger Constr. Co. v. State, 628 P.2d 921, 923 (Alaska 1981). Whatever its basis, the reason for the exception must be directly addressed by the court. *Moses,* 614 P.2d at 1369, citing Alaska Airlines, Inc. v. Sweat, 568 P.2d 916 (Alaska 1977); Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating, Inc., 555 P.2d 964 (Alaska 1976).

126. This term is discussed in note 12 *supra.*

127. The schedule is reproduced in text at note 121 *supra.*

128. *See* text at note 121 *supra.* For example, presuming a recovery of $20,000, the calculated attorneys' fees are, in a contested case with a trial, $2,850; in a contested case without a trial, $2,225; and in a noncontested case, $1,675.

129. *See* note 125 *supra.*

130. Alaska Civ. R. 82(a)(2), reproduced in text at note 121 *supra.* Rule 82(a)(2) provides that if "the money judgment is not an accurate criteri[on] for determining the fees to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered." This subsection is relevant

situation in which the schedule is not used occurs in cases in which a monetary remedy was not obtained by the prevailing party.[131] Finally, the court has the discretion to deny an award of attorneys' fees altogether should it find that the equities of the case, or other valid reasons, mitigate against a fee award.[132] Where the court awards a fee that is not based on the schedule, the award must be for a "reasonable" fee.[133]

The law related to the determination of a reasonable fee has been developed most extensively in the public interest litigation context.[134] Public interest law contains several significant depar-

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when the schedule-determined award would compensate the prevailing party's attorney too much, *see, e.g.*, Alyeska Pipeline Serv. Co. v. Anderson, 629 P.2d 512, 529-30 (Alaska), *cert. denied*, 454 U.S. 1099 (1981), or too little, *see, e.g.*, Joseph v. Jones, 639 P.2d 1014, 1019 (Alaska 1982). Undercompensation can particularly be a problem in mixed equity-law cases, such as ones in which a plaintiff receives a monetary judgment despite the fact that an equitable remedy was the primary focus of the litigation. For example, if a plaintiff petitions the court for equitable relief, and in addition requests monetary relief as an alternative remedy, then a schedule-based award may not be appropriate. *See, e.g.*, Stauber v. Granger, 495 P.2d 67 (Alaska 1972), in which the plaintiffs sought to enjoin the defendants from using defendants' property in violation of a land use restriction. The trial court granted the injunction, but provided it would be void if defendants paid plaintiffs' damages. The Alaska Supreme Court upheld the trial court's decision to determine plaintiffs' attorney fee award on the basis of the value of the attorney's services rather than on the basis of the schedule. *Id.* at 70.

131. Alaska Civ. R. 82(a)(1), reproduced in text at note 121 *supra*. Rule 82(a)(1) grants the trial judge the discretion to award a "reasonable" attorney's fee in cases in which there is no monetary recovery. The discretion granted the court is broad. *See, e.g.*, Blackford v. Taggart, 672 P.2d 888, 891 (Alaska 1983) (holding that an award of $6,000 in fees was not excessive in a tort case where the prevailing defendant had potential liability of more than $50,000 and where the defendant's "attorney spent over a year in preparation, . . . numerous depositions were taken, and the trial lasted three days."); Brunet v. Dresser Olympic Div. of Dresser Indus., Inc., 660 P.2d 846, 847-48 (Alaska 1983) (per curiam) (upholding award of 75 percent of defendant's attorneys' fees in case that was decided upon summary judgment); Alvey v. Pioneer Oilfield Servs., Inc., 648 P.2d 599 (Alaska 1982) (upholding court's award of 20 percent of prevailing defendant's fees and costs in case that was decided upon summary judgment); *see also* Dillingham Commercial Co. v. Spears, 641 P.2d 1, 9-10 (Alaska 1982) (although court erred in using 82(a)(1) schedule to determine fee award in case in which the prevailing party obtained specific performance (the court determined the fee award as though plaintiff had recovered a monetary judgment), the court's award was held to be reasonable and, consequently, it was affirmed).

132. *See generally* Cooper v. Carlson, 511 P.2d 1305, 1309-11 (Alaska 1973); *see also* Haskins v. Shelden, 558 P.2d 487, 495 (Alaska 1976).

133. For an examination of the difficulties attendant to, and the ambiguities inherent in, determining a reasonable fee award, albeit in the federal context, see Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977).

134. The criteria used to classify a suit as public interest litigation are set out in Oceanview Homeowners Ass'n v. Quadrant Constr., 680 P.2d 793 (Alaska 1984). The four elements are that (1) important public policy questions are involved, (2) there are many interested parties in the general public, (3) only a private party would bring the suit, and (4) the private litigant would not have sufficient incentive to bring the suit if not for the broader public interest to be served. *Id.* at 799. *See also*

tures from Alaska's usual fee taxation rules. For example, in public interest cases, a prevailing plaintiff is not restricted to partial compensation and, consequently, may be completely reimbursed for attorneys' fees.[135] Another way in which fee-shifting rules for public interest cases deviate from the norm in Alaska relates to the liability that a losing plaintiff has for the defendant's attorneys' fees. Normally, a prevailing defendant is entitled to receive a fee award. A defendant who prevails in a public interest case, however, will not necessarily receive any fee compensation.[136]

In determining reasonable attorneys' fees in public interest cases, the Alaska Supreme Court has directed trial judges to consider the same types of factors that have been developed to guide an attorney in setting a fee with a client.[137] How much weight to

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Sisters of Providence, Inc. v. Department of Health & Social Servs., 648 P.2d 970, 979-80 (Alaska 1982).

135. *E.g.*, City of Anchorage v. McCabe, 568 P.2d 986, 993-94 (Alaska 1977) (awarding full attorneys' fees to public interest plaintiff in zoning case based on reasonable-fee determination). Full compensation is permissible in public interest cases, but it is not mandatory. As with all attorney fee awards, the extent of compensation is within the discretion of the trial court judge. *See generally* notes 139-140 and accompanying text *infra*. For example, in the public interest case of City of Yakutat v. Ryman, 654 P.2d 785 (Alaska 1982), a taxpayer who successfully challenged Yakutat's tax assessment was awarded only partial fees. He received the amount that compensated him for purposes of an adequate presentation of his case. Most of his claims were dismissed by the court, and the judge felt that the plaintiff (as well as the defendant government) had expended unreasonable amounts of time on the litigation. *Id.* at 793-94. *See also* Hutcherson v. Alaska, 612 P.2d 1017 (Alaska 1980) (per curiam), wherein the court held that regardless of whether a fisherman, who had successfully overturned a worker's compensation statute, was properly found to be a prevailing public interest plaintiff, the decision as to whether to award full fees remained in the discretion of the court.

136. *E.g.*, Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975); Gilbert v. State, 526 P.2d 1131 (Alaska 1974). The basis of this exception is the reluctance to discourage private parties' litigation in the public interest. Whitson v. Anchorage, 632 P.2d 232 (Alaska 1981); *see also* Kenai Lumber Co. v. LeResche, 646 P.2d 215, 222-23 (Alaska 1982). Indeed, it has been held that where an important public interest is involved in the suit, the public interest issue need not even be the predominant issue for the exception to apply. *See, e.g., Gilbert,* 526 P.2d at 1136 (plaintiff sued to change residency requirement for political officeholders).

To determine whether the public interest exception should preclude an award of attorneys' fees to a prevailing defendant in a public interest suit, the court will use a balancing test, weighing the public versus the private nature of the litigation. Thomas v. Bailey, 611 P.2d 536, 539 (Alaska 1980); *see also* cases cited *id.* at 539 n.9. Not surprisingly, a significant monetary interest by the plaintiff in a suit will push the balance back to the norm and preclude the application of the public interest exemption to a losing plaintiff. For example, in Hiller v. Kawasaki Motors Corp., 671 P.2d 369 (Alaska 1983), a plaintiff who lost his products liability suit was held liable for the defendant's legal fees even though the court accepted that the case induced Kawasaki to change the design of its snowmobile. The court held insufficient public interest was served by encouraging the production of safer products, at least where, as here, the plaintiff sought a large monetary judgment as well. *Id.* at 374-75.

137. *Thomas,* 611 P.2d at 541. These factors, taken from Alaska's Code of Professional Responsibility, DR 2-106(B), are as follows:

give to each factor and how to translate each factor's qualitative principles into a quantitative, monetary value is left to the judge's discretion. Indeed, it is not even necessary for the judge to detail the relationship between his or her assessment of each factor and the award that is granted.[138] The crucial feature of the supreme court's directive appears to be the requirement that the trial court judge *consider* each relevant factor in determining the reasonable fee.

Regardless of the applicable subsection, judges' fee determinations under Alaska Civil Rule 82 are granted considerable deference by the Alaska Supreme Court upon review. Although there is

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> (1) The time and labor required, the novelty and the difficulty of the questions involved, and the skill requisite to perform the legal services 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 limitation 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.

Id. at 541-42 (footnote omitted).

The approach to fee determination prescribed by the Alaska Supreme Court in *Thomas* parallels the fee determination methodology adopted by the Ninth Circuit. *See* Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), *cert. denied sub nom.* Perkins v. Screen Extras Guild, 425 U.S. 951 (1976). The Ninth Circuit held in *Kerr*, 526 F.2d at 70, that the trial judge must consider the twelve factors delineated by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), *see* note 170 *infra*. These factors reflect the American Bar Association's Code of Professional Responsibility, DR 2-106.

When Alaska trial court judges tax attorneys' fees under federal statutes, they are explicitly required to use the twelve *Kerr/Johnson* factors to determine reasonable attorneys' fees. *See, e.g.*, Hayer v. National Bank, 663 P.2d 547, 550 (Alaska 1983) (*Johnson* criteria must be used to determine reasonable fee in Truth-in-Lending Act cases); City & Borough of Sitka v. Swanner, 649 P.2d 940, 946 (Alaska 1982) (*Johnson* criteria correctly applied to determine reasonable fee in case brought under the federal Civil Rights Act). For a description of the differences between fee taxation under federal versus Alaskan provisions, see notes 145-147 and accompanying text *infra*.

138. *See, e.g., Thomas*, 611 P.2d at 542:

> Here, the significant factors are the time and labor required, the novelty and difficulty of the questions involved, the skill required, the fee customarily charged in the locality for similar legal services, the result obtained, and the experience, reputation and ability of the lawyers performing the service. On balancing these considerations, we believe that compensation based on the hourly rate customarily charged in the locality by attorneys of similar experience is appropriate.

Cf. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc) (requiring the trial court judge to articulate the reasons for arriving at the fee award, rather than merely asserting that the relevant factors have been considered and then presenting the amount awarded).

a preference for use of the schedule for fee determination, the court tends not to disturb the trial court's award, regardless of the methodology it used to determine the award, so long as there was a rational basis for the award. The review standard used by the Alaska Supreme Court is the abuse-of-discretion standard.[139] The court has stated that "[t]he award [of] fees is committed to the broad discretion of the trial court and will not be disturbed on appeal absent a clear showing that the trial court's determination was arbitrary, capricious, or manifestly unreasonable, or that it stemmed from an improper motive."[140]

In order for the supreme court to defer to the trial court's fee determination, the trial judge must either base the fee award upon the rule 82 schedule[141] or state the reasons for not relying on the schedule.[142] The reasons need not be presented in the form of

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139. *Cf.* ch. 4, "Standard of Appellate Review" section, *infra* (federal courts also use the abuse-of-discretion standard) and notes 83-92 *supra* (review of taxing master's determination is not as restrictive under English law).

140. *Alvey,* 648 P.2d at 601. *See, e.g.,* State v. Fairbanks N. Star Borough School Dist., 621 P.2d 1329, 1334-35 (Alaska 1981), in which the Alaska Supreme Court held that the trial court's fee determination of $37,000, awarded to a defendant who prevailed on a partial summary judgment motion, was not manifestly unreasonable. Itemized billings had demonstrated that the total fees were nearly $57,000. Although the defendant had requested only about $22,000 in fees, the supreme court held that it was in the trial court's power to award more than the amount requested because "Civil Rule 82 does not require the superior court to limit its award to the amount requested." *Id.* at 1335.

Granting the trial judge's determination considerable deference, disturbing it only under the circumstances identified in the *Alvey* opinion, is clearly the approach taken by the Alaska Supreme Court. *See generally* Tobeluk v. Lind, 589 P.2d 873, 878 (Alaska 1979); Alaska State Bank v. General Ins. Co., 579 P.2d 1362, 1370 (Alaska 1978); State v. Alaska Int'l Air, Inc., 562 P.2d 1064, 1067 (Alaska 1977); *Haskins,* 558 P.2d at 495; Adoption of V.M.C., 528 P.2d 788, 795 (Alaska 1974); *Malvo,* 512 P.2d at 586-88; Palfy v. Rice, 473 P.2d 606, 613 (Alaska 1970). Nevertheless, the court has not been reluctant to reverse fee awards under this standard. *See, e.g., Davis,* 587 P.2d at 1171-72; *Fairbanks Builders,* 555 P.2d at 966-67; DeWitt v. Liberty Leasing Co., 499 P.2d 599, 601-02 (Alaska 1972).

141. *E.g.,* Dura Corp. v. Harned, 703 P.2d 396, 412 (Alaska 1985) (attorney fee award of $348,000, calculated pursuant to the schedule, was not manifestly unreasonable); Municipality of Anchorage v. Sisters of Providence, 628 P.2d 22, 35 (Alaska 1981) (trial judge's adherence to schedule was not manifestly unreasonable); *see also* Burrell v. Hanger, 650 P.2d 386, 387 (Alaska 1982) (per curiam) (because attorney fee award was determined using the schedule, it was not necessary for the court "to segregate the [pro se attorney's] hours expended in the attorney role from the hours expended in the client role").

142. *E.g.,* Mullen v. Christiansen, 642 P.2d 1345, 1351 (Alaska 1982) ("The court must either state its reasons for making an award that varies from the schedule set forth in Civil Rule 82(a) or adhere to that schedule."); *see also* Stefano v. Coppock, 705 P.2d 443, 446 (Alaska 1985); Sturm, Ruger & Co. v. Day, 627 P.2d 204, 205 (Alaska), *cert. denied,* 454 U.S. 894 (1981); *Alyeska Pipeline,* 629 P.2d at 530; Miller v. McManus, 558 P.2d 891, 893 (Alaska 1977); *Haskins,* 558 P.2d at 495-96; *Fairbanks Builders,* 555 P.2d at 966; *Cooper,* 511 P.2d at 1309-11. *Cf.* Triangle, Inc. v. State, 632 P.2d 965, 970 (Alaska 1981) (where civil rule 79(k) provides for full compensation for

formal findings of fact or conclusions of law.[143] If the trial judge neglects to provide a rationale or explanation for the departure from the schedule, the fee determination will be remanded, and the trial judge will be required either to provide an explanation or to tax the fees in accordance with the schedule.[144]

Interestingly, when state litigation occurs under federal statutes, the judge's fee determination is no longer granted the wide discretion that is granted when fees are taxed under state law. The Alaska Supreme Court, in the context of a request for fees under the federal Civil Rights Attorney's Fees Awards Act of 1976, discussed the differences between the Alaskan and the federal fee-shifting provisions:

> Despite the . . . similarities, the two fee award provisions are based on dissimilar underlying policies. The purpose of Rule 82 is to partially compensate a prevailing party for the expenses in-

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prevailing defendant in condemnation case, court must state reasons for not awarding full, reasonable attorneys' fees).

The reasons that the trial judge provides do not have to be presented in a detailed manner. *See, e.g.,* Ehredt v. DeHavilland Aircraft Co., 705 P.2d 913 (Alaska 1985), in which the Alaska Supreme Court upheld a fee award that departed from the schedule (and amounted to more than 50 percent of the actual attorneys' fees). The court noted that "[t]he trial court determined that [the prevailing party] was entitled to reasonable attorney's fees, rather than the Civil Rule 82(a) scheduled amount," *id.* at 916, and found that the "court gave *adequate reasons* for refusing to apply the Civil Rule 82 schedule," *id.* at 918 (emphasis added). Nowhere did the court identify the substance of the trial court judge's "adequate reasons." *See also* Moseley v. Beirne, 626 P.2d 580 (Alaska 1981) (per curiam), discussed in note 143 *infra.*

143. *See* Larry v. Dupree, 580 P.2d 326, 327 (Alaska 1978):

> [A] trial judge need not make formal findings of fact and conclusions of law to justify his decision denying attorney's fees. An oral explanation on the record, as appears in the case at bar, is sufficient. Urban Development Co. v. Dekren, 526 P.2d 325, 328 (Alaska 1974).

See also Moseley, 626 P.2d at 581 (Diamond, J., dissenting), in which it is argued that the trial court judge should have been required "to articulate reasons for the rejection of hours claimed by an attorney" in accordance with the approach outlined by the Sixth Circuit in Northcross v. Board of Educ., 611 F.2d 624, *cert. denied,* 447 U.S. 911 (1980). In the portion of *Northcross* quoted by the dissent, the Sixth Circuit concluded that the trial court judge should have "indicate[d] on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. . . . [T]o the extent that hours are rejected [by the district court], the court must indicate some reason for its action, so that [the circuit court, on review,] may determine whether the court properly exercised its discretion or made an error of law in its conclusion." *Id.* at 581-82, quoting from *Northcross,* 611 F.2d at 636.

The majority of the court, in a per curiam opinion, held that the trial court judge did not abuse his discretion in determining a reasonable fee under the federal Civil Rights Attorney's Fees Awards Act. *Moseley,* 626 P.2d at 581. Thus, the majority rejected the dissent's desire to require the trial judge to provide the type of finding of fact and conclusion of law that would have been required of a federal district judge. *See also* note 146 *infra.*

144. *E.g., Stefano,* 705 P.2d at 446.

> curred in winning his case. It is not intended as a vehicle for accomplishing anything other than providing compensation where it is justified. In comparison, the explicit purpose of the fee shifting provision in the federal statute, 42 U.S.C. § 1988, is to encourage meritorious claims which might not otherwise be brought.[145]

The court added, "While the award of attorney's fees under both the Alaska Rule and the federal statute remains within the trial court's discretion, that discretion is narrowly limited when attorney's fees are awarded pursuant to the federal act, and will be reviewed on appeal in light of federal rather than Alaska law."[146] The impact of the court's analysis is not restricted to civil rights cases; rather, it appears to apply to any federal statute that provides fees to the prevailing party "to encourage vindication of [the statutorily created] rights and effect broad compliance with the Act by private rather than governmental action."[147]

In sum, Alaska has developed a bidimensional fee-shifting system. One of the dimensions is the determination dimension; the other dimension is the review dimension. When attorneys' fees are *determined,* they are done so pursuant to the rule 82 schedule or pursuant to a reasonable-fee approach. When fee awards are *reviewed,* an abuse-of-discretion standard is used, with the trial judge accorded broad discretion in the fee determination; however, when federal fee-shifting statutes are involved, the judge's discretion is truncated and the fee award is examined with greater scrutiny. Thus, a judge's fee taxation procedure and the extent of the judge's discretion are affected depending on the particulars of the individual case.

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145. Ferdinand v. City of Fairbanks, 599 P.2d 122, 125 (Alaska 1979), quoting from *Tobeluk,* 589 P.2d at 876 (citations and footnotes omitted).

146. *Ferdinand,* 599 P.2d at 125 (footnote omitted). For example, although federal law requires the judge to determine which issues the plaintiff prevailed on and which the plaintiff did not prevail on, such a detailed dissection of the case is not required under Alaskan law. *Compare* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) (reasonable attorneys' fees can be recovered only for work related to prevailing claims under federal statutory fee provisions), *with Gold Bondholders,* 658 P.2d at 779 ("Rule 82(a) does not require that attorneys' fees be calculated with reference to the disposition of individual issues."). *But cf. Moseley,* 626 P.2d at 581 (per curiam decision upholding trial judge's fee determination that was made in a manner apparently not adequate under federal law, but consistent with Alaskan law, although fees were taxed under the authority of the Civil Rights Attorney's Fees Awards Act), discussed in note 143 *supra.*

147. *Hayer,* 663 P.2d at 550 (referring to the Truth-in-Lending Act, 15 U.S.C. § 1640(a)(3)).

Taxation Practices[148]

An attorney's request for a fee award should be viewed in the context of the judge's routine motion practice, according to Alaska trial court judges, who describe the fee request as a simple motion. The motion for fees is submitted to the judge at the conclusion of the case. In support of the request, the petitioning attorneys submit affidavits containing the evidence necessary for the fee determination. Typically, the data include the attorneys' billing rates, an indication of which professional worked on which matters, and the number of hours spent on the litigation. Sometimes this information is presented in summary fashion, but some attorneys also submit copies of the bills they have sent to their clients. Finally, the petitioning attorneys generally provide a proposed order for the fee award. The petitioners' paperwork tends to run about five pages, excluding copies of bills.

In cases in which there is no opposition to the fee request, the fee taxation process can be concluded rather quickly. The probability that the losing party will object to the petitioner's request for fees depends, in large part, on whether the prevailing party requests that the fees be determined in accordance with Alaska Civil Rule 82's schedule.

Fee shifting is such an accepted part of Alaskan legal culture that there is typically no opposition to schedule-based fee awards. In these cases, the fee taxation process *is* a simple motion request, and the trial judge will expend little time or effort in "deciding" it. Virtually every judge will tax the fees within minutes. One judge we spoke to does not even take that long: He indicates to the court clerk the column of the schedule under which he wants the fees taxed and leaves it to the clerk to make the necessary computations. Another judge has programmed his desk calculator to make the necessary calculations. Even for judges who do not employ such timesaving procedures, fee taxations under the schedule are a fast, uncomplicated, easily managed enterprise.

Often, however, prevailing parties will argue that the monetary judgment they have received does not provide an accurate criterion for the fee award.[149] In such cases, the losing party is more likely

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148. The information on taxation practices reported in this section was obtained primarily through discussions and correspondence with Alaska Superior Court Judges Walter L. Carpeneti, Douglas J. Serdahely, Brian Shortell, and Milton M. Souter, whose assistance is gratefully acknowledged.

149. *See* Alaska Civ. R. 82(a)(2), reproduced in text at note 121 *supra*. A request for a fee award under this subsection occurs in approximately 25 to 30 percent of the cases, according to estimates made by the interviewed judges.

to object to the fee request, and, consequently, an opposition brief will be submitted to the court. The opposition brief usually does not run more than four pages. A reply brief from the petitioner may run another three or four pages.

Nevertheless, Alaska trial court judges estimate that the schedule is ultimately used in more than 80 percent of monetary recovery cases. Because fee taxation in schedule-based award cases takes little judicial time, Alaska's judges appear to expend few resources taxing fees in money judgment cases. Even when a prevailing party requests that the fees be determined outside the schedule, scant judicial resources are required for the judge to decide whether the schedule should be used. According to the judges' estimates, the decision whether to award fees pursuant to the schedule can be made in less than ten minutes, including the time required to read through all relevant documents.

In cases in which the fee determination is not made according to the schedule, considerably more judicial time is likely to be required. There is a strong likelihood that there will be further battle between the two parties over the fees issue, meaning that more time will be required for the judge to review the papers. Because the judge will have to determine a reasonable fee (and then decide what percentage of the reasonable fee will be awarded), nonschedule fee awards consume more judicial resources. In these cases, it is not uncommon to find each side jockeying, on paper, to convince the judge of the rightness of its position. The petition, objection, and reply tend to add up to between ten and fifteen pages. Evidentiary hearings are sometimes requested, but they are rarely granted. Occasionally, discovery is permitted.

