Attorney's Fees in Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners

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ATTORNEY'S FEES IN CIVIL RIGHTS CASES: AN ESSAY ON STREAMLINING THE FORMULATION TO ATTRACT GENERAL PRACTITIONERS

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I. INTRODUCTION

This author's interest in writing an article about attorney's fees in civil rights cases arises from the perception that after more than twenty years of fee awards under Title VII of the Civil Rights Act of 1964 and after nine years of the awarding of fees to "prevailing parties" under the Civil Rights Attorney's Fees Act of 1976, the goal of Congress to attract lawyers to represent plaintiffs in civil rights cases1 is largely unmet. A Third Circuit Task Force, chaired by Judge H. Lee Sarokin of the United States District Court for the District of New Jersey, recently reported that: "Several members of the Task Force expressed the view that fee awards in recent years in the social action context have been so discouraging that few attorneys will accept a civil rights case."2

This article explores various theories for streamlining the system in order to encourage attorneys to represent civil rights plaintiffs. Two recent decisions serve as the starting point.

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1. The Senate Report stated the Congressional goal of the Civil Rights Attorney's Fees Act of 1976:

   It is intended that the amount of fees awarded under [42 U.S.C. § 1983] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature [citing cases in which these standards have been appropriately applied] . . . . These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.


2. Third Circuit Task Force, Court Awarded Attorney Fees, Supplement to 771 F.2d at 19 (3d Cir. 1985) [hereinafter cited as Task Force Report].
The Fifth Circuit's decision in *Uviedo v. Steves Sash & Door Co.* is significant on the issue of determining whether a plaintiff has achieved sufficient success to be a "prevailing party." Part II of this article discusses the two standards for determining whether a party is "prevailing" for purposes of a fee award. These standards are the central-issue test and the any-significant-issue test. The Tenth Circuit's decision in *Nephew v. City of Aurora* is significant on the issue of the amount of fees to which an admittedly prevailing party is entitled. Each decision demonstrates a need for an explication of the United States Supreme Court's seminal opinion on section 1983 prevailing parties in *Hensley v. Eckerhart.* In that case the Supreme Court made this statement about determining the prevailing party issue:

A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

The Supreme Court in *Hensley* also dealt with the extent of a plaintiff's success and the relationship it has to the amount of fees to be awarded. But the case did not involve an award of nominal damages. The Court was therefore not called upon to decide whether a district court must reduce the amount of the attorney's fee award if the prevailing party has recovered only nominal damages. That question is addressed in *Nephew v. City of Aurora.* Thus, Part III considers the viability of a claim for attorney's fees when only small or minimal damages are awarded to a "prevailing" party.

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3. 760 F.2d 87 (5th Cir. 1985).
4. 766 F.2d 1464 (10th Cir. 1985).
6. *Id.* at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (9th Cir. 1978)).
7. *Id.* at 434.
8. 766 F.2d 1464.
Once the threshold to entitlement issues are discussed, the article continues to review limits on amounts of attorney fee awards. Part IV reviews the recent move to simplify the analysis. Part V considers the issue of whether a prevailing attorney employed on a contingency basis is entitled to an upward adjustment of fees. The article concludes by setting forth suggested means by which the fee award system could be altered in order to further the objectives of the Civil Rights Act.

II. “PREVAILING” ON ANY-SIGNIFICANT-ISSUE OR CENTRAL-ISSUE

The judges for the Fifth Circuit recently voted eight to six to deny a rehearing en banc in *Uviedo v. Steves Sash & Door Co.* The Fifth Circuit thereby reaffirmed its minority position that in order to meet the “prevailing party” requirement plaintiffs must demonstrate that they have been successful on “the central issue” in the lawsuit. Lamenting the hardship imposed by this decision, Judge Rubin said in his dissent to *Uviedo* that:

*Hensley* directs that “[a] request for attorney’s fees should not result in a second major litigation.” The application of the central-issue test guarantees increasingly protracted and complicated litigation over fees applications in an effort to distinguish centrality from significance. This case was filed eight years ago, yet litigation over attorney’s fees continues long after the substantive issues have been decided. The *Nadeau* test fulfills the purpose of Congress, facilitates judicial administration, and reduces litigation expense. It is time for us to adopt it and to *make the threshold an entry rather than a barrier.*

In contrast to the majority’s central issue test, the *Nadeau* test mentioned by Judge Rubin is as follows: “[P]laintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on *any significant issue* in litigation which achieves some of the benefit the parties sought in bringing suit.” Judge Rubin’s dissenting opinion lists the Sixth Cir-

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9. 760 F.2d at 89.
10. *Uviedo*, 760 F.2d at 89 (footnote ommitted) (emphasis added) (reference is to *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

The other circuits applying the *Nadeau* standard are Abraham v. Pekarski, 728 F.2d
cuit as following the Nadeau standard. However, the Sixth Circuit decision cited by Judge Rubin, Kentucky Association for Retarded Citizens v. Conn, actually applies the central issue test.

On the other hand, it is the position of the Second Circuit and the Ninth Circuit that the Supreme Court in Hensley approved the Nadeau standard for determining whether a party is a "prevailing party." In Lummi Indian Tribe v. Oltman, the Ninth Circuit reversed a decision denying prevailing party status. The district court had denied fees because both parties received benefits and made concessions in the settlement. The court of appeals found that analysis to be "inconsistent with Hensley v. Eckerhart" and further said that Hensley had approved the more "generous standard" of Nadeau.

Although the Supreme Court ultimately denied certiorari, it was this conflict among the circuits over the correct definition of "prevailing party" that warranted the filing of a petition for certiorari in the United States Supreme Court by the plaintiff in Uviedo. The facts in Uviedo point up the difference between the central-issue test and the any-significant-issue test. Plaintiff Uviedo, a Hispanic worker, sued under Title VII of the Civil Rights Act on the basis of national origin

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12. Uviedo, 760 F.2d at 88.
13. 718 F.2d 182 (6th Cir. 1983).
14. The Third Circuit has cited Kentucky Ass’n for Retarded Citizens v. Conn, 718 F.2d 182 (6th Cir. 1983), as being a "Post-Hensley" case setting a standard that requires a prevailing party to "prevail" on "the central issue." Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 911 (3d. Cir. 1985).
16. Lummi Indian Tribe v. Oltman, 720 F.2d 1124 (9th Cir. 1983).
17. Id. at 1125.
18. Id. at 1125.
19. 760 F.2d 87 (5th Cir. 1985).
discrimination. She pleaded and tried four disparate wage claims, two denial of promotion claims, and one constructive discharge claim. Uviedo prevailed on two of the claims; she was awarded ninety-eight dollars in back-pay on one disparate wage claim and another $288 in back pay on denial of one of the promotion claims. She failed on her constructive discharge claim which the court of appeals characterized as the central issue in her suit. Writing for the panel, Judge Garwood said:

[O]f the approximate $48,000 in damages sought, she has received only $386 plus interest . . . . Certainly she has shown that there was merit to some of her contentions. But she has not shown merit in most of them, or in the most important of them, or in any that could fairly be described singly or collectively, as the central issue in the case.\textsuperscript{22}

Without question, Uviedo would have been a prevailing party under the any-significant-issue test. As Judge Williams said in his concurring opinion, Uviedo vindicated her rights under Title VII and should have been held to be a prevailing party.\textsuperscript{23}

In urging that the Fifth Circuit reconsider en banc its central-issue rule, Judge Williams discussed the Uviedo result as being a restrictive application of pleading rules:

In effect we are abandoning our general rule of liberality in pleading. Fed. R. Civ. P. 8(f). . . . We are saying that the plaintiff must lose because she undertook to prove too much. If she had based her suit solely upon the instances of discrimination she successfully proved, she would recover attorney's fees without question.\textsuperscript{24}

A major frailty of the central-issue test is that it encourages civil rights defendants to engage in claim counting in order to contend that plaintiff is not a prevailing party. For example, in a great many lawsuits against cities and counties the plaintiff will have prevailed against only the governmental entity.\textsuperscript{25} In a typical suit involving allegations of police misconduct, a cautious plaintiff's lawyer may, for statute of limi-

\textsuperscript{22} Uviedo v. Steves Sash & Door Co., 738 F.2d 1425, 1433 (5th Cir. 1984) (emphasis added).
\textsuperscript{23} Id. at 1433 (Williams, J., concurring).
\textsuperscript{24} Id.
\textsuperscript{25} This situation is a natural outgrowth of the Supreme Court's holding in Owen v. City of Independence, 445 U.S. 622, reh'g denied, 446 U.S. 993 (1980). The Court in that case held that a city may be held liable under section 1983 of the Civil Rights Act,
tations and other purposes, feel obligated to join several
different categories of defendants: the city, the individual po-
lice officers who committed the acts in question, their supervi-
sors, the chief of police, the city manager, and members of the
city council. Then, if it becomes simply a matter of counting
claims and defendants, a plaintiff may have prevailed on just
one claim against just one defendant. In "central issue" jurisdic-
tions, defendants can make the contention that the plaintiff
has won only one of twelve claims and therefore should not be
considered a prevailing party. If the claim upon which a
plaintiff has prevailed results in a large damage award, the
plaintiff will most likely be held to be a prevailing party, even
under the central issue test. If the successful claims resulted
in only a small damage award, however, under Uviedo and the
central issue test, the plaintiff would not be a prevailing party
for attorney's fees purposes.