There is a split among Alaska's trial judges concerning the procedures they use to determine a reasonable fee. Some judges go though the petitions methodically, accepting or rejecting each entry, thereby systematically arriving at a total reasonable-fee figure. In contrast, other judges make extensive use of their intuition and experience; they tend to make an initial estimate of a total reasonable fee by relying on their "general sense of the case," based on a review of the papers and their impressions of the proceedings. The details of the petition and objection are of less import to these judges than they are to the first group of judges. Strict application of the abuse-of-discretion standard of appellate review in Alaska supports trial judges' use of the intuitive approach.[150]

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150. In practice, federal courts may not have the same latitude despite identical standards of review in both systems. *See* discussion at notes 139-147 *supra; cf.* discussion at notes 206-209 *infra.*

Regardless of the procedure employed to determine the total reasonable fee, once it has been determined, the judge then selects a *reasonable proportion*[151] by which to multiply the total reasonable-fee figure.[152] The product of these two values (i.e., the total reasonable fees multiplied by the percentage of the total fees to be allowed) is the attorney fee award.

Descriptions of fee taxation procedures from two judges illustrate the different approaches for determining the total reasonable fee. Judge 1 indicated that for nonschedule fee awards, he begins by determining a reasonable fee using a procedure like that used by many federal court fee setters. First, he determines the reasonable number of hours expended on the case by reading through the parties' papers. Using the losing parties' objections as a guide, he carefully reviews the adequacy of the petitioner's entries. Unnecessary expenditures of time are eliminated, hours spent on issues the winning party did not prevail on are removed, and the number of reasonable hours is recalculated. The number of reasonable hours is then multiplied by a reasonable hourly rate (with different rates used for different attorneys) to reach the reasonable-fee figure.[153]

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151. *See* notes 122-125 and accompanying text *supra*. One judge noted, "The Alaska Supreme Court has never provided any guidance on the question of what fraction of the total fees a partial award should be in a typical case. Because of this, the individual trial judges in Alaska award widely varying percentages in similar cases." The judge feels that guidance from the court would increase the predictability and efficiency of Alaska's fee-shifting system. The present requirement is that a "reasonable proportion of the total fees be awarded," a standard that, in the words of the judge, "is simply too imprecise to be of guidance to the bar and to the trial courts."

In one case, *Alvey*, 648 P.2d 599, the Alaska Supreme Court was invited to establish more concrete guidelines. In *Alvey*, the defendant's summary judgment motion was granted by the trial court judge, who granted the prevailing defendant only 20 percent of the actual attorneys' fees. The plaintiff appealed the summary judgment, and the defendant cross-appealed the fee award. According to the defendant's claim, "the [trial] court's award 'was apparently set at a very low rate to encourage this appeal' and to obtain thereby [from the Alaska Supreme Court] 'better defined guidelines' for the determination of costs and fees." *Id.* at 601 n.1. The supreme court, however, did not choose to avail itself of the opportunity to provide more precise guidelines. Rather, it upheld the trial court's award, merely reiterating the trial judge's conclusion that his fee award was "a fair and equitable award." *Id.* at 601.

152. The proportion to be applied generally falls within the 20 percent to 80 percent range, according to published estimates from Alaskan attorneys. *See* note 123 *supra*. The particular proportion depends on such factors as the nature of the case and the results achieved. Conversations with Alaska trial judges indicate that each judge develops his or her own rule of thumb concerning the proportion of fees to allow in specific case types. In some districts, such rules of thumb may be developed through informal discussions among judges that are designed to develop districtwide consistency.

153. Note that although the Alaska Supreme Court directs the trial court to undertake a *Johnson*-type analysis when determining a reasonable fee award, *see* note 137 *supra*, Judge 1 uses a *Lindy* lodestar analysis. *Cf.* Report of the Third Circuit Task Force, *supra* note 54, at 244 (footnote omitted):

After calculating the fee award in this manner, Judge 1 enters brief findings of fact to support his fee determination as part of his fee order.[154] The judge estimates that the amount of time he spends on taxing fees generally is about the same as the amount of time he spends deciding an uncomplicated summary judgment motion. That is, he spends about an hour to complete his fee order.[155]

Judge 2 is a lot more intuitive in his approach. During the course of our conversation, he readily and easily determined a ballpark reasonable-fee figure for a hypothetical case in which there was a five-to-ten-day trial. First, he noted, the hourly fees in his district range from $125 to $165, and the average rate is approximately $140. He compensates attorneys for ten-hour workdays during trial. Thus, an attorney bills approximately $1,400 for each day of trial. To try a case that is expected to take from five to ten days of trial time, the attorney will have to work intensively (putting in approximately ten hours per day) on the case for another five to ten days. Allowing for the time that was spent developing the case, Judge 2 calculated that the total reasonable fees would be somewhere in the $20,000 to $40,000 range, with the estimated amount being $30,000.

Judge 2 calculated these figures within a minute or two during our conversation. He noted that he uses this approach to establish a "benchmark" that he expects to see in fee petitions. A fee request that was markedly higher than $30,000 would trigger closer scrutiny of the petition than would a request around $30,000. On the

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> [M]ost commentators consider *Johnson* to be little different from *Lindy* because the first criterion of the *Johnson* test, and indeed the one most heavily weighted, is the time and labor required. Similarly, many of the *Johnson* factors are subsumed within the initial calculation of hours reasonably expended at a customary hourly rate.

The judge's use of the *Lindy* approach is not comprehensive, however. Under *Lindy,* after a judge determines the lodestar, he or she then makes any adjustments to it he or she deems appropriate under the circumstances of the litigation. In Alaska, adjustments to the lodestar, while allowable under certain circumstances, *see, e.g.,* LaMoureaux v. Totem Ocean Trailer Express, Inc., 632 P.2d 539 (Alaska 1981) (upholding application of multiplier in an Alaska offer-of-judgment case); *see also Thomas,* 611 P.2d at 540-41 (adjustments to lodestar might be appropriate in exceptional public interest cases, but not in this case), are not common. *Cf.* discussion of multipliers under federal law in ch. 4, "Adjustments to the Lodestar" section, *infra.*

154. Usually, Judge 1's findings of fact are stated in about six paragraphs. Most Alaska judges who do write out their findings of fact tend to be fairly brief, particularly in comparison with the extensive findings of fact prepared by federal judges.

155. This is less than the amount of time that it takes federal court officials, who go through roughly the same procedure, to tax fees. *See generally* ch. 4, "Time Spent" section, *infra* (time spent by district court to set fees varies as a function of presence or absence of several factors).

average, asserts Judge 2, reasonable attorneys' fees can be taxed in fifteen to thirty minutes. Like many of his colleagues, Judge 2 does not prepare written findings of fact to support the fee determination. Indeed, it is not an uncommon practice for Alaska's trial judges merely to fill in the blanks on a standardized judgment form that contains spaces next to "Verdict Amount," "Attorney's Fee Award," and "Costs" when the case is decided.

Overall, the experience in Alaska reveals that fee shifting can become merely another part of a judge's motion practice, particularly if concrete guidelines (e.g., the fee schedule) can be applied to arrive at the fee. Naturally, when concrete guidelines are not applicable, the greater the detail with which a fee application is reviewed, the more time it will take to make a fee determination.[156] Nevertheless, despite some differences as a function of judicial decision-making style and of the amount of time a judge has been on the bench, the Alaskan experience, on the whole, suggests that there is little difficulty in applying guidelines as the rule and resorting to alternative procedures (i.e., reasonable-fee-determination procedures)—which take more but not an inordinate amount of time—as the exception.[157]

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156. The time required to determine an attorney's fee will be affected, as well, by the amount of experience a judge has in doing the task. Two of the judges reported that they have substantially reduced the amount of time required to determine fees during their years on the bench. Similar experiences were reported by federal judges and magistrates. *See* notes 228-229 and accompanying text *infra.*

157. One judge estimated that, overall, Alaska's trial judges receive approximately thirty attorney fee petitions per month. *Cf.* ch. 4, "Frequency" section, *infra* (indicating that the number of fee petitions received by the federal courts is considerably fewer than the number received in Alaskan practice). Fee petitions constitute about 10 percent of the motions that a judge receives each month. The judge did not think that the fee requests placed a burden on the bench.

This favorable perspective was not unanimous, however. Another judge was vehemently opposed to judicial fee determinations, feeling that they are a misuse of judicial resources. Furthermore, he thinks that in the nonschedule fee situation, the trial court judge is asked to apply what appear to be quantitative factors, *see, e.g.,* factors listed in note 137 *supra,* but are actually a set of qualitative factors. *Cf.* Berger, *supra* note 133, at 286-87 (the problem with the requirement that the trial judge consider numerous factors is that there is no guidance as to how to apply them in any individual case).

It is not possible, suggests this critical judge, to translate the court's guidelines into quantitative, monetary values in particular cases. Thus, what appears to be a straightforward application of discernible legal standards turns out to be a judicial exercise in, as one court once termed trying to ascertain a testator's intent from the language of her will, searching for a black hat in a dark closet. Roberts v. Trustees of Trust Fund, 96 N.H. 223, 225, 73 A.2d 119, 121 (1950). Trying to transform the standards into monetary values is not only a pointless exercise, in the opinion of this trial judge, it is a time-consuming exercise that requires a great expenditure of judicial time, both at the trial level and at the appellate level. He suggests that until the fee taxation rules are simplified so that fee awards are predictable by both parties (as they are in schedule situations), the cost-benefit balance of Alaska's fee taxation schema will be negatively skewed. It consumes more resources—judicial

Unlike in England, virtually no nonjudicial personnel are used in Alaska to assist in fee taxations. Although some judges occasionally refer calculations under the schedule to a clerk, the programmed-calculator approach used by one judge suggests that even that mundane step in fee calculation can be accomplished virtually instantaneously by the trial judge.

It is noteworthy that Alaska trial judges, like federal court judges,[158] do not use their law clerks to assist them in fee determinations. The reasons offered by the Alaska judges parallel the reasons given by the federal judges: Persons without trial experience are not as helpful in the fee taxation arena as they are in traditional analytical tasks. Law clerks' participation in fee taxations, suggest the judges, is a poor use of the law clerks' time. In addition, it was pointed out by several judges that because of the wide range of discretion granted the trial judge, the fee is a decision better reached by the judge than by a delegatee.[159]

The one area in which a nonjudicial person might be of assistance is in ensuring that all the fee petition submissions meet the requirements of the court. In one Alaskan district, a paralegal is employed as part of the clerk's office to monitor civil motion sub-

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time and litigant's money—to decide fees in nonschedule cases than are conserved, and it is the conservation of unnecessary judicial and litigant expenditures that is at the heart of Alaska's fee-shifting policy.

There is some empirical support for this critical judge's opinion. Attorney fee issues frequently are litigated on appeal. A survey of 266 Alaska Supreme Court decisions issued in 1982 revealed that 56—or slightly more than one-fifth of the cases—dealt with attorney fee issues. Note, *State Attorney Fee, supra* note 109, at 345.

Means to reduce the ambiguity associated with the determination of a reasonable fee were proferred by several judges. For example, it was suggested that the judges of a district might develop a consensus concerning the activities that will be compensated and those that will not. In one Alaskan district, in fact, the judges have informally adopted a districtwide rule of thumb concerning acceptable ranges of hourly rates for various types of fee earners—partners, associates, paralegals, and so on.

158. *See* notes 256-257 and accompanying text *infra.*

159. Note, however, that precisely because of the broad discretion granted the trial court in making attorney fee determinations, *see* note 140 and accompanying text *supra,* fee determination is an area in which a judge might feel quite free to delegate the legwork (i.e., the detailed review of the petitions and objections), with the judge reserving to himself or herself any subjective assessments and the final decision as to the precise amount of the award.

missions. It would not be problematic to include the screening of fee petitions as part of the paralegal's monitoring responsibilities, reflected one judge, although that presently is not the practice.[160]

160. Such a practice might be similar to the practice performed by "rota clerks" in the English taxing master system. *See* ch. 2, "Assignment by Rota Clerks" section, *supra.*

IV. TAXATION OF ATTORNEYS' FEES IN FEDERAL DISTRICT COURTS

Background

Historically, U.S. federal judges have not regularly confronted attorney fee issues. Typically, the "American rule" has prevailed:[161] Parties involved in litigation have primarily settled their fees privately with their attorneys.[162] Within the last twenty-five years, however, there have been numerous encroachments on the "pay your own way" tradition,[163] resulting in numerous requests for awards of attorneys' fees and objections thereto from losing parties. Consequently, district court judges currently are spending significant amounts of time handling attorney fee matters that, decades ago, did not confront the federal judiciary.[164]

Faced with increasing responsibilities for administering fee petitions, federal trial judges have employed a variety of procedures and techniques to handle attorney fee requests.[165] In this chapter, we discuss some of those techniques and procedures. As will become apparent, the taxation[166] practices of federal judges are

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161. *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-71 (1975).

162. *But cf.* M. F. Derfner & A. D. Wolf, *supra* note 6, at ch. 1, for an overview of the numerous categories of federal litigation, statutory and otherwise, in which fee shifting has been applied.

163. *See generally id.*; E. R. Larson, *supra* note 6; Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv. L. Rev. 1597 (1974); Rowe, *The Legal Theory of Attorney Fee Shifting,* 1982 Duke L.J. 651; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. Pa. L. Rev. 636 (1974).

164. *See, e.g.,* Report of the Third Circuit Task Force, *supra* note 54, at 242. There are no statistics that indicate the actual numbers of decided cases in which attorneys' fees are awarded. The increase can be inferred, however, by reference to the increase in fee-shifting provisions over the years. Statutory fee-shifting provisions presently number well over 100. *See* note 106 *supra; see also* Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983) (referring to more than 150 federal fee-shifting provisions). In the wake of the Supreme Court's expansive reading of the fee-shifting provisions of rule 68 of the Federal Rules of Civil Procedure (offer-of-judgment rule) in Marek v. Chesny, 105 S. Ct. 3012 (1985), courts may face even more requests for fee awards.

165. *See* Berger, *supra* note 133, at 284 (there are nearly as many approaches to determining a reasonable fee award as there are judges).

166. The term *taxation* is discussed in note 12 *supra.*

similar, in many significant ways, to the taxation practices of judicial officials outside the federal judiciary. In addition, the federal courts use certain techniques that are unique to the federal system.

Legal Review

As fee shifting has become more common, the law that regulates the determination of attorney fee awards has undergone significant developments. Prior to the 1970s, trial judges were granted considerable discretion in their fee determinations. The judge was guided by the reasonableness standard: So long as the judge's fee award was reasonable under the circumstances of the particular case, the award generally was upheld upon review, regardless of the means used by the court to arrive at the fee figure.[167]

By the late 1970s, however, district courts were required to determine fee awards according to specific methodologies.[168] The two

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167. Report of the Third Circuit Task Force, *supra* note 54, at 242. Professor Berger points out that "[u]ntil quite recently the most common approach taken by the lower courts in setting fees was no approach at all. A review of all decisions reported in volumes 384-94 of *Federal Supplement* (1974-1975) reveals that of the twenty-eight reported cases involving a fee determination, thirteen contain absolutely no articulated reason for the amount awarded." Berger, *supra* note 133, at 284.

Although the fee calculation methodology has undergone changes in recent years, so that specific calculation procedures now generally are required, appellate courts nevertheless grant wide latitude to the trial court's determination of a reasonable fee, disturbing the award only when it is "unreasonable, which is another way of saying that [the court's] discretion is abused only where no reasonable man would take the view adopted by the trial court." Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 115 (3d Cir. 1976) (en banc) (*Lindy II*), quoting Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942). *See generally* "Adjustments to the Lodestar" section *infra*. The methodology is a requirement imposed in addition to the reasonable-fee standard; failure to follow the required fee-setting procedures is an abuse of discretion per se. *See, e.g.,* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974).

168. Criticisms of large, albeit reasonable, fee awards emanating from the general public as well as from members of the legal profession created a climate ripe for the introduction of a more precise standard for fee determination in lieu of the general, and vague, reasonableness standard. *See, e.g.,* Report of the Third Circuit Task Force, *supra* note 54, at 242. It was in this context that the Third Circuit introduced the lodestar concept in the first *Lindy* case, Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166-68 (3d Cir. 1973) (*Lindy I*), *see* note 169 *infra*, and the Fifth Circuit instituted the requirement that fee awards be made in light of twelve factors relevant to fee arrangements between attorneys and their clients, *Johnson*, 488 F.2d at 717-19, *see* note 170 *infra*. *But see* E. R. Larson, *supra* note 6, at 117 (*Johnson* twelve-factor approach "represents an early attempt by the Fifth Circuit to reverse the trial court trend of awarding only *nominal* fee awards to Title VII plaintiffs without stating the reasons for their awards.") (emphasis added).

most influential fee calculation methodologies that emerged were the Third Circuit's *Lindy* lodestar approach[169] and the Fifth Circuit's *Johnson* twelve-factor approach.[170] The Supreme Court, in a series of attorney fee award cases decided since 1983,[171] has ruled that district courts should calculate awards using a *Lindy–Johnson* hybrid approach that begins with the *Lindy* lodestar calculation (multiplying the compensable hours expended on the case by the attorney's reasonable hourly rate) and then looks to selected *Johnson* factors[172] to assess whether the fee applicant has overcome the "strong presumption"[173] that the lodestar amount equals a final reasonable-fee award.[174]

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169. The lodestar approach was adopted by the Third Circuit in *Lindy I,* 487 F.2d at 166-69. Under the *Lindy* approach, the district court is required to determine the compensable time spent on the litigation and to determine the rate at which the attorney will be compensated. The number of compensable hours multiplied by the attorney's hourly rate yields the lodestar figure. The district court also has to decide whether the lodestar should be adjusted to reflect the contingent nature of success or the quality of the attorney's work.

170. The twelve-factor approach was adopted by the Fifth Circuit in *Johnson,* 488 F.2d at 717-19. Under the *Johnson* approach, the district court is required to determine an attorney fee award in light of twelve factors that are used to assess the propriety of legal fees in general. *See* American Bar Association Code of Professional Responsibility, DR 2-106 (1980). The twelve *Johnson* 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 other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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.

171. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 54 U.S.L.W. 5017, 5021-22 (U.S. July 2, 1986) (No. 85-5); City of Riverside v. Rivera, 54 U.S.L.W. 4845, 4847 (U.S. June 27, 1986) (No. 85-224) (plurality opinion); Blum v. Stenson, 465 U.S. 886, 897-902 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433-37 (1983).

172. The Court held in *Blum* and reaffirmed in *Delaware Valley* that *Johnson* factors such as the novelty and difficulty of issues, the skill and experience of counsel, the quality of representation, and the results obtained are "presumably fully reflected in the lodestar amount." *Delaware Valley,* 54 U.S.L.W. at 5022. In the latter case, the Court reserved the issue of enhancement of the lodestar based on contingency of success (i.e., risk of loss) for reargument. *Id.* at 5023. *See also* discussion at notes 198-205 *infra.*

173. *Delaware Valley,* 54 U.S.L.W. at 5022.

174. *See, e.g., Delaware Valley,* 54 U.S.L.W. at 5022:

> "The 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. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." [*Hensley,* 461 U.S.] at 433. To this extent, the method endorsed in *Hensley* follows the Third Circuit's description of the first step of the lodestar approach. [However,] "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward . . ." *Id.,* at

Determination of Compensable Hours

The lodestar calculation begins with a review of the attorney's time expended on the case so that the judge can make a determination as to the number of hours that will be compensated. This determination has been labeled the "most important aspect of fee computation."[175] It has been suggested that the task may be facilitated by reviewing, or previewing, compensable hours in the context of the court's pretrial and scheduling orders.[176] Nevertheless, the judge may often face challenging decisions about the particular hours to compensate, especially in nonroutine cases. The major effort is to distinguish between the time expended for which fees may be taxed to the opposing party and the time expended that cannot be compensated. Noncompensable hours take a variety of forms.

Under virtually all attorney fee provisions, a distinction must be made between those claims on which the prevailing party actually prevailed and those on which the prevailing party did not prevail. Fees are not available for time spent on nonprevailing claims,[177] unless the attorney's efforts on the winning and nonwinning issues were so intertwined as to make it an onerous—if not an impossible—task to distinguish the two.[178]

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434. We then took a more expansive view of what those "other considerations" might be, however, noting that "[t]he district court also may consider [the] factors identified in *Johnson* . . ., though it should be noted that many of these factors are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.*, at 434 n.9 (citation omitted).

Although the Supreme Court has embraced a hybridization of the *Lindy* lodestar/*Johnson* twelve-factor approach for calculation of attorneys' fees, the Court's decisions suggest that in most cases the lodestar figure is the reasonable attorney's fee and that *Johnson*-type adjustments to the lodestar figure will not ordinarily be justified. *See* notes 198-205 and accompanying text *infra*.

Furthermore, there are those who question whether it is useful to rely on the lodestar to determine a reasonable attorney's fee. *See, e.g.*, Report of the Third Circuit Task Force, *supra* note 54, at 246-49 (detailing several general problems with the *Lindy* approach to fee taxation). Several commentators have called for the elimination of the lodestar approach to fee determination, at least in certain kinds of cases. The most frequently identified case type for which the lodestar approach is argued to be least worthwhile is the class action/fund-in-court case. *E.g., id.* at 254-59 (advocating a return to the percentage-of-award approach for fund-in-court cases). For an extensive examination of attorneys' fees awards in class action cases, see A. R. Miller, *supra* note 11.

175. E. R. Larson, *supra* note 6, at 163.

176. T. E. Willging & N. A. Weeks, *supra* note 10, at 5-14, 33; *see also* Report of the Third Circuit Task Force, *supra* note 54, at 262-63. For a description of this technique in practice, and attorneys' reactions to it, see T. E. Willging, *supra* note 11.

177. *E.g., Hensley,* 461 U.S. at 440.

178. *See id.* at 434-37; *see generally* T. E. Willging & N. A. Weeks, *supra* note 10, at 31-33.

Hours also are not compensable if they are duplicative, wasteful, or excessive.[179] There is no consensus among the circuits concerning whether the court may make reductions in the number of compensable hours only upon a specific showing in the record of such duplication or whether the court may enter a general finding of noncompensability and eliminate some proportion of the attorney's claimed hours.[180] Of course, the more specificity required of the district court, the more complicated it is to determine compensable hours.

Determination of Reasonable Hourly Rates

Although the procedures for rate determinations vary from jurisdiction to jurisdiction, establishing a reasonable hourly rate is not a conceptually difficult task. It may be a time-consuming task, however, depending on the procedures that must be followed by the district court judge. For example, if the court needs to hear testimony[181] in order to determine a reasonable hourly rate, then the

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179. *Hensley,* 461 U.S. at 434.

180. *Compare* Prandini v. National Tea Co. & Amalgamated Food Employees Union, Local 590, 585 F.2d 47, 52 (3d Cir. 1978) (in order to reduce the compensable hours because of duplication, the court must make specific findings as to the number of hours of duplication based on the record); Cunningham v. City of McKeesport, 753 F.2d 262, 265-67 (3d Cir. 1985), *judgment vacated,* 54 U.S.L.W. 3866 (U.S. July 7, 1986) (remanding in light of *Rivera*); *and In re* Fine Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984), *with* Northcross v. Board of Educ., 611 F.2d 624, 641 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980) (allowing a percentage reduction of compensable hours where court finds that there has been duplication of hours). The Supreme Court has indicated that either approach is acceptable, *Hensley,* 461 U.S. at 436-37: "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment."