These points are well illustrated in Mary Beth G. v. City of
Chicago which involved a successful attack on the City of
Chicago's strip search policy. The district court disallowed
attorney's fees for the time spent in litigating the strip search
claim against the individual defendants. The Seventh Circuit
reversed, rejecting the approach of counting claims and de-
fendants, stating:

> It would therefore be illogical to define compensable "claims
> for relief" in terms of defendants, because once the plain-
tiff's claim succeeds against one defendant, the plaintiff will
> have achieved full relief for the illegal course of conduct
> notwithstanding the plaintiff's failure to obtain relief from
> each and every defendant. A recovery against more than
> one of the defendants will not enhance the amount of the
damage award. We hold that when, as here, a plaintiff raises
>a claim for relief that relates to several defendants, not all of
> whom are held liable, the total time expended on the claim
> for relief should be counted in awarding the plaintiff attor-
> ney's fees so long as the defendants from whom plaintiff did
> not obtain relief were not named frivolously.27

42 U.S.C. § 1983 (1982), even though the individual city officials are entitled to qualify
for immunity.
26. 723 F.2d 1263 (7th Cir. 1983).
27. Id. at 1281.
III. BEYOND CENTRAL-ISSUE VS. SIGNIFICANCE: GUARANTEEING FULLY COMPENSATORY FEES PURSUANT TO AN AWARD OF SMALL OR NOMINAL DAMAGES

Aside from encouraging claim and defendant counting, another major weakness of the central-issue test is that it assigns very little importance to recovery of small damages in civil rights cases. A plaintiff who recovers only small or nominal damages will seldom be considered a prevailing party under the central-issue test. This result prevents any widespread interest among lawyers in handling civil rights cases, especially those which are on behalf of individual plaintiffs. Civil rights actions which are appropriate for class treatment will not suffer for lack of competent lawyers. But if sole practitioners and general practitioners cannot be assured of attorney's fee awards when they recover small or nominal damages, then people with meritorious individual claims will have difficulty finding representation.

Although there is ambivalence among the appellate courts and the district courts as to whether lawyers who win small damage awards should be fully compensated, there are some decisions in which the courts have taken a strong position in favor of fully compensatory fees. In *Milwe v. Cavuoto*, a police misconduct suit, the plaintiff recovered $1,320 on a pendant state law claim and one dollar on a constitutional claim. The Second Circuit held that even if fees were not awarded on the basis of the state law claim, the one dollar recovery on the constitutional claim would be sufficient to support an award of attorney's fees. The court indicated that its holding was in furtherance of congressional intent:

The award of counsel fees is not intended to punish the defendant in any way. Rather it is to permit and encourage plaintiffs to enforce their civil rights. To declare those rights while simultaneously denying the award of fees would seriously undermine the declared congressional policy. Fees may not be denied simply because only nominal damages are awarded.

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28. 653 F.2d 80 (2d Cir. 1981).
29. *Id.* at 84.
30. *Id.* (quoting Perez v. University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979)).
The court in *Milwe* also made two important points about individual damage actions involving police misconduct: these lawsuits are sometimes "the only tool reasonably available to vindicate society's interest"\(^3\) in curbing police abuses, and such lawsuits will commonly result in small damage awards.\(^3\)

In a teacher lay-off case with due process claims the Eighth Circuit held in *Fast v. School District of Ladue*\(^3\) that the plaintiff who received one dollar in nominal damages was entitled to attorney's fees. In this decision the court held that the amount of relief obtained was insignificant under the *Nadeau* test\(^3\) and that it believed that the *Nadeau* test had been approved by the Supreme Court in *Hensley v. Eckerhart*\(^3\).

The court in *Fast* relied on an earlier decision, *Dean v. Civiletti*,\(^3\) a Title VII sex discrimination case. The district court in *Dean* had found for the plaintiff on one count of discrimination but had denied reinstatement. There was also no evidence that the plaintiff had sustained any monetary loss; thus there was no back pay award. The court of appeals, while affirming the lower court's decision on the merits, ordered that nominal damages of one dollar be awarded and held that an award of attorney's fees should be made. The court said that plaintiff had "prevailed on [a] discrimination issue"\(^3\) and was therefore entitled to attorney's fees.

Some federal courts, however, discount the amount of fees awarded in cases in which only small damages have been recovered. An illustration is the recent decision of the Tenth Circuit in *Nephew v. City of Aurora*.\(^3\) The *Nephew* suit by four plaintiffs was composed of claims of assault, battery and false arrest by City of Aurora police officers acting pursuant to a custom or policy of the city to discriminate against blacks. In addition to damages, injunctive and declaratory relief were