181. *See, e.g.,* National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982) (per curiam) (review of right to a hearing on various attorney fee matters); Copeland v. Marshall, 641 F.2d 880, 905 (D.C. Cir. 1980); *see generally* E. R. Larson, *supra* note 6, at 269-71; T. E. Willging & N. A. Weeks, *supra* note 10, at 47-48. The Supreme Court has suggested that a hearing may be a matter of right, but it has never been asked to address the issue directly. *See Blum,* 465 U.S. at 892 n.5 (emphasis added), wherein the Court observed:

> [The defendant] failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see Hensley v. Eckerhart, 461 U.S. 424, 437, and n.12 (1983), or the facts asserted in the affidavits submitted by [plaintiff's] counsel. She therefore *waived her right to an evidentiary hearing* in the District Court. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 472-473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award).

See also Perkins v. Standard Oil, 399 U.S. 222, 223 (1970) (per curiam) (referring to fee awards available for appellate litigation, the Court stated that "[t]he amount of the award for such services should, as a general rule, be fixed in the first instance

matter is likely to be more time-consuming than if resolved simply upon documentary evidence (i.e., briefs and affidavits).[182] Often, evidentiary hearings are held precisely because the issue is complicated or is being strenuously fought. In any case, other legal and factual circumstances will also result in complicated hourly-rate determinations, such as when

— numerous attorneys of different status are involved in the case, each of whom must have a rate established for his or her time;

— a distinction must be made as to the rate to be applied to different activities, such as between in-court versus out-of-court time or between legal research versus fact-finding chores;

— a dispute arises over whether generalist or specialist rates apply;

— attorneys from outside the district request that their community's rate (or a national rate) be used rather than the local rate; and

— the litigation protracts over a long period of time, requiring a decision whether to award historic rates different from current rates.[183]

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by the District Court, after *hearing evidence* as to the extent and nature of the services rendered.") (emphasis added).

It has been suggested, however, that in most cases rate questions probably will not be made clearer through a hearing on the matter, *e.g.*, T. E. Willging & N. A. Weeks, *supra* note 10, at 47; rather, a review of the affidavits and briefs will provide the court with all the necessary information it needs to make its determination. For a review of various techniques that could be used to obtain rate information expeditiously, including the suggestion that oral arguments—without supporting briefs—might be useful, see *id.* at 47-50.

Nevertheless, there are indications that regardless of whether they are required to, judges will acquiesce to requests for a hearing, at least in certain circumstances. In a survey of judges' practices in fee determinations, virtually all judges reported that they have held oral arguments on fee issues; furthermore, more than 90 percent of the judges responded that they have held an evidentiary hearing to resolve a fee dispute. A. R. Miller, *supra* note 11, at 225-28. What Professor Miller's survey does not reveal, however, is the likelihood that a judge will hold a hearing in an ordinary fee taxation case: The case category examined by the survey, class action suits, is a more complicated area than the "ordinary" case, *cf.* D. Trubek et al., *Summary of Principal Findings,* in Civil Litigation Research Project: Final Report S-14 (1983) (most cases are simple ones); indeed, class actions probably are more complicated than even the typical fee-shifting case, both in the issues that are present and in the numbers of litigants and attorneys that are involved. Furthermore, in a class action case, the court has a duty to protect the interests of class members by guarding against excessive attorneys' fees. *See* Report of the Third Circuit Task Force, *supra* note 54, at 251, 254-55; *see also* Fed. R. Civ. P. 23(e) (court must approve terms of any settlement in a class action).

182. *See, e.g.,* Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980).

183. *See generally* E. R. Larson, *supra* note 6, at 191-240; T. E. Willging & N. A. Weeks, *supra* note 10, at 41-51.

Some circuits require the judge to establish an individualized hourly rate for each compensated attorney, at least in the absence of evidence on local, regional, or national rates.[184] Other circuits, however, accept a generalized determination of relevant market rates.[185] Market rates, of course, are easier and quicker to establish than individual rates. There would seem to be no reason to require petitioning attorneys to reargue the marketplace rate once it had been established in a district, unless a party was trying to argue a change in the market or some uniqueness in the particular case that was not reflected in the market rate.[186]

In determining individual rates, the court is confronted with a *Johnson*-type balancing task. Factors such as the attorney's background (e.g., experience, education), the nature of the case, and the tasks performed, plus any factors relevant to the particular case, must be considered and balanced by the judge in order to properly reach a rate determination.[187] Further effort is required when the judge's rate determination must be specifically supported in the record.[188]

Despite these potential difficulties, in practice the determination of a reasonable hourly rate can be simpler than determining compensable hours, even where the district court is required to make an individualized determination of an attorney's hourly rate. Even in jurisdictions that determine individualized rates, the rate deter-

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184. *See, e.g., Fine Paper,* 751 F.2d 562. In *Fine Paper,* the Third Circuit rejected the trial court's determination of uniform hourly rates for partners ($100), associates ($50), and lead counsel ($150), 98 F.R.D. 48, 83 (E.D. Pa. 1983). The trial judge had determined that these rates were "in conformity with the regular hourly rates billed to noncontingent clients by private law firms in major metropolitan areas." *Id.* (quoted in the appellate opinion, 751 F.2d at 590). The circuit court held, however, that "[n]o record is referred to in support of this observation, and the subject is not one on which judicial notice is appropriate." 751 F.2d at 590 (footnote omitted); *but cf. In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1326-27 (E.D.N.Y. 1985) (court distinguished this case from *Fine Paper*; record supported national hourly rate schema). *See also* note 186 *infra.* In establishing a reasonable hourly rate, the *Fine Paper* court held, the trial judge must take into account each attorney's status (e.g., partner, associate), experience, skill, reputation (i.e., prestige), and customary billing rate. 751 F.2d at 590, quoting *Lindy I,* 487 F.2d at 167. Indeed, "the hourly rate must be individually determined, separately for each attorney, and for separate categories of activities engaged in by each attorney." 751 F.2d at 583.

185. *E.g.,* Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 24-25 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 3488 (1985) (private law firm's customary billing rate establishes market rate so long as the firm's rate falls within the general range of rates charged by other firms in the community for similar work). The Supreme Court's opinion in *Blum* appears to support this approach. 465 U.S. at 895 n.11.

186. *But see Fine Paper,* 751 F.2d at 590 (rate determination in major antitrust case that relied on the market rates in "major metropolitan areas," without evidence of such rates in the record, was not sufficient; furthermore, the rates "subject is not one on which judicial notice is appropriate.").

187. *See, e.g., Fine Paper,* 751 F.2d 562, discussed in note 184 *supra.*

188. *Id.* at 590.

mination does not have to be as case specific as does the hours determination: Evidence of an attorney's normal billing rate typically will suffice.[189] Regardless of the detail of investigation required of the district court, the court is charged with the responsibility of determining a reasonable rate, not a perfect rate.[190] It would seem that having processed hundreds of fee petitions, most judges will have a good idea of the acceptable rate range,[191] if not a specific rate, that encompasses many of the contingency factors discussed above. Standardized fee schedules[192] could expedite the task even more.[193]

Adjustments to the Lodestar

There is a question, in the wake of the Supreme Court's pronouncements in *Delaware Valley, Blum,* and *Hensley,* concerning the circumstances that will justify adjustments (particularly upward adjustments) to the lodestar figure. Prior to these Supreme Court decisions, adjustments to the lodestar, whether upward or downward, were routinely applied. Specifically, contingency and quality factors were regularly considered by the court in making a fee determination,[194] under both the *Lindy* and the *Johnson* fee calculation approaches.[195] Contingency factors considered included

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189. *E.g., Laffey,* 746 F.2d at 24-25; *National Ass'n of Concerned Veterans,* 675 F.2d at 1324-27; *Copeland,* 641 F.2d at 894-900.

190. *See National Ass'n of Concerned Veterans,* 675 F.2d at 1326 (the "task is to determine the approximate market rate.").

191. *Cf.* discussion following note 155 *supra* (description of Alaska trial judge's fee determination procedure, wherein he instantaneously reported the hourly fee range received by trial attorneys in his jurisdiction).

192. Standardized rates have been encouraged by several commentators. *E.g.,* T. E. Willging & N. A. Weeks, *supra* note 10, at 51. It is noteworthy that perhaps the strongest argument in support of standardized rate schedules has come from the Third Circuit Task Force, Report of the Third Circuit Task Force, *supra* note 54, at 260-62, since that circuit has been about the most rigid of the circuits in its requirement for individualized rate setting, *see* note 184 *supra.*

193. *See* Report of the Third Circuit Task Force, *supra* note 54, at 260. Schedules will work best when they establish rates that are perceived as fair by members of the bar. T. E. Willging & N. A. Weeks, *supra* note 10, at 43.

194. *See, e.g.,* City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1098-99 (2d Cir. 1977); *see generally* E. R. Larson, *supra* note 6, at 214-40; T. E. Willging & N. A. Weeks, *supra* note 10, at 53-56; Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 Yale L.J. 473 (1981).

195. *See* E. R. Larson, *supra* note 6, at 215:

> Under the Johnson approach to fee computation, as with other approaches, [contingency and quality factors] can be considered in determining the compensable hours and hourly rates, as well as to enhance the final fee award. Under the lodestar method of fee computation, they are used primarily to increase the hours-times-rates lodestar sum.

the risks of litigation, the preclusion of other work, the undesirability of the case, and the delay in payment.[196] Quality factors considered included exceptional representation, the complexity and novelty of the issues, and the results obtained.[197]

The recent Supreme Court rulings, however, clearly indicate that in most cases, the lodestar figure already encompasses the kinds of contingency and quality factors that district courts previously used as the basis for applying an upward adjustment.[198] The majority of the Court seems to have settled on the view that the number of compensable hours multiplied by a reasonable rate typically yields the reasonable attorney's fee to be awarded.[199] The practical impact of the Supreme Court's position probably will be to restrict the number and type of circumstances in which an adjustment to the lodestar will be justified. Nevertheless, district courts are likely to continue to receive requests for adjustments, and to grant those

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196. *See, e.g.,* White v. City of Richmond, 713 F.2d 458, 462 (9th Cir. 1983) (district court's consideration of the degree of success in the case and the remoteness of likely success in the case (major considerations), along with the extent of proof required to obtain the requested relief, the economic undesirability of the case (suit against police department alleging routine harassment, beatings, and groundless arrests of black residents), and the delay between filing of case and settlement (minor factors), justified court's application of 1.5 multiplier in case); Riddell v. National Democratic Party, 712 F.2d 165, 169-70 (5th Cir. 1983) (district court appropriately considered attorneys' preclusion of employment, contingent nature of the fee, time impositions of the case, importance of the litigated issues, and experience and reputation of the attorneys; court's decision not to adjust the lodestar despite these factors was not an abuse of discretion); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc), *cert. dismissed sub nom.* Ledbetter v. Jones, 453 U.S. 950 (1981) (when an attorney will be paid only in event of successful case outcome, he or she should be paid more than an attorney who will receive a fee regardless of the result).

197. *See, e.g.,* Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211, 218-20 (D.C. Cir. 1984) (quality of representation and exceptional results obtained, along with the delay in payment, warranted a 10 percent upward adjustment to lodestar); Planned Parenthood v. Arizona, 718 F.2d 938, 950-51 (9th Cir. 1983) (circuit's opinion in *Kerr* requires that the district court undertake the procedure that it did in this case, in which the lodestar figure was determined first and then adjusted after the court considered contingency and quality factors, including the following quality factors: novelty and complexity of the issues, time pressures present, and reputation, ability, and experience of counsel); Futardo v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980) (after the lodestar is determined, it is adjusted in light of contingency factors and quality factors such as quality of counsel's representation and achieving exceptional results).

198. *See, e.g., Delaware Valley,* 54 U.S.L.W. at 5022 ("the lodestar figure includes most, if not all, of the relevant factors comprising a 'reasonable' attorney's fee").

199. As the Court stated in *Delaware Valley,* "[T]he figure resulting from [the lodestar] calculation is more than a mere 'rough guess' or initial approximation of the final award to [be] made." *Id.* The Court continued, quoting from *Blum,* 465 U.S. at 897: " 'When . . . 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' to which counsel is entitled." 54 U.S.L.W. at 5022 (emphasis added by Court).

requests, until the circumstances that justify adjustments are defined more precisely.[200]

The Court does not appear reluctant to provide precise definitions. In *Delaware Valley,* the Court noted that

> we specifically held in *Blum* that the "novelty [and] complexity of the issues," the "special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.[201]

Nevertheless, the Court's decision in *Blum* left open the possibility of an upward adjustment based on an attorney's quality of representation "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and the success was 'exceptional.' "[202] In *Delaware Valley,* however, the first case after *Blum* in which the Court had an opportunity to review a district court's judgment that such a rare case had occurred, the Court reversed the lower court's determination. The Court's decision seems to indicate that the rare case justifying a quality adjustment will, in fact, be rare: The specific evidence that must be presented by the fee applicant must be convincing indeed.[203]

Presently, the major adjustment factor left to be considered by the Court involves the possibility that, and, if so, the extent to which, there may be upward adjustments based on the attorney's risk of not prevailing in the case and, consequently, not being entitled to a fee. In *Blum,* the question was specifically left open,[204]

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200. *See, e.g.,* Spell v. McDaniel, 616 F. Supp. 1069, 1107-11 (E.D.N.C. 1985), in which the district court awarded a 1.5 contingency multiplier, noting that "this Court is unaware of any decision, since *Blum,* which has ruled that upward adjustments to the lodestar to account for risk are unavailable as a matter of law." *Id.* at 1108 n.61. *See also* Gillespie v. Brewer, 602 F. Supp. 218, 229 (N.D. W. Va. 1985) (20 percent enhancement to lodestar granted by court to compensate attorney for taking a case that on a scale of most desirable to least desirable cases would rank extremely close to the undesirable end).

201. 54 U.S.L.W. at 5022, citing *Blum,* 465 U.S. at 898-900.

202. 465 U.S. at 899, citing *Hensley,* 461 U.S. at 435.

203. Justice Blackmun, writing in dissent, suggests that the majority's decision in *Delaware Valley* makes it "virtually impossible" for a fee applicant to offer sufficient evidence to justify a superior-representation or exceptional-success enhancement. 54 U.S.L.W. at 5023 (Blackmun, J., concurring in part and dissenting in part).

204. "We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment." 465 U.S. at 886 n.17.

and then in *Delaware Valley* the Court decided not to resolve the issue, feeling that the "resolution of the issue would be benefitted by reargument."[205] The case has been restored to the Court's docket for decision in its 1986 term.

Standard of Appellate Review

Fee awards are reviewed by the circuit courts using the abuse-of-discretion standard.[206] The factual determinations underlying the fee award are subject to review under the "clearly erroneous" standard.[207] Although district judges are presumably granted considerable discretion to determine fees, criticisms have been levied against appellate courts for neither granting maximum deference to the district court's factual determinations of the fee award elements (i.e., compensable hours, reasonable rates, any applicable adjustments to the lodestar) nor granting maximum deference to the court's ultimate award.[208] Most commentators and trial courts are likely to applaud the position taken by the Eighth Circuit in which it announced the importance of granting the district court's determination wide latitude:

> Because of its singular viewpoint, the district court is best equipped to determine whether hours were reasonably expended, whether the attorneys' hourly rates are within the general rates

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205. 54 U.S.L.W. at 5023.

206. *See Delaware Valley,* 54 U.S.L.W. at 5023 (Blackmun, J., concurring in part and dissenting in part), citing Evans v. Jeff D., 106 S. Ct. 1531, 1545 (1986), and *Blum,* 465 U.S. at 896; *Rivera,* 54 U.S.L.W. at 4852 (Powell, J., concurring); *see also* Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985), *cert. denied,* 106 S. Ct. 805 (1986) (fee awards will be disturbed "only where the district court has abused its *legal* discretion or has erred in its understanding of the governing *legal* standards.") (emphasis added). *Cf.* notes 139-140 and accompanying text *supra* (same standard used under Alaskan law) and notes 87-89 and accompanying text *supra* (more lenient standard used in England in cases in which taxing masters tax fees).

207. *See Rivera,* 54 U.S.L.W. at 4851 (Powell, J., concurring), citing Anderson v. Bessemer City, 105 S. Ct. 1504 (1985); *see also* Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1093-94 (5th Cir. 1982); *see generally* Fed. R. Civ. P. 52(a) (findings of fact shall not be disturbed unless clearly erroneous).

208. *See, e.g., Delaware Valley,* 54 U.S.L.W. at 5023 (Blackmun, J., concurring in part and dissenting in part) (suggesting that if "the proper, deferential standard of review" had been used, then the majority might have found that the district court had not abused its discretion in making an upward adjustment for quality of representation); Report of the Third Circuit Task Force, *supra* note 54, at 273; *see also Hensley,* 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part):

> Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee.

charged for a particular service in the relevant community, whether the prevailing party achieved a level of success justifying the hours spent, and whether the risk of the case not prevailing calls for an enhancement of the lodestar fee.[209]

Taxation Practices[210]

Fee taxation practices employed by federal courts vary considerably, unlike in Alaska or England, where convergent fee taxation practices seem to have developed within each of the systems. In the federal courts, we found a diversity of practices related to the administration and management of fee petitions. Formats, timing, monitoring practices, and even the personnel involved differed across, and sometimes within, districts. Nevertheless, we did find some consistencies in the techniques and procedures used in federal courts. In this section, we concentrate neither on the common

209. *Moore,* 766 F.2d at 346. *See Hensley,* 461 U.S. at 437; *see also* Report of the Third Circuit Task Force, *supra* note 54, at 273 (advocating granting considerable discretion to trial courts' determinations, restraint in review by appellate courts, and strict adherence to abuse-of-discretion standard when review is undertaken).

Justice Brennan suggests that a fee award be affirmed if it falls within the "zone of discretion" afforded district courts. *Hensley,* 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part). The Court used this rationale in unanimously affirming part of the district court's fee award in *Delaware Valley,* 54 U.S.L.W. at 5021. Under the zone-of-discretion approach to reviewing district courts' fee determinations, appellate courts, "as a matter of good judicial policy, should not disturb the trial court's solution to the problem of balancing the many factors involved unless the end product falls outside of a rough 'zone of reasonableness,' or unless the explanation articulated is patently inadequate." *Hensley,* 461 U.S. at 455 n.11 (Brennan, J., concurring in part and dissenting in part).

The zone-of-discretion approach appears to be the approach taken by the Alaska Supreme Court in its review of fee awards. *See* discussion following note 138 to end of "Legal Review" section in ch. 3 *supra.* However, by even discussing fee awards, rather than simply affirming them as within the zone of discretion afforded Alaska's trial courts, the Alaska Supreme Court invites continuing appeals on the amount of fees awarded. *See* note 157 *supra* (attorney fee issues appear to be addressed in more than 20 percent of Alaskan civil appeals).

In contrast, the Eighth Circuit sent out a signal in *Moore* that district court fee awards should not be appealed unless there is a legitimate allegation that the court "misapplied the applicable law." *Moore,* 766 F.2d at 346. The Eighth Circuit also announced its case management intentions: "Appeals contending that the district court abused its discretion in determining the amount awarded ordinarily do not require oral argument and will be decided without argument by a three-judge screening panel." *Id.* Finally, the Eighth Circuit warned counsel that where an appeal from a fee award is taken frivolously and not in good faith, sanctions for costs and fees will be imposed.

210. The information on taxation practices reported in this section was obtained primarily through telephone interviews with various federal court personnel. Thirty-nine interviews were conducted with judges, magistrates, court and law clerks, and attorneys from twenty-five district courts. Their assistance is gratefully acknowledged.

practices nor on the idiosyncratic techniques; rather, we present an overview of the array of techniques and procedures that are used and of the personnel who participate in the taxation of attorneys' fees. These practices constitute some of the options that courts have in the administration and management of fee caseloads.

General Issues

Frequency. The frequency with which courts face fee requests varies considerably, depending on a district's caseload. In districts that hear a considerable number of civil rights,[211] title VII,[212] Social Security,[213] and criminal cases in which counsel is appointed, and reimbursed, under the Criminal Justice Act,[214] our interviews revealed that the courts have had extensive experience with fee shifting. In such districts, judges and magistrates make fee awards in twelve or more cases per month. Indeed, one judge reported having to determine fees, on the average, in more than fifteen Social Security cases per month.[215] In districts without high percentages of the above-described cases, the interviews indicated that judges and magistrates typically receive requests to tax fees in less than one terminated case per month.[216]

Opposition to fee request. Unlike in Alaska, where fee shifting has become an accepted part of litigation, the typical attorney in federal court who represents a losing party will not acquiesce to fee shifting without some opposition. However, in common fund and Social Security cases, there often is little or no opposition to a fee request. The reason does not appear to be that fee shifting has become an accepted part of legal practice in these areas; rather,

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211. *See* 42 U.S.C. §§ 1983, 1988 (1982).
212. *See* 42 U.S.C. § 2000(e)-5(k) (1982).
213. 42 U.S.C.A. § 402 (West 1981 & Supp. 1986).
214. 18 U.S.C.A. § 3006A(d) (West 1985).
215. Although the federal courts are confronted with a great many Social Security claims (more than eighteen thousand Social Security cases were commenced in the federal courts during 1985, Administrative Office of the U.S. Courts, Statistical Analysis and Reports Division, Federal Judicial Workload Statistics A-13 (Dec. 31, 1985)), less than 1 percent of these claims ever reach the federal legal system. The vast majority of attorneys' fees available for handling Social Security matters are determined at the administrative, and not the court, level. A description of the fee taxation process in Social Security cases is presented in appendix A.
216. The relative infrequency with which fee requests are received in the federal courts as compared with the English courts, *see* ch. 2, "The Supreme Court Taxing Office" section, *supra* (more than eleven thousand bills of costs taxed), or the Alaskan courts, *see* note 157 *supra* (estimating that Alaska trial judges each receive approximately thirty fee petitions monthly), is unsurprising in light of the philosophical differences between the U.S. federal legal system (ordinarily a "pay your own way" system) and the English and Alaskan legal systems (characterized by compensation to the prevailing party for expended attorneys' fees).

the reason appears to be a function of the source of funds used to pay the attorneys' fees.

In common fund and Social Security cases, fees are typically awarded from the recovery.[217] Thus, the defendant's interest is in minimizing the size of the fund in the first place, not in opposing the manner in which the fund is distributed.[218] Nevertheless, some of the most controversial and vociferously contested fee award cases have been common fund cases, although the disputes tend not to be between parties but among class counsel.[219]

Several judges pointed out that having the fee request undergo an adversarial procedure can have advantages to the court. In adversarial situations, the parties target the aspects of the fee petition that must be scrutinized carefully by the judge. The problem in uncontested requests, such as those in common fund cases, is that the judge has the burden of reviewing the fee request. In these cases, the judge must act as a "quasi adversary" to ensure that the attorneys do not receive more than a reasonable fee.[220]

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217. In common fund cases, however, there are legal, *e.g.*, Prandini v. National Tea Co. & Amalgamated Food Employees Union, Local 590, 557 F.2d 1015 (3d Cir. 1977), as well as tactical reasons for separating the merits settlement from the fees settlement. Ethical and legal issues of bifurcation of fees from merits have been the subject of recent commentary, *see, e.g.*, Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. Colo. L. Rev. 341 (1984); Report of the Third Circuit Task Force, *supra* note 54, at 266-70; Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (1982); T. E. Willging & N. A. Weeks, *supra* note 10, at 65-77; Note, *Attorneys' Fees—Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action*, 51 Temp. L.Q. 799 (1978). The Supreme Court recently upheld a waiver-of-fees settlement provision that was offered as part of the defendant's overall settlement proposal in a class action suit. *Jeff D.*, 106 S. Ct. 1531.

218. We learned during the course of our interviews that in Social Security cases litigated in a district court, the government's attorney sometimes contests the fees requested by the claimant's attorney. The reason claimed by the government is to protect the fund, but some believe it is to antagonize claimant's counsel. Regardless of the motivation, some judges and magistrates expressed gratitude for the presence of a party that carefully scrutinizes the fee petition, thereby alleviating some of the responsibility that would otherwise fall to the bench.