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31. 653 F.2d at 84.
32. Id. See also 626 F.2d 351 (4th Cir. 1980).
33. 728 F.2d 1030 (8th Cir. 1984) (en banc).
34. Id. at 1032.
35. Id. at 1032 n.2 ("'The Supreme Court's description of a legal rule as 'a typical formulation.' Without any intimation whatsoever that it might not agree with that formulation is a firm basis for a fair inference that the Court in fact approves the standard given.'").
36. 670 F.2d 99 (8th Cir. 1982).
37. Id. at 101.
38. 766 F.2d 1464 (10th Cir. 1985).
sought against the city, its mayor and its city council. Damages were sought against the individual police officers. The district court granted a motion for directed verdict in favor of the city, the mayor and the city council. The case proceeded to a jury verdict only upon the claims for actual and punitive damages of $2,000,000 against the individual police officers. The jury returned a verdict in favor of two of the plaintiffs, but awarded them only one dollar each as compensatory damages. No punitive damages were awarded. Subsequently, the trial court awarded attorney's fees of $12,500, expressly refusing to reduce the award on the ground urged by defendants that the prevailing plaintiffs had won only nominal damages. 

The Tenth Circuit reversed, stating the controlling issue as follows: "The issue therefore becomes whether, in a § 1983 case in which plaintiffs proceed only to litigate monetary damages, the attorney's fees awarded should be reduced if the plaintiffs in fact are awarded only nominal damages of $2.00." The panel, in a split decision, then held that the district court abused its discretion by not discounting the fee award because the plaintiffs were awarded only nominal damages. The court indicated that it was relying on the language in *Hensley* that one important factor in determining the reasonableness of fee award is the "results obtained." The panel then criticized a recent decision by the Tenth Circuit in *Ramos v. Lamm* as not being a "proper vehicle for this court to expound on the significance of a nominal monetary recovery in a section 1983 suit in which substantial damages are sought." The panel in *Ramos*, in dicta, had rejected the practice of reducing fee awards because the monetary recovery was small.

The *Nephew* decision is a misapplication of *Hensley v. Eckhart*. The issue in *Hensley* was whether a plaintiff, who raised several unrelated claims and who had prevailed on only some of those unrelated claims, could recover fees for work

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39. *Id.* at 1465.
40. *Id.*
41. *Id.* at 1466 (quoting *Hensley*, 461 U.S. at 435).
42. 713 F.2d 464 (10th Cir. 1983).
43. *Nephew*, 766 F.2d at 1465.
44. *Ramos*, 713 F.2d at 557.
done on the unsuccessful claims. The emphasis in *Hensley* is that a plaintiff who has prevailed on one or more claims should not be awarded fees for work on *distinct* claims which were unsuccessful. Indeed, as the dissent in *Nephew* points out, the district court had applied *Hensley* "by reducing the award to reflect the fact that some of the time was spent pursuing claims for the two plaintiffs who did not prevail." 46 The dissent found the dicta of *Ramos v. Lamm* to be persuasive, noting that *Ramos* is a post-*Hensley* decision made in "full awareness of the Supreme Court's reference to 'results obtained.'" 47 Writing for the dissent, Judge McKay also stated that Congress has expressed the intention that fees should not be reduced because the rights involved may be nonpecuniary in nature. 48 A plaintiff who has vindicated constitutional rights or other civil rights by determining that a violation has occurred should receive attorney's fees on a fully compensatory basis; the amount of money damages should not be a factor.

In addition to the "results obtained" language of *Hensley*, the majority in *Nephew* cited with approval the opinions in *Burt v. Abel* 49 and *Perez v. University of Puerto Rico* 50 in which the Fourth and First Circuits, respectively, held that even though a judgment of small damages does not permit a court to deny an award of attorney's fees, it is a factor which may be considered in determining the amount of the award. Decisions such as *Burt* and *Perez*, viewed from a functional standpoint, deal a serious blow to the congressional goal of attracting lawyers to civil rights cases. As recognized by the *Nephew* dissent:

> What both these cases [*Burt* and *Perez*] and the majority opinion fail to recognize, however, is that the policy of encouraging private citizens to enforce their constitutional rights and the importance to society that constitutional rights be vindicated — the factors which lead them to view the parties as prevailing parties despite the award of nominal damages — lead to the further conclusion that attorney's

46. 766 F.2d at 1468 (McKay, J., dissenting).
47. Id.
48. Id. at 1469.
49. 585 F.2d 613 (4th Cir. 1978).
50. 600 F.2d 1 (1st Cir. 1979).
fees should not be reduced because only nominal damages were awarded.  

The serious uncertainties visited upon plaintiffs’ civil rights lawyers by decisions such as *Burt, Perez* and *Nephew* are demonstrated by two federal district court decisions made in Texas in 1982. The cases have several similarities, but the courts reached very different results. In *Johnston v. Shaw*, four plaintiffs were awarded nominal damages of one dollar each in a case in which the court found due process violations. Plaintiffs requested a fee award of $8,812.50, being the product of 117.5 hours at a rate of seventy-five dollars per hour. Although finding a rate of seventy-five dollars per hour to be reasonable, the district court, in an unpublished opinion, reduced the fee award to $1500. It is clear that the fact that only nominal damages were recovered was a major factor in the large reduction by the court. The court stated: “Because only nominal damages were recovered and the principal remedy obtained consisted of a minor change in agency notice-of-right-to-appeal procedures, an exorbitant award of attorney’s fees is not called for in this case.”

The court’s opinion on this attorney’s fee application is unpublished. This fact beckons further analysis, especially since the court’s opinion on the merits was a detailed eight-page published opinion. Discussion of unpublished opinions in law review articles is not commonplace. As Professors Reynolds and Richman stated in their article about unpublished opinions in the circuit courts of appeals:

The Supreme Court, of course, can review only a tiny fraction of the cases decided by the courts of appeals. With review from above so unlikely, the real accountability of the courts of appeals is to the bench, the bar, the scholars, and the public. Unpublished opinions . . . will generally not receive critical commentary from those groups for the obvious reason that they will go unnoticed. A less obvious consider-

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51. 766 F.2d at 1469 (McKay, J., dissenting).
54. Id. at 11.
55. Id. at 5.
ation is that there is relatively little incentive to comment upon an opinion that is not "law."\(^{57}\)

The unpublished opinion reveals a lawsuit on issues of first impression regarding a state statute substantial contentions of eleventh amendment immunity, and abstention. Also, a serious question as to the existence of a "property interest" was implicated. The tenor of the court's unpublished opinion on the fee application is that the issues involved in the lawsuit were simple, as indicated by the court's reference to "the relative lack of complexity involved in the issues which were actually litigated at trial . . . ."\(^{58}\) In addition to reliance on the nominal damages factor some courts have cited the simplicity of due process issues as a rationale for reducing fees.\(^{59}\) It seems a fair statement that many lawyers who have litigated due process claims as plaintiff or defendant in federal court would disagree. For example, predicting the probable outcome of a given due process claim has been far from easy, as the *Fuentes*\(^{60}\) - *W. T. Mitchell*\(^{61}\) - *Di-Chem*\(^{62}\) trilogy of prejudgment seizure cases illustrates.\(^{63}\)

The court in *Johnston* also emphasized that little actual court time, less than two hours, was involved in the case on the merits.\(^{64}\) The court's perspective on this point gives no attention to the reality that a great percentage of claims now litigated in federal court are appropriate for summary judgment treatment and are prepared with that end in mind. Indeed, one of the ironies of federal civil trial practice is that very little "trial" is involved. A prominent example of this trend is shown by the United States Supreme Court's decision in *Blum v. Stenson*\(^{65}\) in which the Court approved 809 hours

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64. Johnston v. Shaw, No. CA 5-80-133, slip op. at 3, 6.

as being reasonably expended in a case which was decided on cross-motions for summary judgment after only one set of plaintiff's interrogatories had been served and answered. 66

Finally, the unpublished opinion in Johnston indicates the court's bottom line. As "additional factors" 67 the court in Johnston considered the fact that counsel for plaintiffs had stated in open court that he felt attorney's fees would not be appropriate in this case 68 and that the tones of the supporting affidavits by plaintiff's lawyer and another civil rights plaintiff's lawyer were strident. 69 The court's question to plaintiff's lawyer inquiring whether fees would be sought was put to him prior to entry of judgment on the merits. 70 It is highly questionable whether such an inquiry at that stage of the proceedings is proper. It would appear to have the effect of discouraging prevailing plaintiffs from seeking attorney's fees, and, while this author might agree with the court about the strident tone of the affidavits, this matter of etiquette should not enter the court's decision-making. 71

66. Id. at 1544.
68. Id. at 10.
69. Id.
70. In response to a direct question in open court, counsel for plaintiffs informed the court that, in his opinion, an award of attorneys' fees would not be appropriate in this case. He felt, at that time, that any such award would simply reduce the funds available to the LCGAA for assisting the poor and needy of Lubbock County. Despite this presentation, counsel for plaintiffs now seeks to receive attorneys' fees. The court feels compelled to point out that a substantial award of attorneys' fees would have exactly the effect Mr. McIntyre feared at the time of trial. It would deprive the LCGAA of funds which would otherwise be available to assist families with paying their heating bills in winter and making their monthly rent payments.
Johnston v. Shaw, No. CA 5-80-133, slip op. at 10. The hearing to which the court alludes was the hearing on the merits and was held on December 7, 1982. Judgment was entered on December 9, 1982. Johnston v. Shaw, 556 F. Supp. 406, 408, 414 (N.D. Tex. 1982).
71. Perhaps the court's ultimate motivation for not publishing its opinion on attorney's fees is consistent with the following statement by Professors Reynolds and Richman:

Publication, however, cannot be limited without incurring substantial costs. An unpublished opinion is virtually invisible to public scrutiny; hence, the decision not to publish make judges less accountable for their decision-making. Decreased accountability in turn leads to both the perception and the possibility of inconsistent, arbitrary, and even biased decisions.