A different situation exists in Social Security cases in which a claimant's attorneys' fees are sought from the government outside the fund, that is, pursuant to the Equal Access to Justice Act. At least one judge has indicated that a claimant's attorney has an obligation to seek fees under the EAJA. Taylor v. Heckler, 608 F. Supp. 1255 (D.N.J. 1985); *see also* Watford v. Heckler, 765 F.2d 1562 (11th Cir. 1985) (EAJA fees available despite language of section 406(b) of the Social Security Act, which restricts fee awards to 25 percent of claimant's past-due benefits recovered in litigation); *but see* Prettyman v. Heckler, 577 F. Supp. 997 (D. Mont. 1984) (EAJA does not allow an attorney to receive a fee award greater than the 25 percent of recovery available under section 406(b)).

219. *See, e.g., "Agent Orange,"* 611 F. Supp. 1296; *Fine Paper*, 98 F.R.D. 48.

220. It has been suggested that in such instances, the court may want to appoint a guardian ad litem to review the fee petition. T. E. Willging & N. A. Weeks, *supra* note 10, at 18-19; *see generally* A. R. Miller, *supra* note 11, at 230-34.

Time spent.[221] The amount of time it takes to tax the fees varies as a function of several factors. The most consistently identified factor was the nature of the case. Specifically, the typical Criminal Justice Act or Social Security case takes the least amount of time. We were told by several judges and magistrates that they could determine the fees in these case types within ten minutes. The most time-consuming task in Social Security cases, asserted one judge, is the determination of the proportion of fees to be taxed at the administrative level and the proportion to be taxed at the district court level.

At the other end of the spectrum are the common fund cases. One class action case described took, according to conservative estimates, more than 1,200 hours of court personnel's time just to review the fee petitions.[222] Most common fund cases, of course, do not consume resources to the extent that this case did.[223] Nevertheless, most judges who have had experience with fee taxation in common fund cases suggest that the fee determination process for these cases consumes an inordinate and disproportionately large amount of time.[224]

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221. *Cf.* paragraph following text at note 149 *supra* (amount of time spent by Alaska judges to determine fees is, in most cases, less than that spent by federal judges and magistrates).

222. To appreciate the impact, consider that by extrapolating from the district court and bankruptcy court time studies conducted by the Federal Judicial Center, it can be estimated that a district court judge spends somewhere between 1,300 and 1,400 hours per year on case-related activities. *See* S. Flanders, The 1979 Federal District Court Time Study 34 (Federal Judicial Center 1980) (district court judges average slightly more than 6 hours a day on case-related activities); J. E. Shapard, The 1981 Bankruptcy Court Time Study 20, 25 (Federal Judicial Center 1982) (bankruptcy court judges average 6 hours per day on case-related activities and work approximately 216 days per year). In other words, the fees portion of the one class action case could take almost the equivalent of an entire year of a judge's time if the judge handled the fee requests without assistance from other court personnel.

223. Many common fund cases, like other case types, settle prior to trial. The court may face difficulties in setting the attorneys' fees in settled cases, however. To the extent that the attorneys' activities have occurred outside the court, it is hard for the court to make as knowledgeable a determination as to the number of reasonable hours to compensate. Although courts may not have to devote a great amount of time to common fund cases that settle without significant court involvement, courts may find that the quality of their fee determinations suffers in those cases. Thus, courts may face a trade-off of competing interests: the interest in not having to expend a great deal of time on cases that do not require judicial resolution of the merits versus the interest in protecting the fund that has been created for the benefit of the class. *See generally* Rhode, *supra* note 217. One solution to this problem is for a guardian to come in at the beginning of the litigation and work out an arms-length contingency fee agreement with counsel. *See, e.g.,* Report of the Third Circuit Task Force, *supra* note 54, at 254-59.

224. *See generally* A. R. Miller, *supra* note 11, at chs. 4-6.

Complex litigation, however, accounts for proportionately little of most judges' and magistrates' dockets. The interviews suggested that it is more likely for fees to be taxed in a civil rights case or in the context of the imposition of sanctions. Fee determinations in civil rights or sanctions cases typically require between two and eight hours, with fee determinations in sanctions cases generally taking less time than in civil rights cases. In both case types, however, the court is likely to have to expend more than minimal time and effort on the fee matter because even in those cases in which the fee issue is settled, the parties may have a difficult time coming to an agreement without some court involvement.[225]

In general, judges' and magistrates' reports of the amount of time required to tax attorneys' fees revealed quite a bit of variation, even holding constant the type of case. Some differences appear to be due to external considerations. For example, the quality of the attorney fee requests was reported to affect the time it takes to determine fees.[226] Another factor affecting the time required to tax fees was whether hearings are customarily held in fee cases: In districts where hearings are routinely held, fee determinations tend to be more time-consuming.[227] Finally, differences related to the nature of the docket were reported. For example, the typical intransigence of civil rights litigants delays resolution of fee matters in districts that process numerous civil rights cases.

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225. One technique that appears to be particularly useful in facilitating settlement of the fee issue in civil rights cases is the "admissions" practice used by several courts. In this practice, the petitioner is required to set out in detail his or her claim for fees. The respondent must then "admit" or "deny" each requested item. This procedure often results in the narrowing of disputed issues, thereby enhancing the possibility of settlement. For a further description of the admissions procedure, see text at notes 240-242 *infra; see generally* T. W. Evans, Admissions Practice (Center for Public Resources 1985). A variety of case settlement techniques are described in D. M. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986).

226. Different practices among judges and magistrates can affect the quality of the submissions. For example, some judges and magistrates routinely reject fee petitions that do not conform to the court's specifications. Others, however, accept the petitions regardless of what they look like. Although these decision makers do the best they can with the poor-quality submissions, it is clear that having to process such documents increases the amount of judicial time required to tax the fees. *Cf.* ch. 2, "Assignment by Rota Clerks" section and first paragraph of "Nonjudicial Personnel" section, *supra* (the English use clerical staff to screen fee papers before they are reviewed by a taxing officer).

227. Although there is some indication that a hearing may be a matter of right, *see* note 181 *supra*, there nevertheless seems to be a movement toward encouraging parties to resolve the fee award without a hearing. For example, some districts have enacted local rules that require a party who requests a hearing to demonstrate to the court what purpose the hearing would serve before the court will grant one. *See, e.g.,* D.N.H. Local R. 39; W.D. Tex. Local R. 300-10(c). Both local rules are reproduced in appendix B.

Other differences in time spent on fee taxations appear to be related to internal considerations. The value placed on fee determinations by judges and magistrates is particularly important. Some judges and magistrates believe that accurately determining fees is as important a task for the courts as is making any other judicial determination. Others feel that the courts exist to make decisions on substantive matters and that fee issues are collateral matters. Fee awards, suggested several of the jurists interviewed, are more a matter of accounting than judging, and it is a misuse of scarce judicial resources, they said, to expend considerable amounts of time deciding on particular fee amounts.

This split in attitudes toward fee determination, and its impact on fee taxation practices, are well illustrated by reference to the reported practices of two judges. Judge 1 believes that spending much time on fee taxations would interfere with his availability for decision making in substantive rights matters. He spends relatively little time reviewing fee petitions. Judge 1 also feels that detailed review of petitions is obsessive behavior, resulting in no more than a 10 percent adjustment to the final award in the vast majority of cases. He is concerned about the administration of justice in a system that has limited resources for those who need it to resolve substantive issues.

Judge 2, on the other hand, emphasized the role of the courts in preventing legal services from becoming too expensive for potential litigants. He feels that it is his duty to painstakingly review every item in an attorney fee petition to ensure its legitimacy. Judge 2 also feels that the risks of overcompensation, particularly in the hourly rates to be used in the lodestar computation, are considerable, because the awards (both the hourly rate and the ultimate compensation) establish a common law of fees that is then used to establish attorneys' fees in subsequent cases.

These two views represent the poles of attitudes about fee awards: Most of those interviewed indicated they possess some of each perspective. They suggested that the scrutiny with which they examine a fee request, the time spent reviewing the documents, and the effort required to determine the fee award vary from case to case, both within and across case categories. Some cases require more, others less. The judges and magistrates indicated that they try to adapt their procedures, at least somewhat, to the needs of a particular case. Nevertheless, despite their case-specific flexibility, most respondents indicated that their attitudes about fee awards also affect the manner in which they treat the typical fee case.

Finally, the experience (while on the bench) and legal background (before coming to the bench) of the judge or magistrate

seem to influence the amount of time spent taxing fees. Not surprisingly, the more years he or she has been on the bench, as a general rule, the easier and quicker the judge or magistrate believes it has become to tax fees. Moreover, for those who had specialized in certain case types as attorneys, taxing fees in those types of cases is particularly trouble-free.[228] For example, judges or magistrates who had been involved with civil rights or class action litigation, whether as an advocate for the plaintiff's or the defendant's side, reported fee taxations in these cases to be easier than did their nonexperienced colleagues.[229]

In sum, the respondents' overall estimate of the proportion of their time required by fee taxation was about 10 percent. Virtually all of those we interviewed indicated that they were concerned with the amount of time that district courts presently must devote to fee matters.

Determination of Compensable Hours

To reach a decision as to the number of hours to compensate, many of the judges and magistrates we interviewed said that they now require a petitioning attorney to submit actual time records or billing statements for review;[230] in the past, many courts accepted the sole submission of an affidavit attesting to the time spent on the case. The format of the required time records or billing statements is typically left up to the discretion of the petitioning attorney.[231] Most attorneys maintain and submit their records in chronological order.[232] The types of entries expected by the judges and magistrates who request particular formats typically include such categories as—

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228. The federal experience seems to parallel the Alaskan experience. Alaska judges' *general* fee taxation efficiency appears to increase with judicial experience. *See* note 156 *supra*. For federal judges and magistrates, with their comparatively limited experience with fee shifting, the benefits of background and judicial experience are more specific, confined primarily to the areas with which they have had personal contact.

229. It is noteworthy that in England, the taxing master position requires ten years of legal practice experience, the same amount of experience required for an English circuit judge. *See* note 32 and accompanying text *supra*.

230. *See generally* 2-3 M. F. Derfner & A. D. Wolf, *supra* note 6, at chs. 18-28; E. R. Larson, *supra* note 6, at 281-83; T. E. Willging & N. A. Weeks, *supra* note 10, at 25-27. In Alaska, a summary affidavit is often sufficient. *See* ch. 3, first paragraph in "Taxation Practices" section, *supra*.

231. Some courts, however, specify the format. *See, e.g., "Agent Orange,"* 611 F. Supp. at 1318; *Continental Illinois,* 572 F. Supp. at 934. This practice is somewhat similar to the English practice, in which requests for fees must be in a standard format. *See* note 75 and accompanying text *supra*.

232. *See, e.g.,* J. P. Bennett, *supra* note 9, at app. B-1, exhib. G, and app. D-2.

- the date of the activity;
- the person who engaged in the activity;
- the status (e.g., paralegal, associate, partner) and billing rate of that person;
- the nature of the activity (e.g., research, memorandum preparation, document review);
- the time spent on the activity;
- the time charged for the activity;[233] and
- the product that resulted from the activity (e.g., motion, client conference, settlement discussion).

(We have developed a record sheet using these categories; it is presented in appendix C.)

The required formats vary as a function of the preferences of the individual judge or magistrate. One judge said that he requires fee requests to be organized according to the twelve *Johnson* factors. Another judge has directed that in complex cases, she be given a data sheet organized chronologically by activity.[234] Finally, one judge not only requires that the petitioner submit the typical documentation, he also requires that in statutory cases, the petitioner's "case" for fees be presented at the conclusion of the plaintiff's case-in-chief. The defendant must offer any objections at the conclusion of the defense presentation. Thus, by the time the trial is concluded, this judge has all the necessary data required to make his fee determination should he find in favor of the plaintiff.

Whereas some judges and magistrates indicated that they review the petitioner's documents in great detail, the majority said that

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233. Not all time expended, of course, is billable to the client. The Supreme Court stated that the kinds of billing judgments used by attorneys in their private billing practices should be used in fee-shifting contexts as well. *Hensley,* 461 U.S. at 434, quoting *Copeland,* 641 F.2d at 891; *see also National Ass'n of Concerned Veterans,* 675 F.2d at 1327.

234. *Cf. Continental Illinois,* 572 F. Supp. 931, a major class action securities case. The court issued a pretrial order requiring that attorneys who wanted to obtain fees from the court, if the class prevailed, submit their fee petitions in a form constructed chronologically by activity. *Id.* at 934.

Some of the judges and magistrates we interviewed were supportive of this type of format requirement. Others felt that it imposed too great a burden on attorneys. The reasoning of the critics was that most attorneys bill their clients chronologically, with an indication of activity. Such a record, they felt, is sufficient. At most, they might require summary statements of the time spent on each activity.

The court's format requirement in *Continental Illinois* was a reaction to the fee taxation difficulties experienced by the court in the *Fine Paper* case. *See* 98 F.R.D. 48. For a study of reactions to the chronologically-by-activity innovation, see T. E. Willging, *supra* note 11, at 30-32 (vast majority supported idea of organizing fee petitions by activity; majority also concluded that this would be costly to implement).

they scan the documents, looking for obvious problems (e.g., four hours being requested in compensation for the preparation and filing of a simple, common boilerplate motion).[235] As one interviewee bluntly stated, "After reading several, recent, appellate opinions reversing district courts' fee awards, I'm even more convinced that it is not worth it to spend judicial time getting too precise in attorney fee calculations." This interviewee felt that the circuit courts are unrealistic in demanding district courts to state in great detail the reasons for denial of parts of an attorney fee request. It often is impractical, suggested several respondents, for the district court to specify exactly which hours have been reduced from a fee's petition or to give more than a general reason for the reduction. Many district court personnel feel that the circuit courts treat the determination of attorneys' fees as an objective process when, in fact, it is a highly subjective endeavor. It is the subjective nature of the fee taxation process that makes some courts unwilling to devote significant amounts of time to reviewing fees petitions.

Regardless of their usual practice, all judges and magistrates reported that they would give close scrutiny to a fee petition in specific circumstances. In particular, a detailed review is likely when the fee request, as a whole or some portion of it, appears out of line with the subjective "pricing" that judges and magistrates invariably place on a case. The crucial role of "instincts," "intuition," "gut reaction," and other terms of subjective assessment was avowed again and again.[236]

However, the chore of finding errors or otherwise challenging the number of hours claimed is primarily left to opposing counsel, except in common fund cases.[237] As one judge, a former trial attorney, noted, "It's hard to tell [a lawyer] that the deposition that he took was unnecessary because, at the time, it may have appeared to be important. A judge can't supervise an attorney in that manner." The consensus appears to be that detailed scrutiny of the fee petition is a task better left to the attorneys whenever possible.

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235. *Cf.* discussion following note 153 *supra* (description of the approach taken by two Alaska judges, the first of whom reviews fee requests in great detail and the second of whom uses a quicker and more subjective approach).

236. This procedure of evaluating the case, or portions of it, is close to the one described by the second judge from Alaska (*see* note 235 *supra*).

237. *See, e.g.*, Friends for All Children, Inc. v. Lockheed Aircraft Corp., 567 F. Supp. 790, 812-13 (D.D.C. 1983) (greater responsibility exists for court to determine the fairness of fees in common fund cases); *see generally* Krause v. Rhodes, 640 F.2d 214 (6th Cir.), *cert. denied,* 454 U.S. 836 (1981); Report of the Third Circuit Task Force, *supra* note 54, at 254-59 (advocating a return to the percentage-of-recovery approach for common fund cases in light of the enormous difficulties experienced by judges in taxing fees in these cases).

Finally, several of the interviewees indicated that they attempt to combine settlement discussions[238] and issue-narrowing, admission techniques[239] to focus the parties on areas of outstanding dispute and to expedite determination of compensable hours.[240] To illustrate this approach, we describe the practices of two magistrates, both of whom have adopted similar procedures, although they preside in different jurisdictions. Interestingly, procedures similar to—but not as extensive as—the procedures used by the two magistrates have been adopted by several districts.[241] Following the filing of a petition and objection, the magistrates reported that they bring the opposing parties together in conference to determine if a settlement of the fee award can be negotiated. In the conference, the magistrates and parties go over each hour claimed, and the losing party must "admit or deny" the petitioner's request. For each objection, the magistrates attempt to mediate or arbitrate the dispute on the spot. One of the magistrates even has the attorneys go through a moot-court exercise in which they argue their positions to one another. If some hours remain in dispute at the conclusion of the conference, a judicial determination is made. In three out of four cases, both magistrates estimated, the parties are able to work out an agreement without requiring a determination by the court. In the rest of the cases, the required determination is much more manageable because the admission process and settlement attempts typically reduce the number and scope of unresolved issues.[242]

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238. *See generally* D. M. Provine, *supra* note 225.

239. *See generally* T. W. Evans, *supra* note 225.

240. Although we describe these practices in the context of compensable-hour determinations, they are also applicable to hourly-rate determinations, as well as to questions of whether to adjust the lodestar figure. In practice, each element relevant to the fee award would be dealt with at the same time. Conceptually, however, the elements are separable, and the settlement/issue-narrowing technique is especially relevant to resolution of the number of hours to be compensated.

241. *E.g.*, in the District of Columbia, D.D.C. Local R. 215, the Middle District of North Carolina, M.D.N.C. Local R. 210, and the Western District of Texas, W.D. Tex. Local R. 300-10, local rules require the prevailing and losing parties to attempt to settle the fees matter before asking the court to make a determination. The district court in these jurisdictions will become actively involved only if the parties have been unable to resolve the fees. The relevant local rules of these three jurisdictions are reproduced in appendix B.

242. Both magistrates estimated that the conference requires at least two hours. They believe it is time well spent because their fee taxations are completed within two hours for most cases, including complex ones. Written conclusions of law and findings of fact are avoided in the settled cases. Even in cases in which all fee issues are not resolved, the procedure still reduces the amount of time they need to spend making the necessary determinations.

Determination of Reasonable Hourly Rates

For the most part, the determination of hourly rates is not a complex or controversial task. Although some courts still require that counsel submit affidavits setting out usual billing rates[243] or provide affidavits from other attorneys (typically from three to five) who attest to their billing rates[244] in order to establish the community rate for a particular type of lawsuit, the trend—if our interview information is indicative of national practices—appears to be toward taking judicial notice of hourly rates.

Frequently, the hourly-rate request is not disputed. This tends to be more common when both parties are represented by members of the private bar, as both parties' attorneys have an interest in establishing reasonable rate structures for the future. The possibility of attorneys' disinclination to dispute rates was remarked upon by one judge who spends considerable amounts of time ensuring the "reasonableness" of the requested hourly rate. This judge observed that because the court is giving its imprimatur to the rate, the rate taxed can become the de facto market rate. The judge believes that attorneys in the case, or others practicing in the same area, are likely to use the court's rate "determination" as evidence to convince clients that the court's rate is the rate reasonably charged in the community. Furthermore, attorneys are likely to use the rates taxed in one case to convince other judges (or even the same judge) of the market rate in subsequent cases.[245] Consequently, this judge scrutinizes each rate request carefully, regardless of whether it is challenged by the opposing party, because she feels it is an important part of her judicial responsibilities to protect the community's interest in fee rates before the rates become ingrained as part of the "common law." In terms of the kind of procedure used to establish reasonable rates, however, there was no difference between this judge and the other judges and magistrates who require that evidence be presented to support a rate request.

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243. *See* note 189 and accompanying text *supra*. Where there is a fee-paying client, the submission of the billings from the prevailing attorney to the client can significantly facilitate the court's taxation of fees. For example, where an attorney voluntarily submitted to the court detailed, self-explanatory time-charge diaries, along with documentation of historical rates and awards, the court apparently had little difficulty in awarding the attorney his requested fee despite the defendant's objections. Kyles v. Secretary of Agriculture, 604 F. Supp. 426 (D.D.C. 1985). *See also* J. P. Bennett, *supra* note 9 (guide to attorneys for submission of fee requests, written by attorney specializing in employment discrimination litigation). Mr. Bennett was the plaintiff's attorney in the *Kyles* case, and his fee petition received favorable comment from the court in its opinion.

244. *See generally* T. E. Willging & N. A. Weeks, *supra* note 10, at 26-27.

245. *See, e.g., Kyles*, 604 F. Supp. at 428-29.

In cases in which the government, as defendant, is responsible for paying attorneys' fees, the problem tends to be the reverse of that which occurs when both parties are represented by the private bar. Governmental entities are repeat players in lawsuits; it is therefore in the government's interest for attorneys' hourly rates to be low. Consequently, government attorneys frequently oppose the hourly rate requested. Several judges said that they take judicial notice of reasonable community rates for particular case types in order to avoid the government's turning the hourly-rate matter into a major battle.

Probably the most efficacious and expeditious method of determining reasonable community rates is to use hourly-rate schedules that have been objectively developed outside the context of an individual lawsuit. Median or mean rates charged by attorneys—broken down by type of specialty, size of firm, attorney's experience, and locale—are available from several services.[246] Ideally, this approach involves collaboration with the local bar to develop a rate schedule that is then used to establish the presumptive reasonable rates.[247] Different hourly rates can be established for partners, associates, and clerks. Rates may also be affected by the size of the firm with which an attorney is affiliated. Although the schedule rate might not be used if counsel is able to convince the court of its nonapplicability, it can establish the reasonable rate in most cases. Despite strong support from numerous interviewees for the use of rate schedules, only one of the twenty-five jurisdictions we examined had implemented such a procedure.[248]

Other Fee Management Considerations: Timing and Monitoring

There have been recent suggestions that fee determinations could be expedited through active and early intervention by the

246. *See, e.g., Spell,* 616 F. Supp. at 1103 (court used North Carolina Bar Association Economic Survey 1985, which is a survey of typical hourly rates for lawyers in the state, as starting point for determination of rate); *"Agent Orange,"* 611 F. Supp. at 1327 (citing various private reference services and legal publications that provide such data); *see also* T. E. Willging & N. A. Weeks, *supra* note 10, at 26. An example of a rate schedule, developed by Community Legal Services, Inc. (Philadelphia, Pa.), is printed in Report of the Third Circuit Task Force, *supra* note 54, at 260 n.70; *see also* note 280 *infra.*

247. *Cf. Spell,* 616 F. Supp. at 1103-06 (average rate schedule developed by state bar association used as starting point for court's rate determination; average rate adjusted upward for all attorneys after further consideration of reputation and experience of counsel, novelty and difficulty of litigated issues, skills required, preclusion of other employment, risk of litigation, time constraints involved, undesirability of case, and rates awarded in similar cases).

248. Standardized rate schedules have been encouraged by several commentators. *See, e.g.,* Report of the Third Circuit Task Force, *supra* note 54, at 260-62; T. E. Willging & N. A. Weeks, *supra* note 10, at 50.

court.[249] Most judges and magistrates, however, are unconvinced. Their reasoning is that since most cases settle anyway, it does not make sense to invest judicial time when there is only a slight possibility of the necessity for a future fee determination. Although they would not necessarily reject active and early fee management in special cases, they see its routine use as overkill.