In a case similar to *Johnston, Nicholson v. Bates*, the district court permitted an award of fees of $9,150 for 116.5 hours of work on the case. The case involved less complicated legal issues than *Johnston* in that the plaintiff’s claims were for racial discrimination in housing against a private landlord. Unlike *Johnston*, however, the case was tried to a jury. The jury made a favorable finding on liability but awarded no damages to the plaintiff. Pursuant to the Supreme Court’s decision in *Carey v. Piphus*, the court awarded one dollar in nominal damages.

The court in *Nicholson* takes an approach totally different from the one taken by the judge in *Johnston*; the tenor of the *Nicholson* court’s published opinion is written in terms of vindication of civil rights. It describes the right to obtain housing in a manner which is free from racial discrimination as “a basic right that is ultimately non-pecuniary.” Specifically on the question of small damages the court said:

> Under § 1983, attorney’s fees should ordinarily be awarded, unless some special circumstance present in the action would render such an award unjust. . . . The finding of liability by the jury, and a subsequent refusal to award substantial damages, does not constitute such a special circumstance. In fact, the Supreme Court has explicitly stated that “the potential liability of § 1983 defendants for attorney’s fees . . . provides additional — and by no means inconsequential assurance that [defendants] will not deliberately ignore” the rights protected by that statute.

Considering the range of decisions on the question of the award of attorney’s fees based on nominal or small damages, there is a strong possibility that the issue will be decided by the Supreme Court. On August 28, 1985, Justice Rehnquist, sitting for the Ninth Circuit, issued a stay of the Ninth Circuit’s mandate in *City of Riverside v. Rivera*. The City of Riverside and five of its police officers were thereby temporar-
ily relieved of the obligation to pay $245,456 in attorney's fees to plaintiffs who had recovered a total of $33,350 in damages.

Justice Rehnquist framed the issued in this way: "This case seems to me to present a significant question involving the construction of § 1988: should a court, in determining the amount of "a reasonable attorney's fee" under the statute, consider the amount of monetary damages recovered in the underlying action?" Justice Rehnquist noted that neither the Hensley nor Blum cases addressed whether "disproportionality" between the amount of monetary judgment and the amount of the proposed attorney's fee should be a factor in the determination of the fee award. Justice Rehnquist postured that the issue presented in Rivera would draw at least the minimum-required four votes for the granting of certiorari in the instant case or in a similar case. He also found that petitioners would have a substantial probability of success on the merits.

This necessarily tentative judgment by Justice Rehnquist is mainly based on his assessment that "a very reasonable client might seriously question an attorney's bill of $245,000 for services which had resulted solely in a monetary award of less than $34,000." However, Justice Rehnquist made what might seem to be a concession by saying that he is not suggesting that substantial attorney's fees cannot be awarded in cases involving "primarily injunctive or other non-pecuniary relief."

Justice Rehnquist's tentative opinion in Rivera tends to ignore the public interest genesis of the Attorney's Fees Act of 1976, and it is contrary to the Supreme Court's position expressed by Justice Powell in Blum:

Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under § 1988. Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1983 reflects the amount of attorney time reasonably expended on the litigation. Presumably, counsel will

78. Id.
79. Id. at 3144.
80. Id. at 3144-45.
81. Id.
82. Id.
spend as much time and will be as diligent in litigating a case that benefits a small class of people or, indeed, in protecting the civil rights of a single individual.  

If the Supreme Court chooses to address the nominal and small damages issue, the resolution should be aided by the recommendations of the Third Circuit Task Force. The Task Force indicated a "need for a neutral fee-setting process that does not relate fees in statutory cases [civil rights, antitrust, and federal securities, for example] to subjective judgments about 'benefit' and does not become mired in a concern about the dollars recovered and the dollars to be awarded in fees."  
The Task Force expressed the hope that such an approach will allow civil rights lawyers adequate compensation to vindicate public policies "without regard to whether they produce economic or noneconomic benefits."

IV. **Blum v. Stenson: Simplifying the Analysis**

Once entitlement to a fee award is established, the *amount* of the award is the issue to be focused upon. A United States Supreme Court clarification of the issue would certainly simplify the analysis. Until recently, the federal courts in setting attorney's fee awards followed the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.* In *Johnson*, the court held that a district court should consider twelve factors in order to determine whether any adjustment should be made to make the fee reasonably compensatory. But this feature of attorney's fees analysis has been changed by the Supreme Court's decision in *Blum v. Stenson*. As a Texas

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85. *Id.*
86. 488 F.2d 714 (5th Cir. 1974).
87. The twelve 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. *Id.* at 716-20.
district court stated in *Patrick v. Trustees of Mineola Independent School District*:

Before *Blum*, a court was required to direct light from the lodestar through the twelve filters enumerated in *Johnson*, in order to determine whether an overall adjustment of the product of hours-times-rate was necessary to make fees reasonably compensatory. In *Blum*, the court held that the prevailing hourly rate in the community already subsumes most of the factors listed in *Johnson*. The only *Johnson* factor to survive *Blum* is contingency. 89

The Tenth Circuit reached the same conclusion in *Jordan v. Heckler*,90 a case decided under the Equal Access to Justice Act. The Ninth Circuit ruled to the same effect in *Hall v. Bolger*.91 The elimination of the necessity of considering the *Johnson* factors should result in attorney’s fee awards being much more susceptible of prediction. Also, the amount of time spent by federal judges and their staffs on fee decisions and opinion writing should be greatly reduced.