Those who do become involved early tend also to monitor the fees part of the case throughout the proceedings. Several different procedures have been adopted. One judge related that he addresses the fee issue as part of his initial rule 16[250] scheduling conference. He informs counsel of his format and data requirements, and he reminds counsel of them in any other conferences that may be held. Other judges indicated that they go further, requiring counsel to make periodic filings of these materials with the clerk's office.[251]

Not all early-involvement and early-monitoring schemata require the attorney's participation, however. Several judges mentioned that they evaluate the "worth" of the case (in terms of fees) during the pretrial phases of the proceedings. They do not bother to inform the parties of their evaluations, since the information is meant only for the personal use of the judges, but they do record their observations in their case notes. When the fee request is filed at the conclusion of the case, they compare their evaluations with

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249. *See* T. E. Willging, *supra* note 11, reporting on Judge Grady's early intervention in fee management in *Continental Illinois,* 572 F. Supp. 931, a case involving the potential creation of a common fund. *See* note 234 *supra; see also* Jacquette v. Black Hawk County, 710 F.2d 455, 463-64 (8th Cir. 1983) (advocating stringent and early case management to avoid excessive costs and delay); A. R. Miller, *supra* note 11, at 338-45.

250. Fed. R. Civ. P. 16.

251. Under one version of the periodic-filing requirement, these materials remain under seal until the conclusion of the case. Order of Judge Santiago E. Campos (D.N.M.), reproduced in appendix D *infra. See also* Manual for Complex Litigation, Second, § 24.21 (1985) (suggesting filing of attorneys' time records with the judge, who will keep the records in camera until the conclusion of trial); Report of the Third Circuit Task Force, *supra* note 54, at 271-72 (advocating filings to ensure contemporaneous record keeping). Regardless of whether attorneys are required to file the documents with the court during the course of the litigation, the contemporaneous-record-keeping requirement has become virtually a national one. *See, e.g., Hensley,* 461 U.S. at 437, 438 n.13; Wojtkowski v. Cade, 725 F.2d 127, 130-31 (1st Cir. 1984); Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983); New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983); *Copper Liquor,* 684 F.2d at 1094-95; *National Ass'n of Concerned Veterans,* 675 F.2d at 1327; *In re* Meade Land & Dev. Co., 527 F.2d 280, 283-84 (3d Cir. 1975). Failure to do so may be grounds for reduction of hours, per se, without need of additional evidence. *See* Buian v. Baughard, 687 F.2d 859, 863 (6th Cir. 1982); *see also Friends for All Children,* 567 F. Supp. at 800 (fees "will be paid only for time that is clearly supported by time sheets, preferably contemporaneous").

the amounts requested.[252] These judges find that having kept a record of their observations and evaluations makes it much easier and quicker for them to make their fee determinations.

Delegating Fee Determinations to a New Decision Maker

Despite attempts to make the fee taxation process more objective, standard, and routine, fee determinations presently depend to a large extent on subjective assessments. Consequently, although most people we spoke to acknowledged that delegation of parts of attorney fee determinations might be useful in certain circumstances,[253] the consensus was that routine delegation, especially to nonjudicial personnel, is neither efficient nor desirable. An attorney averred that "fee determinations are not a major problem. They can be—and should be—handled by the judicial officer hearing the case."

Relatively few delegations of substantial portions of fee award determinations were reported. In cases where delegations occurred, the case was typically an extraordinary one. For example, in the *"Agent Orange"* litigation, the court hired recent law school graduates and had them review the attorney fee petitions under court-established criteria.[254] In another case, in which the fee request

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252. A similar approach is used by one of the Alaska judges interviewed for this report. See the text following note 155 *supra* for a description of the judge's technique.

The valuation of cases (for fee purposes) has received some systematization in England. Fee scales for various kinds of cases have been developed by the judiciary (i.e., the chief taxing master) in conjunction with the bar. The fee scales serve the same function as does the informal valuation procedure used by some federal judges and magistrates; that is, the schedule rate acts as a starting point, not a final fee figure, for the award determination. *See* discussion in third paragraph of "Guidance to the Clerks" section in ch. 2 *supra*.

The English also use other approaches that have a similar impact in expediting the determination of fee awards. For example, in certain cases (e.g., noncontested divorce cases) solicitors may opt to take a fixed amount for their services rather than apply for an "actual fee" award. *See* text at note 97 *supra*. Also, until recently, fixed time and rate scales were applied to more than one hundred activities and events common in litigation. A recent change in rules reduced the number of items and the scope of their applicability. *See* notes 61-68 and accompanying text *supra*.

253. For a general discussion of delegation in the fees context, see T. E. Willging & N. A. Weeks, *supra* note 10, at 15-20; *see also* A. R. Miller, *supra* note 11, at 234-36, 341-43.

254. The law school graduates were hired, on a temporary basis, as assistant clerks. As the court indicated:

> [Three clerks] worked full-time under the court's direction for more than three months on the fee and expense petitions. With the aid of a senior law clerk familiar with the "Agent Orange" litigation working full-time on fees, they reviewed the petitions using guidelines established by the court. Another law clerk worked full-time on legal and other research connected with the petitions. A member of the Clerk's Office staff devoted a large part

was for several million dollars, the judge reported that he was seriously considering referring the fee matter to a special master.[255]

The subjective element in fee determinations seems to be the crucial factor in the rejection of delegations by judges and magistrates. In fact, we learned that even elbow law clerks are not consulted much on fee determination matters.[256] Whereas even a novice law clerk can be counted on to provide traditional legal research and analysis, law clerks generally do not have the requisite practical experience to make more than the most ministerial contributions to fee determinations, such as conducting a preliminary review of the documents to identify striking instances of duplication or excessive billing.[257] It is not merely judges and magistrates

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> of her time during this three-month period to keeping track of fees petitions and related attorney submissions. Apart, therefore, from the substantial judicial time required to consider fee questions, thousands of court-personnel hours were required for this difficult task.

611 F. Supp. at 1319.

The work of the clerks was closely monitored by the court. *See* note 257 *infra.* Although the court felt obliged to "check and recheck" the clerks' work to ensure accuracy, the court nevertheless was quite favorable in its evaluation of the clerks' involvement.

255. For discussions concerning the possible role of special masters in fee taxations, see A. R. Miller, *supra* note 11, at 341-43; T. E. Willging & N. A. Weeks, *supra* note 10, at 18; *see generally* La Buy v. Howes Leather Co., 352 U.S. 249 (1957); Fed. R. Civ. P. 53. *See also* notes 326-337 and accompanying text *infra.*

Several of the people we spoke to believe that special masters are a viable alternative only in major cases because they must be paid for by the parties. For a discussion of the issues related to special masters' fees, see Levine, *Calculating Fees of Special Masters,* 37 Hastings L.J. 141 (1985).

256. Typically, federal judges and magistrates rely quite extensively on their law clerks to make preliminary determinations and recommendations for a vast array of judicial matters. *See generally* J. B. Oakley & R. S. Thompson, Law Clerks and the Judicial Process: Perceptions of the Qualities & Functions of Law Clerks in American Courts (1981).

257. *See, e.g.,* T. E. Willging & N. A. Weeks, *supra* note 10, at 17: "[A] clerk may lack the experience and intuition to determine which expenditures are acceptable. Annual or biennial turnover of clerks institutionalizes such inexperience." *Cf.* text at notes 158-159 *supra* (Alaska judges do not use law clerks for fee determinations).

Nevertheless, ministerial contributions may be very useful to the court, especially in complex cases. For example, although the temporary clerks hired by the court to assist in the review of petitions in the *"Agent Orange"* litigation, 611 F. Supp. 1296, performed essentially clerical tasks, their legal background and training allowed the court to make extensive and valuable use of them. *See* note 254 *supra.* The advantages of using clerks to screen fee petitions, and the limitations inherent in such delegations, are suggested by the description of the way in which the court used clerks in the *"Agent Orange"* litigation:

> In some respects reviewing the petitions was largely a clerical exercise. Meaningful analysis, however, required a thorough knowledge of the history of this case and of the individual lawyer's work reached through direct observation and evaluation of attorneys by the court over many months. For this reason a two-step process was used. First, a petition was reviewed by one of the assistant clerks. Following guidelines provided by the court,

who have come to this conclusion; the law clerks themselves indicated that they are not nearly as comfortable with being asked to engage in such activities as they are with serving in traditional roles. This was true even for the few law clerks who had participated in numerous fee determinations.

Despite the disinclination of most judges and magistrates to delegate fee matters, we found that a few courts make routine use of nonjudicial personnel. For example, one judge, who routinely delegates aspects of judicial tasks much like she delegated tasks when she was a partner in a major litigation firm, regularly uses a paralegal in the clerk's office to tax fees in routine cases. The judge initially worked closely with this paralegal/clerk, instructing her as to the standards and criteria to employ in reviewing fee petitions. Now very experienced, the clerk can do a significant portion of the taxations, organizing the submissions and making recommendations to the judge. The judge indicated that although she does not always follow the clerk's recommendation, she finds that the clerk's participation greatly expedites her fee determinations.[258]

In other jurisdictions, court clerks regularly review Criminal Justice Act petitions. As has been noted elsewhere, "clerks will generally have the capacity to review the petition and classify the information according to categories assigned by the court (e.g., time spent on functions such as legal research or conferring with cocounsel, and time devoted to specific activities such as conducting depositions or drafting a memorandum in support of a motion for summary judgment)."[259] Several clerks we interviewed made basi-

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> the clerk examined the number of hours claimed and by whom, the type of task for which time was sought and the expenses and accompanying vouchers and receipts. A recommendation was made concerning what hours and expenses were compensable. Using calculating machines furnished by the Clerk of the Court, for each petition the assistant clerks added first the number of hours recommended as compensable and next the amount of expenses recommended as compensable. Second, every petition, supporting documents and all adding machine tapes showing hours and expenses were examined by the court and revised and recomputed when the court, based on its direct involvement in the case, deemed it necessary.

611 F. Supp. at 1319.

258. The practices in England provide several examples of ways in which clerks can effectively serve paralegal-type functions in the fee determination process. *See especially* ch. 2, "Assignment by Rota Clerks" and "Reading the File" sections, *supra; see also* ch. 2, "Nonjudicial Personnel" section, *supra* (describing the use, background, and training of nonjudicial personnel in English fee taxations).

259. T. E. Willging & N. A. Weeks, *supra* note 10, at 16 (footnote omitted); *see also* A. R. Miller, *supra* note 11, at 344-45. The English report similar use of clerks in similar cases. *See generally* cross-references in note 258 *supra.*

cally this same point and argued that they could assist the court in cases other than CJA cases. As they pointed out, clerks typically tax costs;[260] the continuity and standardization the clerks bring to the taxation of costs within their districts, these clerks believe, could be brought to the taxation of fees. This might be especially helpful in districts in which numerous judges each tax fees according to their own practice. However, many of the judges and magistrates we spoke to expressed some concern that such standardization would be contrary to the intent of fee-shifting provisions; thus, they argued, the use of clerks, however efficient, is not desirable. In response, other jurists pointed out that clerks' determinations are reviewable by the court. The problem, of course, is that if challenges to clerks' determinations were frequent, courts would lose much of the advantage they gained by reference in the first place.[261]

Delegation of substantial portions of fee determinations represents the minority practice. In courts in which fee taxations are delegated, they are typically referred to magistrates.[262] Frequently, the magistrate has already had major involvement in the pretrial phases of the case.

Sometimes, however, magistrates are referred a case in which to determine fees when they have had no previous contact with the case. Although one might expect this practice to be held in disfavor because of the importance of subjective factors in making fee decisions, the judges and magistrates involved reported no dissatisfaction. These magistrates tend to see their role as that of "settlement masters," and they generally seem to be successful in this role.[263] Thus, because many of the cases settle, these magistrates infrequently end up making fee determinations; typically, they preside over extrajudicial fee resolution.

Finally, there was support from a minority of the interviewees for the diversion of fee matters for resolution outside the federal courts. Several jurists called for the use of binding arbitration.[264]

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260. Authority for taxation of costs by clerks is found in 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d); *see generally* Bartell, *Taxation of Costs and Awards of Expenses in Federal Court,* 101 F.R.D. 553 (1983).

261. These and other issues are discussed in ch. 5 *infra.*

262. The authority for these referrals comes from 28 U.S.C. § 636 and Fed. R. Civ. P. 53(b). *See* discussion at notes 301-325 and accompanying text *infra.* For a general description of the varieties of roles played by magistrates in the courts, see C. Seron, The Roles of Magistrates: Nine Case Studies (Federal Judicial Center 1985); C. Seron, The Roles of Magistrates in Federal District Courts (Federal Judicial Center 1983).

263. *See, e.g.,* discussion at notes 238-242 *supra* (description of settlement procedures used by two magistrates).

264. One possibility would be to have fee issues decided through court-annexed arbitration. *See generally* D. M. Provine, *supra* note 225, at 44-51.

One judge suggested that it would be worthwhile to contract with a professional arbitration service on an ongoing basis in order to systematize the procedures and ensure a sophisticated group of arbitrators. Another judge recommended working with local bar organizations to develop procedures whereby fee disputes would be referred to panels of attorneys who would hear and decide them. This judge noted that in some jurisdictions panels have already been created that handle resolution of attorney–client fee disputes. Such panels tend to be staffed on a voluntary basis, however, and probably would not be equipped to handle a regular stream of fee matters. Critics of such suggestions further point out that if delegations outside the courts were routinized, some system would have to be established to pay for the services. We were unable to find any extrajudicial programs that presently operate to award attorneys' fees in federal cases; thus, there is only inferential evidence (e.g., from the attorney–client bar association panels) on which to base assessments of the usefulness of referrals outside the courts, and assessments are further limited by the lack of systematic evaluations of such programs.

V. APPLICATIONS FOR FEDERAL COURTS: POLICY CONSIDERATIONS AND POTENTIAL LEGAL CONSTRAINTS

In the three preceding chapters we described the practices and procedures used to tax attorneys' fees in the English, Alaskan, and federal legal systems. While some of the differences among these systems may be attributable to differences in the substantive laws governing (and relating to) fee awards, other differences simply reflect the fact that attorneys' fees can be determined pursuant to a variety of approaches.

The English have created a centralized system in which judicial and nonjudicial specialists share responsibility for determining costs and legal fees in a wide range of cases. They use a high degree of standardization of procedures and formats. Over the years, the taxation of attorneys' fees has evolved into a highly technical and esoteric subspecialty area of law—indeed, an area so specialized, complex, and costly that it has invited severe criticism from the legal profession. On the basis of the English experience, it appears that extensive delegation to nonjudicial personnel reduces judicial involvement to a minimal amount of decision making, and then only in large cases. Paradoxically, despite its complexity, the body of law created by the English courts and administered by the taxing officers is apparently predictable, at least to frequent participants in the system.

In Alaska, judges do their own taxations, without much reliance on outside participation. That which is delegated, such as fee computation, is probably too limited to result in significant time savings. Alaska's judges do not have to rely on delegation, however, to expedite the fee taxation process. Rather, with fee schedules regulating the amount of compensation available, and with fee shifting as an accepted part of Alaskan legal culture, fee taxations do not impose significant burdens on the state's judiciary.

The federal system offers diversity. Fee shifting is a relatively new phenomenon in federal practice, and it has not yet developed into a routinized part of federal litigation. The role that fee awards

play in federal litigation is an emerging, rather than a resolved, matter. Fee taxation practices and procedures vary not only across districts but also sometimes within districts. In addition, federal courts must sometimes tax fees in cases that are so large (with fees running into the millions of dollars) and complex (e.g., *Fine Paper, Continental Illinois, "Agent Orange"*)[265] that creation of case-specific procedures is required.

In this chapter, we identify and discuss three primary issues, and several associated subissues, raised by fee taxation practices in the English, Alaskan, and federal systems. The issues involve the desirability of standardizing fee formats and taxing procedures, the desirability of substituting a new decision maker for the merits decision maker in fee award determinations, and the desirability of centralizing fee determinations. We try to identify the most salient advantages and disadvantages related to each issue, and we discuss some of the policy considerations involved. We also discuss potential legal constraints related to use of substitute decision makers.

We have identified three policy considerations that cut across the issues of standardization, substitution, and centralization and that we believe deserve special attention. The first consideration relates to the *quality of justice* associated with fee determinations. The second relates to the *procedural efficiency* with which fees are determined. The third relates to the *uniformity* of fee decision making.

Different quality-of-justice considerations are embedded in the two major categories of fee-shifting provisions. First, provisions such as the Civil Rights Attorney's Fees Awards Act of 1976 and the allowance of fees in common fund situations are designed to promote access of litigants to courts and to encourage attorneys to accept their cases. Second, provisions such as Federal Rule of Civil Procedure 68 (as interpreted in *Marek v. Chesny*),[266] Federal Rule of Civil Procedure 11, and the bad-faith exception to the American rule are designed to deter unnecessary litigation. Thus, access to justice and the availability of penalties in instances of misuse of the legal system are two of the goals furthered by fee-shifting rules.

The efficacious processing of fee requests is a goal in its own right; an efficient system has special value to the party seeking fees because it reduces the delay in disposition of attorney fee peti-

265. *Legal Times* publishes a monthly summary of the major complex cases in litigation. *E.g., Litigation Monitor,* Legal Times, Apr. 7, 1986, at 11-17. Many of these complex cases consume extensive judicial resources for determination of attorneys' fees by the court.

266. 105 S. Ct. 3012 (1985).

tions. Moreover, creation of an efficient system for reviewing and deciding attorney fee petitions would promote the goals of access to justice and prevention of misuse of the courts. Where the purpose of the fee-shifting statute or rule is to promote access to counsel and access to the courts for all classes of litigants, prompt resolution of fee disputes through more efficient procedures would enhance achievement of those goals.[267] Similarly, where the purpose of the fee-shifting provision is to deter attorneys and parties from engaging in deleterious, vexatious, or otherwise unnecessary practices, efficient fee determination procedures would allow the courts to impose sanctions for these practices promptly, thereby reinforcing the deterrence functions of the provision. Furthermore, to the extent that efficiency and predictability are interrelated, an efficient fee determination system has the advantage of allowing all participants to be reasonably certain of what the courts will do, as well as when they will do it. When parties are clear about what the courts will do, there is an added incentive to settle their disputes without resort to extensive consumption of court resources.

To what extent is it desirable or necessary to achieve uniformity in the fee taxation area? There is some overlap between this policy consideration and the considerations of quality of justice and procedural efficiency. If one believes that quality of justice and procedural efficiency are enhanced by uniformity in fee taxations, then there will be an incentive to choose options that reduce the diversity of procedures across districts and circuits. However, if one believes that quality of justice and procedural efficiency are independent of uniformity, then there will be less concern with procedural diversity. For example, there is a strong argument for the proposition that the quality of justice is best protected through case-by-case determinations, employing procedures that are best adapted to the nature of the individual case. (This argument assumes, of course, that there are individual differences in attorney fee disputes relevant to quality-of-justice issues.) Under this line of reasoning, what is lost in predictability of outcome is more than compensated for by the ability to tailor decision making to the individual case.

We think it is reasonable to presume, however, that uniformity does not necessarily eliminate the ability to adapt decision making to the unique features of an individual case. From a systemwide, case management perspective, uniformity enhances, but does not

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267. *See, e.g.*, Kimble, *Attorney's Fees in Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners*, 69 Marq. L. Rev. 373, 373 (1986) (advocating adoption of streamlined fee-setting procedures to "encourage attorneys to represent [individual] civil rights plaintiffs").

contravene, the quality of justice. It certainly promotes procedural efficiency. We take the position that case-by-case decision making should be limited to those situations in which quality of justice is a consideration. Where the quality of justice is not at stake, we believe that consistency and predictability best serve the judiciary, allowing it to be the most effective from a systemwide point of view. Nevertheless, we are sensitive to the fact that embracing the goal of uniformity can lead one to make certain choices that may not necessarily be desirable: for example, homogenizing the rules of procedure, reducing the number of people who make decisions, or centralizing the decision-making function. We discuss these options below without suggesting that they are superior policy choices.

Should Standard Formats and Procedures Be Developed for Filing and Processing Attorney Fee Petitions?

In many ways, this is the simplest of our three primary questions. Without specifying the court unit that would apply the standard formats and procedures,[268] we have two major concerns: whether their adoption would aid in the decision-making process and whether standardization would enhance the efficiency with which the courts deal with fee petitions.

Adoption of Standardized Formats to Assist in Determination of Compensable Hours

Some advantages of a standard format are evident from the English system. In general, the standard format facilitates structuring the case so that identifiable components of the decision making can be systematically assigned to nonjudicial personnel.[269] Classification of information according to the stage of the case permits clerks or parties to summarize the information in ways that are useful to the court.[270] In common fund cases, standardization

268. The unit could be the judges' chambers, the district court or a geographic subdivision, the districts within a state, the courts in a federal circuit, all district courts, all courts of appeals, or all courts.

269. For example, the requirement that all expenditures be supported by vouchers allows the court to have a clerk verify the disbursements to third parties, removing the issue regarding falsification of requests that might otherwise trouble some courts.

270. *See, e.g., Continental Illinois,* 572 F. Supp. at 934-35 (time records should be submitted to court organized chronologically by activity, not attorney; specific descriptions of activities required); *see also* discussion of the court's order in T. E. Willging, *supra* note 11.

would ease the court's burden in reviewing fee petitions, whether or not some of the reviewing responsibilities were delegated to nonjudicial personnel. Even beyond its advantages for delegation purposes, the routine receipt of information placed in standard formats for all cases allows the decision maker to organize and compare information about reasonable expenditures of time in various types of cases. Standardization also generally serves to separate and focus the decision-making tasks.

The opinions of the federal personnel we interviewed were very favorable toward standardization of formats. In courts that have required standardized formats for fee requests, the results have been positive.[271] The promise of easier review of expended hours, and thus of more efficient determination of compensable hours, has been realized in the few complex cases in which standardized submissions have been required. Several judges and magistrates spoke in favor of standardization in a more general sense, suggesting that it may help to reduce attorneys' overestimates of time expenditures and prevent duplicative requests.

Standardized formats nicely complement contemporaneous record keeping, and they can be effectively incorporated into the procedures of courts that favor early involvement or continuous monitoring.[272] For example, those judges who like to discuss their fee expectations with counsel should find it convenient to refer to a standardized format. For courts that monitor the hours being expended on litigation during the course of the proceedings, a standardized format for fee petitions could facilitate giving specific screening duties to a clerk. In situations in which a problem seemed to be developing, the problem could be brought to the court's attention and the matter confronted before it emerged as a major issue. In ordinary cases the court could be assured, without a judge's involvement, that preliminary monitoring was occurring. Most courts that have opted to monitor attorneys' hours during the proceedings have adopted format requirements. With standardization, courts would receive documents similar in appearance from different firms or practitioners, as is customary in much motions practice.

Standardization is not likely to be a major problem for the bar. Many attorneys who routinely have their fees taxed by the courts have found it to their advantage to standardize their submissions regardless of courts' requirements.[273] Attorneys, at worst, might

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271. Examples of information required in some standard formats are given in the text following note 232 *supra*.

272. *See* notes 249-251 and accompanying text *supra*.

273. *See, e.g.*, J. P. Bennett, *supra* note 9.

experience some transitional start-up difficulties and costs if they do not currently use the particular format selected by the court.

Standardization might even aid the bar in the long run. Not only would it structure the petition of an attorney who might be unorganized or unaware that his or her form of submission was idiosyncratic, it would also expedite both the petitioner's and the opposing party's review of the request. This is particularly relevant for opposing counsel: Instead of having to search through many documents to find objectionable items, counsel would have the data readily available for review.

It is interesting to note that in Alaska standardization of fee request submissions has evolved as the norm without judicial regulation. Virtually all of Alaska's attorneys' billings list the hours and tasks for which a charge is made, and these billings are typically submitted to the court as documentation for a fee request. The federal system is so large and diverse, however, that it is probably unrealistic to expect that convergent practices will develop without intervention from the courts.

Among the disadvantages of a standard format, particularly one adhered to by a single judge, are that it may be expensive for counsel or that conforming submissions to the format may require extraordinary efforts. Even where costs or efforts would not be prohibitive, format requirements might be unnecessarily inconvenient to counsel. Variations in format requirements from chambers to chambers and district to district would compound the difficulties.

Adoption of Standardized Procedures to Assist in Determination of Reasonable Hourly Rates

One procedure—use of rate schedules to determine the value of attorneys' time in a particular district—enhances efficiency because the schedules remove disputable items from the case.[274]

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274. For example, the use of fee schedules for attorney fee awards in Alaska avoids disputes over the appropriate hourly rate to be paid to the prevailing party's attorney. Of course, when the fee schedule does not apply, there may be disputes over the hourly rate to be used in determining the reasonable fee.

The Alaskan experience suggests that to remove as many disputable items from fee determinations as possible, a jurisdiction may want to enact both fee award schedules and hourly-rate schedules. Rate schedules are discussed at notes 246-248 and accompanying text *supra*. An example of a fee award schedule in the federal judicial system is the one used in the Central District of California, which applies only to default judgment cases. A schedule-based award is a function of the amount recovered. The prevailing attorney has the option to petition the court for an award in excess of the schedule-determined award. C.D. Cal. Local R. 14.12.3, reproduced in appendix B.

Schedules reduce both the temptation to object to charges and the need for a judicial officer to resolve that aspect of the case. The benefits of having an individualized evaluation of each attorney's skill level in the context of a given case may be outweighed by the costs, however. For example, the grading process invites disputes because such decisions touch the heart of professional reputation and prestige. But while the creation of rate schedules might initially lead to controversies over the appropriate values to place on lawyers' efforts, the disputes would be limited to the original rule-making process rather than require litigation on a case-by-case basis.

Furthermore, rate schedules systematize and bring into the open a rating practice that appears to occur in private anyway. Both Alaskan and federal decision makers indicated that they carry in their heads a range of acceptable hourly rates. Sometimes this range may merely be the judge's perception of the market. Sometimes the range is developed from evidence on market rates presented as part of individual fee cases. Once established, however, the range seems to be applied routinely: The judges and magistrates we spoke to indicated that they would be very reluctant to approve an hourly rate that exceeded the top of their range, unless the case-specific evidence offered by the petitioning attorney was particularly compelling and extraordinary.

The practice of the federal bench appears to reflect a belief that it is a waste of time to have to "reinvent the wheel" in each case. The practice also suggests a policy: Instead of requiring in every case that petitioning attorneys provide the court with affidavits of their billing practices, affidavits of other attorneys attesting to their billing practices, and whatever other evidence might be deemed probative and relevant,[275] rates could be established yearly (or every other year) by bench–bar committees.[276] Of

275. Particularly wasteful is the practice of having expert witnesses testify on the community's market rate. *See* T. E. Willging & N. A. Weeks, *supra* note 10, at 50; *see also* Laffey v. Northwest Airlines, Inc., 572 F. Supp.. 354, 385 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985) (court refused to compensate for expert testimony of one economist because his testimony did not elucidate any relevant factors).

276. Typical hourly rates for lawyers, presented as a function of years since passing the bar, size of firm, and city size, are compiled by the North Carolina Bar Association. NCBA, Economic Survey 15-20 (1985). In fact, the bar association also collects hourly-rate information for paralegals and law clerks. *Id.* at 21. Although they were not developed to assist the federal courts in making fee determinations, at least one federal court in North Carolina has used the data from the bar association's publication as a starting point for making hourly-rate determinations. Spell v. McDaniel, 616 F. Supp. 1069, 1103-05 (E.D.N.C. 1985).

course, the established rates would have to be sufficiently high to encourage attorneys to participate in the litigation of applicable cases, and they ought not be so high that they provide a windfall to the attorneys in these cases. These factors, however, represent considerations in establishing rates; they do not imply deficiencies in the notion of rate schedules.

Other considerations are also worthy of note. In establishing rate schedules, attention should be paid to differences in attorneys' practice areas, backgrounds, experiences, and status.[277] One could also establish rate bonuses designed to encourage early settlement of cases.[278] Another issue that should possibly be examined is how to create rate structures so that they do not violate antitrust law.[279]

When rate schedules are implemented, a significant part of the court's lodestar determination is easily completed. The judge or magistrate hearing the case needs only to articulate the appropriate factors to a clerk, who can then pinpoint the particular rate on a schedule matrix. The following is an example of a hypothetical schedule matrix, which we developed by drawing on an hourly-rate schedule adopted by Community Legal Services of Philadelphia,

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277. *See, e.g.*, Report of the Third Circuit Task Force, *supra* note 54, at 260-61.

278. *Cf. id.* at 265, where the Third Circuit Task Force recommends applying an upward adjustment to the lodestar in cases in which the petitioning attorney contributes to a prompt resolution of the matter. Such a policy "provid[es] an incentive that neutralizes an attorney's possible predilection to increase the number of hours invested in a case for lodestar purposes." *Id.*

279. There is, of course, little question that a rate schedule promulgated by a court under its rule-making authority is not subject to attack as price-fixing under the Sherman Antitrust Act because it is an act of governmental sovereignty. *See* Bates v. State Bar, 433 U.S. 350, 359-63 (1977); Parker v. Brown, 317 U.S. 341 (1943).

The question of whether a nonjudicially created rate schedule would be a violation of the act, however, still remains open. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (enforcement by state bar association of a minimum-fee schedule established by county bar association for legal services is price-fixing under section 1 of the Sherman act). The Court indicated that an advisory fee schedule would be acceptable. The fee schedule adopted, however, was a "rigid price floor," to be enforced by threat of disciplinary action by the state bar. *Id.* at 781. Such schedules, the Court held, are impermissible. *See also* Arizona v. Maricopa County Medical Ass'n, 457 U.S. 332 (1982), in which the Court held that maximum-fee agreements by members of medical care organizations are price-fixing arrangements in violation of the Sherman act. The Court noted that price-fixing violations occur when there is "a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in difficult cases." *Id.* at 348. The Court added that maximum-fee arrangements "may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character." *Id.*

Pennsylvania, and the structure of Alaska's attorney fee schedule:[280]

Attorney's Hourly Rate in Average Civil Rights Case

Attorney Experience	After Trial	Before Trial	Within 120 Days of Filing
More than 10 years	$180	$160	$125
6–10 years	160	145	115
2–5 years	120	100	80
Less than 2 years	85	75	65
Law student	60	50	35
Paralegal	40	35	30

Schedules containing rate ranges, rather than specific rates, may also be useful, allowing the decision maker to make a determination as to the particular value in the range to apply.[281]

Delegation of parts of—or the entire—fee determination to clerical staff and use of rate schedules, while conceptually separable, are mutually reinforcing. In combination, use of schedules and clerks removes entire issues from consideration by a judicial officer. For example, the clerk could simply apply the rate schedule to the hours allowed. Indeed, over time, schedules could be used to establish an average value for specific items of legal work, as has been done in England.[282]

The disadvantages of rate schedules are similar to the disadvantages that arise with any use of timesaving procedures that target the general at the expense of the individualized.[283] In the course of

280. The schedule of Community Legal Services is reprinted in Report of the Third Circuit Task Force, *supra* note 54, at 260 n.68. Alaska's fee schedule, Alaska Civ. R. 82(a)(1), is reproduced in text at note 121 *supra*. *Cf.* Levine, *Calculating Fees of Special Masters*, 37 Hastings L.J. 141, 180-81 (1985) (suggesting possible use of guidelines, originally promulgated by the U.S. Supreme Court in Newton v. Consolidated Gas Co., 259 U.S. 101 (1922), for determination of special master's fee); *see especially id.* at 180 n.231 (table presenting maximum per diem and hourly rates that might be allowed in setting master's fee).

281. One option would be to break rate ranges into three values: high, average, and low. The decision maker would indicate at which level the attorney (or attorneys) seeking fees should be compensated. This would allow for recognition of differences in representation while retaining the essential elements of the schedule.

282. The English experience also teaches us the costs of too much reliance on schedules: Apparently, the use of minutely detailed scales (e.g., the cost of copying writs on different sizes of paper) was a major contributor to the complexity of the English taxing master system. Nevertheless, having a range of reasonable values for relatively major items (e.g., preparation and filing of a motion to dismiss) could allow schedules to be used to channel, but not preempt, individualized judgments.

283. *See also* the three paragraphs preceding text at note 293 *infra*.

excluding hourly-rate issues from fee disputes, rate schedules screen rate problems from the attention of the district court. To the extent that the courts make policy in deciding cases and in establishing local or national rules of procedure, they will bring to their policy-making less information about the issues of attorneys' fees and costs of litigation.

Should a New Decision Maker Be Substituted for the Judicial Officer Who Hears the Case on the Merits?

A dramatic difference in the English and American systems for determining costs and attorneys' fees is that in England, with few exceptions, the court that heard the dispute on the merits is not responsible for taxation of attorneys' fees. Decision makers who have not participated in the trial are responsible for making judgments about the quality and value of the legal services in the case. In America, the trial judge generally makes the fee award and controls the ultimate decision on attorneys' fees and costs even if some aspects of the calculation are delegated. The question of whether to change from present practices in the United States to a system with any of the major features of the English system (other than simple delegation of certain tasks to a judge's staff), particularly whether to shift decision making away from the trial judge, is a fundamental policy choice, with advantages and disadvantages on either side. The policy choice will be affected, to some extent, by one's view of the nature of fee awards. Especially critical is whether fee awards are seen as a central or ancillary part of litigation.

One view is that fee awards are an integral part of substantive law. A primary rationale underlying most of the fee-shifting statutes, for example, is the belief that a statute is without substance if litigants do not have the means, and the incentives, to pursue their statutory rights.[284] This rationale is not based merely on a desire to endow citizens with the powers of a private attorney general to act in the public interest; it also involves a concern for creating access to the courts to enforce individual claims.[285]

A different perspective is that although the *availability* of fees is a substantive issue, the particular fee *award* is not. Reflecting this view are those who believe that the courts ought not to spend time

284. *See, e.g.,* S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), reprinted in E. R. Larson, *supra* note 6, at 314.

285. *E.g.,* E. R. Larson, *supra* note 6, at 1.

to determine fee awards precisely. Rather, under this perspective, the role of the court is (1) to judge whether fees are available to the prevailing party and then (2) to remove itself from the time-consuming process of fee taxation. By substituting a new fee taxer for the merits decision maker, the courts would free themselves to resolve the substantive differences of other disputants waiting at the courthouse door. The operative principle here is that scarce judicial resources are best not expended determining marginal differences among possible fee awards when such decision making delays the court's ability to make legal judgments for others, particularly since the judgments on fees are more a matter of accounting than a matter of law. The idea of substituting a nonjudicial decision maker for the presiding judge or magistrate in fee determinations is not viable, however, if it can be demonstrated that the right to have fees awarded provides the claimant with specific procedural due process rights to have a judicial officer consider evidence that has been presented under oath, subject to cross-examination, with the matter then being determined according to applicable law.[286]

Although one's view of the nature of attorneys' fees awards does affect one's belief about the desirability of using a special decision maker for fee awards, that view does not control the decision to use one. There are several independent advantages and disadvantages to replacing the merits decision maker with specialists in fee cases.

One advantage of the merits decision maker is accuracy. Presumably, the judicial officer who tried the case has developed insights into the value of the legal services and the intricacies of the litigation that would be lost in a review of a cold documentary record. The trial court's judgment may also tend to be less expensive and more efficient because pleadings and other trial documents will not have to be reviewed again. Finally, to the extent that fee decisions depend on intangible, unquantifiable, subjective assessments, it can be argued that the decision making will naturally be more efficient and of superior quality when done by the person who has a better context in which to make such assessments than someone outside the litigation context.

This argument should not be carried too far, however. In England, many of the primary sources of information about the value and necessity of legal work come not from the trial documents but from the internal memorandums and correspondence files of the solicitor.[287] These documents presumably give some insight into

286. *Cf.* note 181 *supra* (examining whether there is a right to a hearing in fee determinations).

287. Clearly, requiring disclosure of these documents, even if examination is carefully restricted to judicial officers or their designees, would raise serious questions of

the strategies and alternatives considered by the attorneys, indicating in some cases whether trial was even necessary or wise. Moreover, an independent evaluation of the file by someone not directly involved in settlement discussions or the trial may bring a more balanced and objective perspective to the fee decision.

A major reason not to use the trial judge to determine costs and fees is that the nonjudgmental aspects of the task do not demand a judge's talents. Formal proceedings often are unnecessary, and the decision making tends to be mechanical once the court learns the discrete, narrow body of emerging law governing attorneys' fees. Because Article III judges are a scarce resource that should be reserved for work that demands their abilities and experience, the use of magistrates or other court personnel to handle routine attorney fee matters warrants attention, and it is precedented. For example, we learned that it is the custom in certain federal courts to refer the fee determination to a magistrate, regardless of whether the magistrate has been involved in the pretrial phases of the case.[288] As one of the interviewed magistrates noted, the important role for Article III judges (trial and appellate) is to clarify policy issues in a few select cases, not to make individual fee award determinations.

A disadvantage of referring the decision about fees to someone other than the trial judge is that such delegation might weaken the judge's power to control the proceedings and impose appropriate sanctions. This disadvantage is probably ephemeral for two reasons. First, the court retains straightforward options for imposing sanctions under the Federal Rules of Civil Procedure. Second, the court could, in an order authorizing fees, instruct the "delegatee" to impose sanctions in the form of reduced fees. In the English system, the court's order awarding costs can have many variations.[289] Moreover, the court's judgments about the value of the legal services in a particular case could be distilled and communi-

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attorney-client privilege and the privilege against self-incrimination—questions that are beyond the scope of this report. In England, for example, the taxing office carefully guards the confidentiality of documents supporting the bill of costs. Only the bill of costs itself is sent to the paying party.

288. In some jurisdictions, the delegations to magistrates are made on a random-assignment basis. Consequently, even if a magistrate was involved in the pretrial phases of litigation, this assignment policy could result in a different magistrate's determining fees.

289. In England, costs in criminal cases are generally computed by a clerical officer after the court announces its order as to costs. The court may dictate as part of the order whether a routine "uplift" or "downlift" (positive or negative multiplier) should be applied.

cated to the fees decision maker with a minimal time expenditure.[290]

Use of Specialists as the New Decision Makers

The federal judiciary is, "on the whole, a body of generalists";[291] the use of specialists has typically been reserved for particularly complex factual or legal issues. Nevertheless, it is relevant to consider the issue here, especially in light of the English use of specialists in fee taxations.

Specialists might promote efficiency in three major ways, as illustrated by the English taxing master system. First, specialization could routinize the decision-making process and thereby reduce the amount of time spent per case. Second, because specialists do not have to possess all of the skills of Article III judges, and because the skills required for fee determinations are not in scarce supply, specialists would not command the salaries of Article III judges.[292] Finally, specialists would be likely to structure their work so that nonspecialists could perform routine tasks in preparation for the specialists' decision making. Because they would repeat the process frequently, specialists would likely gain both the knowledge and the incentive to identify repetitive tasks and delegate them.

Specialization might promote other values beyond cost efficiency. A small group of specialists is more likely than a large group of generalists to create a system in which decision making is routine and predictable. This in turn would promote autonomy among litigants by giving them the ability to frame their own settlements.

Specialization could have some negative effects. By narrowing the tasks to finite bits, the courts could make the position unpalatable to anyone with wisdom, intelligence, and imagination. The English have addressed this issue by advancing the prestige of the office to that of judicial rank and by recruiting experienced lawyers who, for a variety of reasons, prefer the security of a specialized judicial appointment to the uncertainties and pressures of private law practice. Nonetheless, recruitment of specialists has proven to be difficult, though possible, in that system. Those in the

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290. Such a procedure already exists for the taxation of costs. Typically, costs are assessed by the clerk's office pursuant to the instructions of the court. Thus, if the court decides that certain discretionary costs should not be allowed in the case, that decision is carried out at the clerk's office level, without need for the court to make cost determinations.

291. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113 (1982) (White, J., dissenting).

292. This advantage may be minimal, however, because the ultimate decision maker on fee matters probably will need considerable familiarity with litigation.

position apparently find the work interesting, manageable, and satisfactory; there is little turnover.

Specialization also might make fee decision making so refined as to outpace the interests and ability of the bar to educate themselves in the esoterica of the process. This apparently happened in England, although the problem did not appear to lie in the workings of the taxing office so much as in the nature of the rules enacted to regulate fee taxation. The effect was to create the legal specialty of costs draftsmen, whose function was to prepare the English equivalent of fee petitions. Ultimately the English fee taxation system faced challenges from a legal profession that lost control of one of its primary economic supports. The movement to simplification suggests that it is in the interest of the profession and its clients to prevent the fee award process from becoming too complex. Perhaps participation by lawyers, judges, and other public representatives in the creation of a specialized system in America would avoid the tendency toward complexity.

Finally, specialization in U.S. courts traditionally has been restricted to areas of particular complexity. There is little controversy over whether the taxation of attorneys' fees is complex; clearly, it is not. Rather, the debate focuses on the amount of time consumed by this chore. In complex cases, fee taxation is more time-consuming than in simple cases. In such cases clerical help is clearly helpful.[293]

However, it is another matter again to decide to change the system in order to make fee taxation a specialized process. The issue hinges, at least in part, on the perspective that is adopted toward fee taxation. If fee awards are deemed to be a part of substantive law, that may be reason enough not to treat fee award determinations differently from merits determinations; on the other hand, if fee awards are deemed to be ancillary matters, that may accord more weight to the goal of enhancing the efficiency with which fees are determined. In the latter context, specialization may be an attractive option.

Legal Constraints on Delegation to a New Decision Maker

Delegation of decision making is subject to constitutional constraints. Any schema proposing to delegate judicial functions to those not vested with Article III protections will be closely scrutinized.[294] Fortunately, we do not have to succinctly state the consti-

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293. *See, e.g., "Agent Orange,"* 611 F. Supp. at 1319, discussed in notes 254 and 257 *supra.*

294. Although the language of Article III seemingly is straightforward, and amenable to ready and consistent interpretation, Article III cases decided by the Su-

tutional parameters affecting judicial delegation, nor do we have to reconcile the various strands of Article III law in order to formulate an important conclusion relevant to the delegation of fee matters pursuant to Congress's statutory authority. It seems incontrovertible that—as a matter of law, although perhaps not as a matter of policy—"Congress may populate Article III courts with non-Article III personnel, such as magistrates[,]"[295] given that "the United States Supreme Court (an institution one might assume to be the quintessential guardian of Article III-ness) has, in a line of cases dating back almost to the inception of the country, endorsed congressional authority to imbue non-Article III decisionmakers with adjudicatory capacities."[296]

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preme Court historically have resulted in murky constitutional analyses, in the opinion of several justices. *See, e.g., Northern Pipeline,* 458 U.S. at 90 (Rehnquist, J., concurring) (Article III delegation matters are "an area of constitutional law . . . [characterized by] frequently arcane distinctions and confusing precedents"); *id.* at 93 (White, J., dissenting) ("one of the most confusing and controversial areas of constitutional law"), citing Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962) (plurality opinion of J. Harlan). The Court's approach to Article III issues has been bereft of a unifying theoretical framework agreed upon by a majority of the justices. Note, *Federal Magistrates and the Principles of Article III,* 97 Harv. L. Rev. 1947 (1984) [hereinafter cited as Note, *Federal Magistrates*]; *compare Northern Pipeline,* 458 U.S. at 80-81 (plurality opinion) (evaluate delegation schema in light of "two principles that . . . determin[e] the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers"), *with id.* at 113 (White, J., dissenting) (balance constitutional values against legislative responsibilities).

Thus, it is difficult to predict the kinds of decision-making delegations that would be deemed constitutional and the kinds that would not. Nevertheless, the Article III cases decided by the Court suggest that it is constitutional to grant certain non-Article III judicial officers judgelike powers under certain conditions. According to one commentator, the Court's analyses in *Northern Pipeline* and Thomas v. Union Carbide Agricultural Prods. Co., 105 S. Ct. 3325 (1985), seem to indicate "that there is a 'core' of federal jurisdiction which in some instances Congress may not delegate to [non-Article III decision makers]." Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates,* 52 U. Chi. L. Rev. 1032, 1041 (1985) [hereinafter cited as Comment, *Boundaries of Article III*].

Whether attorney fee matters could be completely delegated, particularly to decision makers other than magistrates, probably depends in part on whether fee awards are deemed to be integral to the merits of a case or collateral matters; if fees are held to be integral, then they are more likely to fall within the "core" that cannot be delegated, except according to accepted delegation practices. *See* note 298 *infra.* A detailed analysis of the delegation doctrine is beyond the scope of this report. For examinations of Article III issues in the wake of recent congressional attempts to empower non-Article III personnel with judgelike authority under the Bankruptcy Reform Act and the Federal Magistrate Act, see especially Resnik, *The Mythic Meaning of Article III Courts,* 56 U. Colo. L. Rev. 581 (1985); Comment, *Boundaries of Article III, supra;* Note, *Federal Magistrates, supra;* Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act,* 80 Colum. L. Rev. 560 (1980); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View,* 88 Yale L.J. 1023 (1979).

295. Resnik, *supra* note 294, at 587.

296. *Id.* at 583 (footnote omitted). *See, e.g.,* the Court's most recent treatment of the issue in Thomas v. Arn, 106 S. Ct. 466 (1985) (district court is not required by

In light of the Supreme Court's acquiescence to the power of non-Article III personnel to make constitutionally sensitive determinations,[297] it is unsurprising that, pursuant to congressional delegation of decision-making powers to magistrates, bankruptcy judges, and administrative law judges, these persons have been involved in the taxation of attorneys' fees. Given the Court's precedents, it is unlikely that the Court would disapprove of these officials' taxing fees, particularly so long as fee determinations are subject to district court review.[298]

The Court's opinion in *Mathews v. Weber*[299] would seem to support the proposition that magistrates have the statutory authority to participate in fee taxations. In *Mathews,* the Court indicated that it was sympathetic to the intent of Congress to help ease the workload of federal judges. Congress attempted to assist the bench by authorizing the use of magistrates to help reduce the amount of time that judges need to devote to procedural portions of their caseloads. Magistrates' participation in the procedural portions of cases was designed to free Article III judges to try cases. In fact, the Court noted that "Congress had a number of precedents for [the magistrate] before it: *British masters,* justices of peace, and magistrates; our own traditional special masters in equity; and pretrial examiners."[300]

Although the Supreme Court has never specifically addressed whether magistrates may tax attorneys' fees, no federal court has held that their participation in fee matters violates statutory or constitutional (i.e., Article III) provisions.[301] However, since delega-

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Article III automatically to review magistrate's legal and factual determinations, even where circuit provides for waiver of appellate review in instances in which no objections are filed to magistrate's report, because district court is not precluded from undertaking review sua sponte).

297. *E.g., Thomas,* 106 S. Ct. 466; United States v. Raddatz, 447 U.S. 667 (1980) (no Article III violation where magistrate's recommendation that criminal defendant's motion for suppression of evidence be denied was adopted by trial judge without hearing witnesses' testimony, even though magistrate's recommendation was based on his assessment of witnesses' credibility).

298. So long as the district court maintained its review capacity, delegations of fee award determinations would not likely deprive Article III judges of the "essential attributes" of judicial power that they must maintain. *See* Crowell v. Benson, 285 U.S. 22, 51 (1932) ("there is no requirement that, in order to maintain the "essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by [Article III] judges."); *see also Northern Pipeline,* 458 U.S. at 78-81 (plurality opinion); *Raddatz,* 447 U.S. at 681-83; Mathews v. Weber, 423 U.S. 261, 271 (1976).