In addition to the great amount of judicial time required to consider all the *Johnson* factors, some of the factors, such as “the novelty and difficulty of the questions,” the “skill requisite to perform the legal service properly,” and “the experience, reputation, and ability of the attorneys” involved the federal courts in highly subjective determinations.

In some cases the determination of the novelty and difficulty of the case appears to be little more than a bare conclusion, with no supporting rationale. While it is true that the legislative history of the Civil Rights Attorney’s Fees Act of 1976 considers civil rights cases inherently complex,92 findings by some courts that cases involving due process rights, abstention, and sovereign immunity allegations93 are “simple,” are not unusual.94 The Supreme Court in *Blum* resolved this con-

90. 744 F.2d 1397 (10th Cir. 1984).
91. 768 F.2d 1148, 1150 (9th Cir. 1985).
92. “It is intended that the amount of fees awarded under [§ 1983] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . .” S. REP., supra note 1, at 5913 (emphasis added).
93. See *King v. New Hampshire Dep’t of Resources and Economic Dev.*, 562 F.2d 80 (1st Cir. 1977).
flict of opinion in the following fashion: "The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates."\(^9\)

The Johnson factor, on the other hand, which involves inquiry into "reputation" of counsel, remains a highly subjective exercise. Among other problems it requires lawyers applying for a fee to "toot their own horns." This sort of self-adulation is in general discouraged by the canons of ethics of the American Bar Association.\(^9\) Of course, since the fee applicants must toot their own horns, this makes their reputation fair game for the party opposing the fee. At the very least, this needless attention to reputation might tend to diminish good relations among the federal bench and bar. Moreover, if the fee applicant is found to have represented a prevailing party, that fact should speak for itself about the lawyer's ability. For the most part the Supreme Court in *Blum* eliminated the necessity of inquiring into reputation by holding that "'quality of representation'... generally is reflected in the reasonable hourly rate."\(^9\)

Related to the reputation problem is the practice in some recent decisions of diminishing the hourly rate because the attorney is a sole practitioner. In *Clark v. Marsh*,\(^9\) a district court reduced the hourly rate from $100 per hour to eighty-five dollars per hour on the basis that plaintiff's attorney is a sole practitioner. The court assumed that since the attorney did not have a full complement of support staff she must have spent some time on tasks which were not "lawyer tasks." The holding in *Clark* is particularly harmful in a field of law in which many of the plaintiffs' lawyers are sole practitioners or they are in small partnerships or corporations which do not employ paralegals and other sophisticated support staff.

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95. 104 S. Ct. at 1548.

96. "A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self laudatory or unfair statement or claim." (emphasis added). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1982).

97. 104 S. Ct. at 1549.

ATTORNEY'S FEES

The fine-tuning effected by Blum with respect to the reputation issue could be augmented by standardizing hourly rates. The Third Circuit Task Force recommends this procedure, concluding that development of standardized district-wide hourly rates could achieve "substantial efficiencies and objectification."\(^9\) The Task Force recommends in general terms that the hourly rates be structured according to the number of years of experience of the lawyers and indicates that a specific schedule, such as that adopted by Community Legal Services of Philadelphia, may be appropriate.\(^{100}\)

V. CONTINGENCY ENHANCEMENT

A question left open by the United States Supreme Court in Blum v. Stenson was whether the fact that a prevailing plaintiff's case was handled by an attorney on a contingency basis should result in an upward adjustment of fees: "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."\(^{101}\) A more precise analysis is that delay in receiving the fee is a factor at least as important as the risk of losing. The court in Patrick v. Trustees of Mineola Independent School District,\(^{102}\) a post-Blum decision, touched on the question: "The only Johnson factor to survive Blum is contingency, that is, the de-

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99. Task Force Report, supra note 2, at 32.
100. The Community Legal Services rate schedule is:

<table>
<thead>
<tr>
<th>Category</th>
<th>Range of Hourly Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Students</td>
<td>$30.00 - $50.00</td>
</tr>
<tr>
<td>Attorneys with post law school experience under two years</td>
<td>$60.00 - $85.00</td>
</tr>
<tr>
<td>Attorneys with 2-5 years experience</td>
<td>$80.00 - $120.00</td>
</tr>
<tr>
<td>Attorneys with 6-10 years experience</td>
<td>$100.00 - $160.00</td>
</tr>
<tr>
<td>Attorneys with more than 10 years experience</td>
<td>$125.00 - $180.00</td>
</tr>
<tr>
<td>Supervising Attorneys, Projects Heads, Managing Attorneys, Deputy Director, Executive Director</td>
<td>$130.00 - $200.00</td>
</tr>
<tr>
<td>Paralegals I and II</td>
<td>$30.00 - $40.00</td>
</tr>
<tr>
<td>Senior and Supervisory Paralegals</td>
<td>$40.00 - $60.00</td>
</tr>
</tbody>
</table>

Id. at 33 n.68.