299. 423 U.S. 261 (1976) (holding that Magistrates Act permits district court to direct magistrate to make preliminary report and recommendation in all Social Security benefit cases).

300. *Id.* at 268 (emphasis added).

301. Cases decided since the Magistrate Act of 1979 discuss the scope of magistrates' power, not its existence. *See, e.g.,* Gleason v. Secretary of Health & Human

tions under different provisions of section 636 of the Magistrate Act[302] grant magistrates varying powers, it is important for a court to identify the subsection of the act under which the magistrate is assuming jurisdiction.[303]

Under section 636(b)(1)(A), for example, a matter involving attorneys' fees awarded as part of discovery- or motion-abuse sanctions may be referred to a magistrate.[304] Under this subsection, a magistrate is empowered to make both the legal determination as to whether the law allows a pretrial sanction and the factual determination as to the amount of fees to be awarded. The parties do not have the right to decide whether they want the magistrate to participate in pretrial matters. A party may request the district court judge's consideration of the magistrate's determination; however, the judge is limited to reviewing the magistrate's decision under the "clearly erroneous or contrary to law" standard.[305]

Pursuant to section 636(b)(1)(B), the district court judge may request that the magistrate conduct a fact-finding hearing on certain pretrial matters[306] or on any motion made to the court. When a referral is made under this subsection, the magistrate must prepare findings of fact and make recommendations for the disposition of the motion. Any party may object to the magistrate's proposed findings and recommendations; upon doing so, the judge is required

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Servs., 777 F.2d 1324 (8th Cir. 1985); Kreimes v. Department of Treasury, 764 F.2d 1186 (6th Cir. 1985); Yates v. Mobile County Personnel Bd., 719 F.2d 1530 (11th Cir. 1983); Merritt v. International Bhd. of Boilermakers, 649 F.2d 1013 (5th Cir. 1981); Cullins v. Heckler, 108 F.R.D. 172 (S.D.N.Y. 1985); West v. Redman, 530 F. Supp. 546 (D. Del. 1982); Jones v. Federated Dep't Stores, 527 F. Supp. 912 (S.D. Ohio 1981). Cases decided prior to the 1979 amendments to the Magistrate Act also support the use of magistrates in fee taxation situations. *See, e.g.,* Foster v. Gloucester County Bd. of Chosen Freeholders, 465 F. Supp. 293, 295-96 (D.N.J. 1978); White v. Crowell, 434 F. Supp. 1119 (W.D. Tenn. 1977).

302. 28 U.S.C. § 636 (1982).

303. *See, e.g., West,* 530 F. Supp. 546, discussed at notes 320-325 and accompanying text *infra.*

304. Section 636(b)(1)(A) provides that "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court."

305. § 636(b)(1)(A). If the sanctions imposed by the magistrate also include dismissal, however, the magistrate's authority extends only so far as making a recommendation to the judge under section 636(b)(1)(B). Section 636(b)(1)(A) prohibits a magistrate from involuntarily dismissing an action.

306. Under section 636(b)(1)(B), certain dispositive pretrial matters, which may not be referred under section 636(b)(1)(A), may be referred to the magistrate for purposes of preparing proposed findings of fact and recommendations for disposition. In the civil area, these matters include motions "for injunctive relief, for judgment on the pleadings, for summary judgment, . . . to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action." § 636(b)(1)(A). The standard under which the judge reviews the proposed findings and recommendations is much broader under section 636(b)(1)(B) (de novo determination) than under section 636(b)(1)(A) (clearly erroneous or contrary to law).

to make a de novo determination of the parts of the magistrate's opinion that are objected to.[307]

Under section 636(b)(2), a magistrate may be appointed to serve as a special master in two circumstances. Upon the consent of the parties, a magistrate may be appointed without regard to the exceptional-conditions limitation of Federal Rule of Civil Procedure 53(b).[308] However, if the parties do not so consent, a magistrate may still be appointed so long as exceptional conditions exist. In both circumstances, the district court may review exceptions to the magistrate's factual findings under the "clearly erroneous" standard,[309] unless the parties stipulate that the magistrate's findings of fact are to be accepted as final.[310]

Section 636(b)(3) authorizes the court to assign a magistrate "such additional duties as are not inconsistent with the Constitution and laws of the United States."[311] The functions assignable under this subsection have been the subject of debate. Some circuits have held that the intent of Congress in enacting this subsection was to grant district judges wide latitude in their references,[312] whereas other circuits have construed the provision in a much narrower fashion.[313] The subsection is silent as to the applicable review standard. Most jurisdictions seem to agree that a magistrate's determination under this subsection is subject to a de novo determination,[314] although a few appellate decisions have indicated that a more restrictive standard of review is appropriate.[315]

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307. The judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." § 636(b)(1)(B).

308. Rule 53 is discussed at notes 327-334 and accompanying text *infra*.

309. Fed. R. Civ. P. 53(e)(2).

310. Fed. R. Civ. P. 53(e)(4).

311. § 636(b)(3).

312. *See, e.g.,* United States v. Peacock, 761 F.2d 1313, 1317 (9th Cir. 1985) (magistrate designated to conduct voir dire and preside over jury selection in criminal case despite timely objection by defendant), and cases cited therein.

313. *See, e.g.,* Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952, 955 (6th Cir. 1985) ("subsection applies only to procedural and administrative matters. . . . [T]o permit non-consensual references . . . would be anomalous and contrary to fundamental precepts of statutory construction and the legislative history of the Magistrate's Act."), and cases cited therein; *see also* Harding v. Kurco, Inc., 603 F.2d 813, 814 (10th Cir. 1979) (per curiam) (magistrate's entry of final judgment pursuant to section 636(b)(3) consensual reference not a "final decision" directly appealable to court of appeals; district court retains supervisory responsibilities for magistrate's determinations), and cases cited therein.

314. *E.g., Peacock,* 761 F.2d at 1318; Coolidge v. Schooner Cal., 637 F.2d 1321, 1324-27 (9th Cir.), *cert. denied,* 451 U.S. 1020 (1981); Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352, 355 (5th Cir. 1980).

315. *See, e.g.,* DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 503, 508-09 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976) (district court had found that the consensual reference was authorized under the "such additional duties" provision of the Magistrate Act; appellate court held that appropriate standard of review is "clearly erroneous" standard).

Under section 636(c)(1), the parties may consent to a magistrate's presiding over any part of a civil case or the entire proceeding. If the parties consent to the magistrate's hearing the entire matter, the magistrate is authorized to enter final judgment in the case.[316] Appeals then may be taken directly to the appropriate circuit court.[317] However, the parties may agree to have the case heard on appeal by the district court.[318] In either circumstance, the review standard is the "clearly erroneous" standard applicable to review of any factual findings made by the court in a nonjury trial.[319]

Given the differences in the standards of review applicable to magistrates' decisions, the provision of the Magistrate Act under which an attorney fee award determination is referred can be particularly important. Illustrative of the possible implications is the issue confronting the court in *West v. Redman.*[320] In *West,* the plaintiff's request for interim attorneys' fees was referred by the court to a magistrate for determination. The magistrate granted an interim award, and the defendants made timely objection to the magistrate's order. The court observed that whether the attorney fee matter had been delegated under section 636(b)(1)(A) or under section 636(b)(1)(B) would determine, respectively, whether the magistrate's decision was reviewable under the "clearly erroneous" standard or whether the matter could receive a de novo determination.[321] The court's conclusion was that the fee matter was delegated pursuant to section 636(b)(1)(B).[322] The court reasoned that because fee determinations are integral to the merits of an action and not collateral,[323] the reference to the magistrate was more like a reference for determination of a dispositive matter (§ 636(b)(1)(B)) than for determination of a pretrial matter (§ 636(b)(1)(A)).[324] The court's decision allowed the district judge to undertake a de novo review of the magistrate's fee award; the consequence was that the court ruled that the 10 percent quality enhancement to the attorney fee award granted by the magistrate should be eliminated.[325]

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316. Without such consent, only the district judge may enter judgment under Fed. R. Civ. P. 54.
317. § 636(c)(3).
318. § 636(c)(4).
319. Fed. R. Civ. P. 52(a).
320. 530 F. Supp. 546 (D. Del. 1982).
321. *Id.* at 547.
322. *Id.* at 548.
323. *Id.,* citing Croker v. Boeing, 662 F.2d 975, 983 (3d Cir. 1981) (en banc).
324. 530 F. Supp. at 547-48.
325. *Id.* at 548-50.

The authority to delegate decision-making functions absent an explicit congressional provision (such as exists under the Magistrate Act) is not a well-developed area of law. Nonetheless, a review of the case law indicates that decision-making functions may be delegated subject to certain restrictions and limitations.

Under the authority[326] of Rule 53 of the Federal Rules of Civil Procedure, a special master may be appointed to assist the court in a variety of ways, including the taxation of attorneys' fees.[327] Special masters may be appointed, even without the consent of the parties, so long as there is a showing of exceptional conditions that require the appointment.[328] A magistrate may be appointed to

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326. *See* 28 U.S.C. § 2072 (1982); *see generally* W. R. Brown, Federal Rulemaking: Problems and Possibilities (Federal Judicial Center 1981); Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

327. Among the functions that a master may serve are that of "a referee, an auditor, an examiner, [or] an assessor." Fed. R. Civ. P. 53(a). *See generally* W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983); Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 Am. B. Found. Research J. 143; Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. Chi. L. Rev. 394 (1986); Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452 (1958); Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C.D. L. Rev. 753 (1984); Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. Tol. L. Rev. 419 (1979); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297 (1975); Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779 (1975).

328. Fed. R. Civ. P. 53(b) provides:

> A reference to a master shall be the exception and not the rule. . . . in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

See La Buy v. Howes Leather Co., 352 U.S. 249 (1957). Note that appointments for purposes of accounting and for difficult damages computations are also exempted under rule 53(b). *See generally* C. A. Wright & A. R. Miller, Federal Practice and Procedure: Civil § 2605 (Supp. 1985); Note, *Masters and Magistrates in the Federal Courts*, *supra* note 327, at 794-96, and cases cited therein.

The courts have not yet addressed whether the fee taxation function is sufficiently comparable to matters of accounting and computation to warrant an exception for appointment of masters in fee cases. However, descriptions of accounting and computing tasks appear very similar to descriptions of fee taxations. *See, e.g.*, Kaufman, *supra* note 327, at 457:

> Generally, an accounting involves a mechanical application of general investigatory and accounting principles and is often required under circumstances where much exploratory work in the books and records is essential. To impose this duty on the court would result in a severe drain on limited judicial man-hours which could be more profitably exploited in other avenues of judicial endeavor. No peculiar judicial talent or insight is required and errors in accounting lend themselves to detection and correction on review by the court.

serve as a special master, upon the consent of the parties, without regard to the exceptional-conditions limitation.[329] The powers of the special master may be fashioned as broadly or as narrowly as the district court wishes to make them by specifying the master's powers in the order of reference.[330] The master must submit a report to the district court; it is in the court's discretion whether to require that the report include findings of fact and conclusions of law.[331] The master's factual findings are subject to review by the district court under the "clearly erroneous" standard,[332] unless the parties stipulate that the master's findings of fact shall be final.[333] The master's conclusions of law, like a district court's conclusions of law, are fully reviewable.[334]

Special masters may also be appointed pursuant to the inherent authority of the judiciary.[335] Delegations made under the court's inherent authority are not restricted by the exceptional-circumstances limitation of rule 53(b).[336] Indeed, the Court in *Peterson* indicated that appointments of masters to assist the district court with specific judicial duties, such as matters of accounting and computation, are highly desirable.[337] Nevertheless, there is no question but that such delegations may be made only for specific functions, with the authority for final judicial determinations being retained by the district court.

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329. *See* Fed. R. Civ. P. 53(b), quoted in note 328 *supra*.

330. Fed. R. Civ. P. 53(c). *See generally* Turner v. Orr, 722 F.2d 661 (11th Cir. 1984), *aff'd after remand*, 759 F.2d 817 (1985); Silberman, *supra* note 327, at 1331-32.

331. Fed. R. Civ. P. 53(e)(1).

332. Fed. R. Civ. P. 53(e)(2). Despite the apparently clear language of rule 53(e)(2), some commentators note that the court nevertheless retains considerable authority to deviate from the master's findings of fact. *See, e.g.*, Silberman, *supra* note 327, at 1330. Professor Silberman's position is based on her reliance on other language found in rule 53(e)(2) that permits the court, pursuant to timely objection to the magistrate's report, to "adopt the report or . . . modify it or . . . reject it in whole or in part or . . . receive further evidence or . . . recommit it with instructions." Fed. R. Civ. P. 53(e)(2).

333. Fed. R. Civ. P. 53(e)(4).

334. *See DeCosta*, 520 F.2d at 508-09; *see also* Silberman, *supra* note 327, at 1356-57 n.350 (although the precursor of rule 53, equity rule 61½, provided that a master's determination of law was to be presumed correct, the present rule allows the court to disregard the master's legal determination).

335. *Ex parte* Peterson, 253 U.S. 300 (1920).

336. *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982) (rule 53 does not restrict the court's inherent authority to appoint special masters); *see also* cases and authorities cited *id.* at 1161 n.240.

337. In such circumstances, "it is the better practice to refer the matter to a special master than for the judge to undertake or perform the task himself." *Ex parte* Peterson, 253 U.S. at 313. *See also* Kaufman, *supra* note 327, at 457 (quoted in note 328 *supra*). Rule 53(b) specifically exempts accounting and computation functions from the exceptional-circumstances restriction on appointment of special masters. *See* note 328 *supra*.

In sum, there are three sources of authority—congressional, rule-based, and inherent judicial—that support and restrict the delegation of fee taxation functions. These sources form the backdrop for an understanding of the legal justifications for and constraints on the involvement of non-Article III personnel in taxing fees in district courts.

Policy Considerations Regarding Delegation

Even in the most conservative appraisal of those constraints, however, delegation of initial decision making to magistrates and special masters is likely to be permitted. The appellate courts generally have been sympathetic to delegation schemes that provide for the district court judge to retain supervision of the delegatee and maintain the judge as ultimately responsible for decision making.[338]

In many ways, delegation of initial decision making to magistrates and masters is the functional equivalent of the use of taxing masters in England because the taxing masters' decisions are always appealable to a judge. Furthermore, delegation of non-decision-making tasks such as examination of supporting documents and preparation of the case for decision, tasks done by experienced civil servants in England, is permitted without question. Deputy clerks and law clerks routinely serve such functions for district judges and magistrates.

Advantages to delegation revolve around the fact that it is designed to achieve the same economies in the decision-making process as is specialization. The earlier discussion of the advantages and disadvantages of specialization need not be repeated here; the assumption is that a pyramidal structure, with the lowest-cost employees at the base doing the most work, is efficient as well as economical.

The principal objection to delegation of fee decision making to nonjudicial personnel is that the process of delegation will convert the issues into compartmentalized computations that fail to take into account either the overall values of the justice system or the needs or reactions of individual actors in the system. For example, under a mechanical, delegated system, it may be difficult for the judge to obtain information that a level of compensation in a given case provided disincentives or inadequate incentives for the lawyers to continue to be involved in that type of litigation. Separation

338. *See* cases cited in note 298 *supra; see also* Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537, 544-46 (9th Cir. 1984); Wharton-Thomas v. United States, 721 F.2d 922, 927 (3d Cir. 1983); *Harding,* 603 F.2d at 814; *DeCosta,* 520 F.2d at 503-06.

of the decision maker from the parties and the trial facts (as opposed to summaries of those facts) may reduce the amount and quality of information that judges have available for deciding whether statutory or common-law objectives are being reached.

Similarly, the judge in a system with a large amount of delegation may be unable to respond to individual factors in a fee petition because the process of collecting aggregate information submerges the subjective factors. For example, if the form of assessment of contingency factors for risk does not include a specific question on risk, a judge may be unaware of specific financial hardships imposed on the lawyer as a result of his or her undertaking a lengthy trial.[339] Controlled delegation to clerks with little or no legal experience tends to emphasize the objective aspects of the task at the expense of ignoring more subjective factors. Delegation to masters and magistrates does not necessarily share this weakness.

Should Taxation of Attorneys' Fees Be Centralized?

As was emphasized in chapter 2 (describing the English taxing master system), a hallmark of the English system is its apparent predictability and uniformity of outcome. A major factor in England's promotion of the values of certainty and uniformity is the centralization of the taxation function in a single office in London, the Supreme Court Taxing Office. Regular meetings, formal and informal, among taxing masters are purposeful efforts to establish uniform treatment of similar issues. In addition, nonjudicial staff receive formal and informal communications about policy decisions; they also meet with each other to discuss common problems. National standards emanate from the Supreme Court Taxing Office to taxing officers in other areas, whose decisions are subject to review by the central taxing office.

In the Alaskan courts and the federal courts, attorney fee taxations are highly decentralized. Separate decisions about procedures are made in each chambers. Nevertheless, in Alaskan courts, there is relative homogeneity of practice and outcome despite the absence of administrative centralization. Part of this consistency may be due to the informal practices of Alaska's judges. Within districts, superior court judges meet to discuss their taxation practices. In one district, judges discuss acceptable rate ranges to promote consistency in their hourly-rate determinations.

339. *See* T. E. Willging & N. A. Weeks, *supra* note 10, at 54.

In the federal courts, attorney fee matters are not dealt with at a central administrative level, nor are they usually discussed in districtwide meetings, as they are by judges in Alaska. Districtwide local rules frequently are too general to give meaningful guidance to the bar. Circuit court and Supreme Court rulings do shape a general uniformity of approach on substantive law and set minimum procedural mandates, but case management approaches vary from judge to judge. It is not surprising, therefore, that federal taxation practices are quite diverse.

If uniformity of fee taxations is indeed desirable, the English experience teaches us that centralization of fee taxations is one of the most effective means that could be used to achieve it. Centralization could occur at the district, statewide, multidistrict, circuit, or national level. Centralization at any level would promote uniformity.

Uniformity and predictability should be distinguished, however. For example, predictability of outcomes at a local level could be achieved without uniformity on a national level. The practice of the Alaskan judges in one district who meet to discuss rate ranges illustrates an attempt to develop predictability on a small scale that does not require participation by others in the system or take decision-making responsibilities away from the trial court. Predictability of rate allowances appears to be high in this Alaskan jurisdiction, and it was achieved without formal encroachment on judicial discretion and without resort to rule changes.

Uniformity of outcomes for markedly dissimilar fee cases, of course, is a disadvantage. Uniformity in the face of regional variations in fees and costs creates problems of unfairness. An undesired consequence might be a reluctance of attorneys to accept certain types of cases that cost too much to pursue in light of the fixed (yet predictable) return. National uniformity might be achieved at the price of alienating the legal profession and creating massive unrest relating to loss of local control over the process. Separate rate schedules or individualized decision making might be required as a remedy for any regional disparities.

Assuming that centralization is seen as a desirable means to achieve uniformity, centralization at the circuit or statewide level may have more merit than centralization at the national level. A major disadvantage of centralization at the national level would be the creation of a major bureaucracy. The sheer volume of the task would require large numbers of clerks and decision makers, dwarfing the staff of forty-five to fifty in the English Supreme Court Taxing Office. The disadvantages of centralization at the national

level seem especially weighty. The countervailing advantages seem minimal.

Centralization at the circuit and statewide levels has many of the same disadvantages. At the circuit level, significant regional differences in costs exist, albeit fewer than at the national level. The values of autonomy and local involvement in the decision-making process would be affected but, again, probably less than in a national system. An advantage is that the size of an office at the circuit or statewide level would likely be small enough to foster uniformity and predictability. Another advantage of centralization at either the circuit or the statewide level is that there would be few, if any, variations in the law governing attorneys' fees. Thus, both uniformity and predictability would be enhanced under such a centralization scheme.

One consideration involved in creating a system at the circuit or statewide level is that the structure would not fit into any existing governing structure (unless it were to be created at the court of appeals level). Independence from existing judicial structures could present advantages or disadvantages that are difficult to identify in advance because there presently are few models to examine.

Centralization at the district level has many of the advantages of centralization at the circuit and statewide levels and fewer of the disadvantages. Local control and involvement would be maximized. In many districts the caseload might be sufficient to support a modest level of staffing, while in others the caseload might not warrant more than a single specialist and clerk. Simplicity of adoption is an advantage of centralization at the district level because district judges have rule-making and administrative powers.[340] Districts might adopt a taxation system by local rule, under existing authority and using existing resources. Magistrates and clerks could easily be assigned to a new office designed to prepare reports and recommendations on attorney fee petitions.

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340. Many districts have already adopted local rules to assist courts in the management and administration of attorney fee petitions. These rules cover several aspects of fee taxation, ranging from fee application deadlines, *see, e.g.*, S.D. Fla. Local R. 10F, to procedural requirements, *see, e.g.*, D.D.C. Local R. 215; M.D.N.C. Local R. 210; W.D. Tex. Local R. 300-10, to the nature of the information that must be included in an attorney fee request, *see, e.g.*, E.D. La. Local R. 21.16; D. Md. Local R. 23A. Each of these local rules is set out in appendix B, which also contains a list of local rules that relate to the taxation of attorneys' fees.

CONCLUSION

We refrain from concluding with concrete recommendations. The considerations are too many, are too interdependent, and involve too many competing interests to enable us to suggest simple policy choices. The descriptions of the fee taxation practices used in the English, Alaskan, and federal legal systems should provide interested decision makers and policymakers with numerous possibilities from which to fashion fee taxation schemata.

As more courts adopt specific fee taxation procedures, we recommend that they conduct formal evaluations to assess them. Before conducting such evaluations, however, there needs to be serious consideration of the assessment criteria to use. We have identified several general criteria in this report: Quality of justice, uniformity of fee awards, procedural efficiency, bench and bar satisfaction, costs of the program, and overall fairness seem particularly relevant. Reflection on the most useful criteria is likely to identify other factors as well.

The history of the federal judiciary has been that in the face of stresses on the system, courts have created solutions, whether preprogrammed or ad hoc. From our discussions with members of the federal judiciary, it seems that attorney fee requests are starting to become a stress on the system. We are confident that the judiciary can temper—through careful consideration, development, and implementation of fee taxation schemata—any strain that fee decision making imposes. The lessons that can be learned from the English and Alaskan experiences will increase the likelihood that the federal judiciary will cope successfully with its caseload of attorney fee awards.

APPENDIX A
Attorney Fee Awards in Social Security Cases

Attorney Fee Awards in Social Security Cases[341]

Taxation of attorneys' fees in Social Security cases is noteworthy both because of the large number of cases in which fee awards are made and because of the organizational structure that has evolved to handle the administration of attorney fee awards. The Social Security Administration (SSA) has developed a multitiered system for the processing of Social Security claims; in fact, it has "creat[ed] the largest system of administrative adjudication in the Western world."[342]

In fiscal year 1985, more than 5.7 million SSA claims were made.[343] Claimants who have been unsuccessful in obtaining benefits from the SSA are entitled to have their cases reviewed by a district court. During 1985, there were more than 18,000 case filings in federal courts under the Social Security laws.[344]

Benefit claims are initially presented to a service representative in an SSA district office. If there is a denial of benefits at this stage, the claimant must request reconsideration by another representative from the office. If the reconsideration does not result in an award of benefits, the next stage is a hearing before an administrative law judge. Appeal of the judge's decision is taken to the SSA's Appeals Council. Thereafter, action may be initiated in the district courts for review of the council's determination.[345]

At any stage, a claimant may appoint a representative to assist in processing the claim. The representative often is, but does not have to be, an attorney.[346] Before a representative may collect a fee for services from a claimant, the fee must be approved by the Social Security Administration.[347] If the case proceeds to the dis-

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341. The information reported in this appendix was obtained through telephone interviews and correspondence with several administrative and judicial officials from the Social Security Administration, as well as with attorneys who regularly litigate Social Security cases. Their assistance is gratefully acknowledged.

342. L. Liebman, Disability Appeals in Social Security Programs 1 (Federal Judicial Center 1985).

343. Social Security Office of Research and Statistics, Central Office, Baltimore, Md.

344. Administrative Office of the U.S. Courts, Statistical Analysis and Reports Division, Federal Judicial Workload Statistics A-13 (Dec. 31, 1985).

345. *See, e.g.*, 20 C.F.R. § 404.900(a) (1985).

346. 42 U.S.C. § 406(a) (1982); *see, e.g.*, 20 C.F.R. § 404.1705 (1985).

347. 42 U.S.C. § 406(a) (1982) (secretary shall fix a reasonable attorney's fee to compensate for legal services performed); *see* 20 C.F.R. § 404.1720 (1985); 20 C.F.R. § 410.686 (1985); 20 C.F.R. § 416.1520 (1985).

trict court, and the court finds in favor of the claimant, then the court may determine the fee to be granted for representation at the district court level.[348] Court-awarded fees may not exceed 25 percent of the claimant's past-due benefits, but fees authorized by the SSA are not restricted by the fee cap.

In cases other than those decided in favor of the claimant by the district court, the fee award is determined by an official from the Social Security Administration. The specific person authorized to set the fee depends on several factors, such as the type of claim, the level at which the claim was resolved, and the amount of fees to be awarded.[349]

If services are concluded below the hearing level, the Office of Retirement and Survivors Insurance (ORSI), Adjudicative Policy and Appeals Branch, has jurisdiction to set the attorney's fee. However, the ORSI delegates the fee award decision to a lower level office in the SSA's hierarchy in most cases (depending on the type of claim involved and on the amount of fees to be awarded). These lower level offices include area program service centers, the Office of Disability Operations, and the International Program Service Center. The ORSI becomes directly involved with authorizing fees if the fee setter determines that the fee should be for more than $3,000.

If services are concluded at the hearing level or above, the Office of Hearings and Appeals (OHA) has jurisdiction to set the attorney's fee. In fact, an OHA official probably determines 95 percent of attorneys' fees. Administrative law judges determine most attorney fee awards. In cases in which the administrative law judge believes the attorney should receive more than $3,000 in compensation, the award must be authorized by a regional chief administrative law judge. The Attorney Fee Branch of the OHA determines the fee in cases concluded at the Appeals Council level and in cases remanded to an administrative law judge after a district court proceeding.

Criteria considered in setting an attorney's fee are the same for all SSA officials. The goal is to award a reasonable attorney's fee.[350] In determining the fee, the agency official must take into

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348. 42 U.S.C. § 406(b) (1982); *but see* Webb v. Richardson, 472 F.2d 529, 536 (6th Cir. 1972) (holding that "the tribunal that ultimately upholds the claim for benefits is the only tribunal that can approve and certify payment of an attorney fee").

349. A major evaluation of attorney fee award determinations in SSA cases was recently conducted by the Office of the Inspector General, Department of Health and Human Services, Office of the Secretary. The inspector general's report is expected to be issued in the near future. Office of the Inspector General, DHHS, Improvements Needed in Attorney Fee Approval Process Could Save Beneficiaries Millions (forthcoming).

350. *See* 42 U.S.C. § 406(a) (1982).

account the particular purpose of the Social Security program involved. For example, fee petitions related to disability claims are considered in light of the purpose of the disability programs, which are designed "to provide a measure of economic security for the beneficiaries."[351] In addition to considerations related to the purpose of the SSA program involved, *Johnson*-type factors are used.[352] Thus, while the amount of benefits affects the attorney's fee,[353] it is only one of seven factors to be considered. Fee awards are determined in light of—

> (i) The extent and type of services the representative performed;
>
> (ii) The complexity of the case;
>
> (iii) The level of skill and competence required of the representative in giving the services;
>
> (iv) The amount of time the representative spent on the case;
>
> (v) The results the representative achieved;
>
> (vi) The level of review to which the claim was taken and the level of the review at which the representative [began his or her representation]; and
>
> (vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.[354]

Fee awards are not considered to be an initial determination of the agency, subject to administrative and judicial review.[355] Nevertheless, the SSA allows one review of the fee determination. This review is conducted by an official of the administration who did not participate in the initial fee decision. While there are detailed rules that identify the type of official who will conduct the review under particular circumstances, typically this person is at one level higher than the level of the person who made the fee award. This second determination is not subject to further review.[356]

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351. 20 C.F.R. § 404.1725(b)(1) (1985).

352. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); *see* discussion at note 170 *supra*.

353. 20 C.F.R. § 404.1725(b)(2) (1985).

354. 20 C.F.R. § 404.1725(b)(1) (1985).

355. *Compare* 20 C.F.R. § 404.902 (1985) (actions that are initial determinations) *with* 20 C.F.R. § 404.903 (actions that are not initial determinations).

356. *See, e.g.*, 20 C.F.R. § 404.1720(d)(1) (1985).

APPENDIX B
List of Local Rules Related to Attorney Fee Taxation and Selected Examples from Eight Districts

List of Local Rules
Related to Attorney Fee Taxation

District	Local Rule	Title
M.D. Alabama	19	Recovery of Taxable Costs
	20	Attorney's Fees
	21	Fees Under Equal Access to Justice Act
N.D. Alabama	11	Attorneys' Fees Costs
S.D. Alabama	25	Fees Under Equal Access to Justice Act
	28	Attorneys' Fees
D. Alaska	Gen. 21.1	Attorney Fees
E.D. Arkansas	27	Attorneys' Fees
W.D. Arkansas	27	Attorneys' Fees
C.D. California	14.12.3	Default Judgment—Schedule of Attorney's Fees
	16.10	Filing Date for Attorney's Fees
E.D. California	293	Awards of Statutory Attorney's Fees
N.D. California	230-4(f)	Abuse of or Failure to Make Discovery; Sanctions: Declarations Re Expenses and Fees
	270	Attorney's Fees
D. Colorado	105(A)	Costs and Judgment
D. Delaware	6.3	Attorneys' Fees
D. District of Columbia	215	Determination of Attorneys Fees
S.D. Florida	10F	Motions to Tax Costs and Attorneys' Fees
N.D. Georgia	270	Attorney's Fees
S.D. Georgia	11.2	Costs: Attorney's Fees
D. Idaho	11-107	Filing of Claims for Attorney Fees—Objections
N.D. Illinois	Gen. 46	Time for Filing Petitions for Attorney Fees
N.D. Iowa	2.9	Claims for Attorney's Fees
S.D. Iowa	2.9	Claims for Attorney's Fees
D. Kansas	25(c)	Taxation and Payment of Costs
E.D. Kentucky	15(d)	Social Security Cases: Attorney's Fees

E.D. Louisiana	21.16	Award of Attorney's Fees
D. Maine	30	Claim for Attorneys' Fees
D. Maryland	23A	Motion for Attorney's Fees: Time Limit for Filing—Contents
	23B	Motion for Attorney's Fees—Social Security Cases
D. Massachusetts	27	Attorneys' Fees
E.D. Michigan	17(n)	Motion Practice: Application for Attorney Fees
D. Minnesota	5(D)	Motion Practice—Social Security: Attorney Fees
	6	Attorney's Fees
N.D. Mississippi	15(b)	Taxation of Costs and Motions for Award of Attorney's Fees: Motions for Attorney's Fees
S.D. Mississippi	15(b)	Taxation of Costs and Motions for Award of Attorney's Fees: Motions for Attorney's Fees
E.D. Missouri	30	Filing of Claims for Attorney's Fees
D. Montana	135	Equal Access to Justice
D. Nebraska	34(D)	Taxation and Payment of Costs: Attorney's Fees
D. Nevada	205-18	Costs and Attorneys' Fees: Motions for Attorney's Fees
D. New Hampshire	39	Attorney's Fees
D. New Jersey	Gen. 12J	Application for Attorney's Fees and Petitions for Leave to Appeal Determination of Attorney's Fees Under the Provisions of the Equal Access to Justice Act
D. New Mexico	15(f)	Costs and Attorney's Fees: Claims for Attorney Fees
	37	Implementation of the Equal Access to Justice Act
E.D. New York	Civ. 5	Fees in Stockholder and Class Actions
S.D. New York	Civ. 5	Fees in Stockholder and Class Actions

M.D. North Carolina	210	Award of Statutory Attorney's Fees
D. North Dakota	23(d)	Taxation of Costs: Attorneys Fees
E.D. Oklahoma	6(f)	Costs and Attorney Fees
N.D. Oklahoma	6(f)	Costs and Attorney Fees
W.D. Oklahoma	6	Costs
	32	Equal Access to Justice
D. Oregon	265-4	Petitions for Attorneys' Fees
W.D. Pennsylvania	33	Motions for Attorney's Fees
D. Puerto Rico	332	Attorney's Fees
	333	Application for Attorney's Fees and Appeals under 28 U.S.C. 2412; 5 U.S.C. 504(c)(2)
D. Rhode Island	25(c)(3)	Costs
D. South Dakota	18	Taxation of Costs: Attorney's Fees
M.D. Tennessee	13(e)	Judgments, Garnishments and Costs: Attorneys' Fees
N.D. Texas	12.2	Request for Attorney's Fees
W.D. Texas	300-10	Claim for Attorney's Fees
E.D. Virginia	11(L)	Motions for Attorney's Fees
E.D. Wisconsin	9.04	Costs: Attorney Fees

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Rule 14.12.3
Default Judgment—Schedule of Attorney's Fees

When a promissory note, contract or applicable statute provides for the recovery of a reasonable attorney's fee, that fee shall be calculated according to the following schedule:

Amount of Judgment	**Attorney's Fees Award**
$0.01-$1,000	30% with a minimum of $250.00
$1,000.01-$10,000	$300 plus 10% of the amount over $1,000
$10,000.01-$50,000	$1200 plus 6% of the amount over $10,000
$50,000.01-$100,000	$3600 plus 4% of the amount over $50,000
over $100,000	$5600 plus 2% of the amount over $100,000

This schedule shall be applied to the amount of the judgment exclusive of costs. An attorney claiming a fee in excess of this schedule may file a written request at the time of entry of the default to have the attorney's fee fixed by the Court. The Court shall hear the request and render judgment for such fee as the Court may deem reasonable.

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

Rule 215
Determination of Attorneys Fees

(a) *Post-Judgment Conference.* In any case in which a party may be entitled to an attorneys fee from another party, the court shall, at the time of entry of final judgment, enter an order directing the parties to confer and to attempt to reach agreement on fee issues. The order shall also set a status conference, ordinarily not more than 60 days thereafter, at which the court will (1) determine whether settlement of any or all aspects of the fee matter has been reached, (2) enter judgment for any fee on which agreement has been reached, (3) make the determination required by paragraph (b) of this rule, and (4) set an appropriate schedule for completion of the fee litigation.

(b) *Determination of Attorneys Fees Pending Appeal.* At the status conference described in paragraph (a), the court shall ascertain whether an appeal is being taken by either party, and if so, whether the appeal is on all or less than all issues. If a party has not finally decided whether to appeal, the court may allow the party reasonable additional time to reach such a decision. After a decision has been made that there will be an appeal, the court shall make a specific determination as to whether, in the interest of justice, the fee issues, in whole or in part, should be considered or be held in abeyance pending the outcome of the appeal.

(c) *Interim Awards.* Nothing in this rule precludes interim applications for attorneys fees prior to final judgment, nor does this rule apply to attorneys fees sought as sanctions under Rules 11, 16, 26 or 37, Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Rule 10F
Motions to Tax Costs and Attorneys' Fees

Motions to tax costs and claims for attorneys' fees authorized to be claimed in accordance with law in actions or proceedings shall be filed by the parties, where appropriate, no later than thirty (30) days following the entry of final judgment or other final dispositive order, if any.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Rule 21.16
Award of Attorney's Fees

In all cases where attorney's fees are sought, the party desiring to be awarded such fees shall submit to the Court a contemporaneous time report reflecting the date, time involved, and nature of the services performed. The report shall be in both narrative and statistical form and provide hours spent and justification thereof.

Any Judge of this Court may, for good cause shown, relieve counsel of the obligation of filing such a report with the Court.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Rule 23A

Motion for Attorney's Fees Time Limit for Filing—Contents

Except as otherwise provided by statute, or Local Rule 23B, or ordered by the Court, a motion for attorney's fees claimed by a prevailing party and/or such party's attorney must be filed by said party or attorney within twenty (20) days of the entry of judgment. Any motion for attorney's fees must set forth the nature of the case, the claims as to which the party prevailed, the claims as to which the party did not prevail, a detailed description of the work performed broken down by hours or fractions thereof expended on each task, the attorney's customary fee for such like work, the customary fee for like work prevailing in the attorney's community, a listing of any expenditures for which reimbursement is sought, any additional factors which are required by the case law, and any additional factors that the attorney wishes to bring to the Court's attention. Noncompliance with the time limits established by this Local Rule and by Local Rule 23B shall be deemed a waiver of any claim for attorney's fees. Local Rule 6(A) and 6(G) are applicable.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Rule 39
Attorney's Fees

In any case (with the exception of those cases wherein the statutory or regulatory authority relied upon mandates a different time limitation) wherein a litigant claims that attorney's fees are to be awarded, such litigant shall notify the court and counsel in writing of such claim not later than thirty (30) days prior to the date scheduled for the completion of discovery and shall include in his pretrial statement (*see* Rule 10) a statement containing a citation to the statutory and/or regulatory authority upon which the litigant relies for such claim. In all cases wherein attorney's fees are claimed, the clerk is herewith directed to delay entry of final judgment until resolution of the issue of attorney's fees is made by the court. In this regard, applications for attorney's fees are to be filed with the Clerk of this Court not later than twenty-one (21) days after the return of the verdict upon which the claimant relies. Such application shall be accompanied by the detailed time-sheets of counsel and a brief memo setting forth the method (which must be in accord with the law of the First Circuit) by which the amount of fees was computed, with sufficient citation of authority to permit the reviewing court the opportunity to determine whether such computation is correct. Within seven (7) days of the filing of such application, the opposing litigant may file with the clerk a memo in opposition to the aforesaid claim.

It is contemplated that the issue of attorney's fees will be resolved without further hearing, but if either party believes that an evidentiary hearing is required, their respective memos shall detail the reasons therefor, shall identify the witnesses to be produced at hearing with a brief outline of the testimony which they are expected to present, and shall give a reasonable estimate of the time required for such hearing. In the event the reviewing court decides that a hearing is necessary, such shall be scheduled as soon as possible in light of the court's current calendar.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

Rule 210
Award of Statutory Attorney's Fees

The court will not consider a motion to award statutory attorney's fees until moving counsel shall first advise the court in writing that after consultation the parties are unable to reach an agreement in regard to the fee award. The statement of consultation shall set forth the date of the consultation, the names of the participating attorneys, and the specific results achieved.

If the parties reach an agreement, they shall file an appropriate stipulation and request for an order. If they are unable to agree, within 90 days of final judgment the moving party shall file the statement of consultation required by this rule and a motion setting forth the factual basis for each criterion which the court will consider in making an award. The motion shall be supported by time records, affidavits, or other evidence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

Rule 300-10
Claim for Attorney's Fees

(a) All post-judgment motions for an award of attorney's fees shall be filed on or before twenty (20) days after the entry of judgment, except if a statute or regulation provides a longer period of time. Counsel for all parties shall meet and confer for the purpose of resolving all disputed issues relating to attorneys fees prior to making application and so certify in their application. The application shall include a supporting document which is organized chronologically by activity or project, listing attorney name, date, and hours expended on the particular activity or project, as well as an affidavit certifying (1) that the hours expended were actually expended on the topics stated, and (2) that the hours expended and rate claimed were reasonable. Such application shall also be accompanied by a brief memo setting forth the method by which the amount of fees was computed, with sufficient citation of authority to permit the reviewing Court the opportunity to determine whether such computation is correct. The request shall include reference to the statutory authorization or other authority for the request. Detailed timesheets for each attorney for whom fees are claimed may be required to be submitted upon further order of the court.

(b) Objections to motions for attorney's fees shall be filed on or before ten (10) days after the date of filing of the motion.

(c) The motion shall be resolved without further hearing, unless an evidentiary hearing is requested, reasons therefor presented, and good cause shown, whereupon hearing on the motion may be granted.

(d) Applications for fee awards which are filed beyond the twenty (20) day period may be deemed untimely and a waiver of entitlement to fees.

APPENDIX C
Record Sheet for Use with Attorney Fee Petition

RECORD SHEET

Date	Person	Status[1]	Billing Rate	Activity[2]	Time Spent/Charged	Product (specify)

[1] 1 = attorney, 10 or more years of legal experience; 2 = attorney, 6–10 years; 3 = attorney, 2–5 years; 4 = attorney, less than 2 years; 5 = law student; 6 = paralegal.

[2] 1 = research; 2 = writing or dictating; 3 = review of documents; 4 = client conference; 5 = consultation (specify: e.g., attorney, expert witness, etc.); . . . 9 = other (specify).

APPENDIX D
Order of Judge Santiago E. Campos
(District of New Mexico)
and Sample Time Record

ORDER

In conformity with the dictates, intent and spirit of *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983),

IT IS HEREBY ORDERED that any lawyer who appears in this case and who, pursuant to any federal statute, intends to apply to the Court to set and award a reasonable fee for his or her services must comply with the following conditions:

(1) He or she shall within ten (10) days file copies of time records kept by him or her, to the date of filing copies of such records, for his or her personal time spent in the representation of his or her client or clients in this case.

(2) Thereafter, he or she shall file, on or before the 20th day of every month, copies of time records kept by him or her in the representation of his or her client or clients in this case in the prior month.

(3) The time records filed under Paragraphs (1) and (2), above, shall specify *in detail* the character and nature of the work done and the legal or factual matter treated together with notation as to how much time was spent on each separate item of work. The notations on the time records to be submitted shall be made no later than the day following the day the work was performed and the lawyer shall certify that such notations were made within the time set forth herein.

(4) Failure to file the time records provided in Paragraphs (2) and (3), above, shall constitute a waiver of claim for attorney fees for the time or for the month for which such records are not timely filed.

(5) All claims for payment of more than one lawyer representing one client or one set of clients shall be waived unless preliminary approval for payment of services of more than one lawyer shall have been secured from the Court. Such preliminary approval for payment may be applied for by application setting forth the reasons why the services of more than one lawyer are necessary.

(6) This Order is not intended to prohibit any party from being represented by more than one lawyer. Compliance with the conditions above or preliminary approval of the application treated in Paragraph (5), above, shall not constitute final approval of fees or costs in this case.

(7) Copy or copies of any submission under this Order need not be sent to opposing or any other counsel. All submissions under

this Order shall, on receipt, be immediately sealed by the Clerk and they shall remain sealed until further order of the Court.

_____

UNITED STATES DISTRICT JUDGE

[See following sample of time record form.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TIME RECORDS FOR _____

DATE	NATURE OF ACTIVITY	TIME
12/07/83	Telephone call to _____ re: schedule meeting in _____ to discuss potential litigation	0.4
12/15/83	Travel to _____ from _____	8.5
	Meet with _____ attorneys and clients _____	2.5
	Attend and present at community meeting	2.0
12/16/83	Meeting with _____ attorneys to discuss strategy	4.5
	Meet with attorney for Plaintiff in _____ to discuss status of the case and participation in the case	1.5
	Travel from _____ to _____	8.0
12/20/83	Obtain _____ data and analyses from _____; review same	1.5
	Telephone conference with _____ re: specify information needed	0.5
	Conference with _____ re: strategy will recommend	0.3
12/21/83	Telephone conference with _____ re: _____	0.6
	Prepare pre-litigation memorandum with _____ facts and _____ with recommendation for strategy (includes calculation)	3.4
	Call to _____ re: strategy recommended	0.3
12/22/83	Prepare expense reports for travel and set up _____ and _____ litigation and various information files	2.0
01/03/84	Telephone conference with _____ re: status of the conference between Plaintiff and Defendants' counsel	0.3

01/05/84	Telephone conference with _____ re: final recommendation on strategy	0.3
	Telephone conference with _____ re: final strategy plans	0.2
01/09/84	Telephone conference with _____ re: division of responsibility for pleadings and denial of election injunction in _____	0.4
	Telephone conference with _____ re: status of case and proposed strategy	0.5
	Begin research for preparation of intervention pleadings	2.0
01/10/84	Further research on intervention pleadings	3.0
01/11/84	Research in intervention pleadings	2.5
	Begin preparation of motion for intervention, supporting memorandum and complaint in intervention	3.5
01/12/84	Preparation of motion for intervention and supporting memorandum and complaint in intervention	4.0
01/13/84	Finalize preparation on motion and memorandum, complaint for intervention; prepare motion for pro hac vice and orders on above	3.3
01/16/84	Final review of pleading	1.6
01/17/84	Instruction on preparation of pleadings for mailing and letter to _____ re: pleadings	0.9
01/19/84	Telephone conference with _____ re: receipt of pleadings and discussion on content	1.0
01/20/84	Telephone conference with _____ re: changes to pleadings to conform with local rules and new information from counsel for original parties as to motion for intervention	0.8
01/25/84	Telephone conference with _____ re: call to _____ from _____ responding to the motion for intervention	0.6
01/26/84	Telephone conference with _____ re: information on press conference and information on case citations	0.5

02/08/84	Telephone conference with _____ re: telephone conference call among attorneys on the motion for intervention set up for 02/13/84 at 9:30 a.m. (8:30 a.m. Mountain Time)	0.3
02/13/84	Conference call with Court, attorneys for Defendants, Plaintiff and _____ re: motion for intervention	0.8
	Conference with _____ re: implications of Court's Order allowing conditional intervention	0.4
	Telephone conference with _____ re: implications of Court's Order allowing conditional intervention	0.5
02/14/84	Memo to file re: Order of Court allowing conditional intervention	0.7
	Telephone conference with _____ re: Court's Order allowing conditional intervention	0.3
	Telephone conference with _____ re: discussion with _____ about Court's Order allowing conditional intervention	0.2
02/15/84	Telephone conference with _____ re: Court's Order allowing conditional intervention	0.5
02/16/84	Review written Order allowing conditional intervention, memo to _____ re: the same and letter to _____	1.2
02/22/84	Telephone conference with _____ re: memo	0.4
02/27/84	Prepare Plaintiff-Intervenors certification of conditions for intervention and certificate of service; review and instruct on mailing by express mail	2.3
02/29/84	Telephone conferences with _____ re: express mail not received; dictation of certification pleading	1.3
03/16/84	Extract and prepare time records on _____ case for typing	2.0

Respectfully submitted,

_____

TABLE OF CASES

Table of Cases

☆U.S. GOVERNMENT PRINTING OFFICE : 1986 O - 163-049

THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and six judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** provides educational programs and services for all third branch personnel. These include orientation seminars, regional workshops, on-site training for support personnel, and tuition support.

The **Division of Special Educational Services** is responsible for the production of educational audio and video media, educational publications, and special seminars and workshops, including programs on sentencing.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and tests new technologies, especially computer systems, that are useful for case management and court administration. The division also contributes to the training required for the successful implementation of technology in the courts.

The **Division of Inter-Judicial Affairs and Information Services** prepares a monthly bulletin for personnel of the federal judicial system, coordinates revision and production of the *Bench Book for United States District Court Judges,* and maintains liaison with state and foreign judges and related judicial administration organizations. The Center's library, which specializes in judicial administration materials, is located within this division.

Federal Judicial Center
Dolley Madison House
1520 H Street, N.W.
Washington, D.C. 20005
202/633-6011