101. 104 S. Ct. at 1550 n.17.
gree of risk that the action will be unsuccessful, and also that payment will be delayed.”

Since Blum seven appellate courts have considered the question of whether a contingent fee arrangement may justify an upward adjustment to the fee lodestar. Five circuits have held that an increase is permissible. The decision by the First Circuit in Wildman v. Lerner Stores Corp. is the most recent. In Wildman the district court allowed a fifty percent upward adjustment to the lodestar but gave an essentially rambling rationale:

[I]n this particular action the attorneys for the plaintiff faced and overcame difficulties above and beyond the normal prosecution of an action. The law in this area is still in its formative stages. Counsel displayed an acute understanding of the law. The plaintiff’s attorneys also faced a contingency of losing all their time and effort. The ability of defendants’ counsel and the competency with which they represented their clients, required even more than the average performance on the part of plaintiff’s attorneys.

The First Circuit rejected the district court’s reliance on complexity or novelty of the issues stating that, as a result of Blum, upward adjustments for quality of representation “are to be few and far between.” The court of appeals, instead, framed the issue as “whether a multiplier can be justified solely because of the contingent nature of the action.” In holding that a multiplier can be justified on such a basis, the court reasoned that, while the lodestar may reflect the difficulty and novelty of a case, it does not differentiate between a case taken on a full retainer and a case in which a lawyer spends many hours over a period of years with no assurance of ever receiving a fee. The First Circuit indicated that per-

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103. Id. at 759 (emphasis added).
105. 771 F.2d 605 (1st Cir. 1985).
106. Id. at 610.
107. Id. (quoting Garrity v. Sununu, 752 F.2d 727, 739 (1st Cir. 1984)).
108. 771 F.2d at 611.
109. Id. at 612.
mitting a district court to consider an upward adjustment in a contingent fee case is necessary to effectuate the will of Congress:

Section 1988 was enacted in order to enable plaintiffs to secure civil rights guaranteed to them under federal law and the Constitution. We think it clear that Congress did not intend that the enforcement of civil rights be limited primarily to those able to pay an attorney a full retainer or attract one of the few pro bono legal service organizations to their cause . . . . To deny all consideration of the added burden and additional risks an attorney under a contingent fee agreement may have to bear does not strike us as "reasonable."110

The First Circuit's opinion in Wildman rejects the reasoning of the Seventh Circuit in McKinnon v. City of Berwyn111 and the District of Columbia Circuit's decision in Laffey v. Northwest Airlines.112 The position of the minority circuits is that any upward adjustment for contingency compensates attorneys for bringing unsuccessful civil rights suits. According to the court in McKinnon, if the logic of a risk adjustment is carried to conclusion then a lawyer with a one out of fifty chance of winning would get a multiplier of fifty to compensate for the forty-nine similar cases the lawyer lost.113 As the First Circuit points out in Wildman, however, multipliers of two are unusual.114

VI. MODERATION IN MULTIPLIERS

Despite the weakness in the Seventh and District of Columbia Circuit's fears of a multiplier of fifty, the irritation indicated by Judge Wilkey in Laffey has some justification. The district court had granted a multiplier of 3.5 to enhance a lodestar of $1,471,241.25. A much more conservative multiplier would have made the fee reasonably compensatory. The court's revulsion is understandable. Moreover, the court's position that settlements of attorney's fee application are much

110. Id. at 612-13.
111. 750 F.2d 1383, 1392 (7th Cir. 1984).
113. 750 F.2d at 1392.
114. 771 F.2d at 613.
more likely where the amount of a court-ordered award can be predicted with some certainty is reasonable.\textsuperscript{115}

The Eighth and Ninth Circuits take a moderate and more reasonable position on the issue of upward adjustment. In \textit{Sierra Club v. Clark},\textsuperscript{116} the Eighth Circuit approved a multiplier of thirty percent for contingency, among other factors, and in \textit{LaDuke v. Nelson},\textsuperscript{117} the Ninth Circuit approved a multiplier of twenty percent. Multipliers roughly in this range would serve the purpose of providing a reasonably predictable standard and would ensure reasonably compensatory fees in contingent fee cases.

\textbf{VII. CONCLUSION}

If the expressed goal of Congress to attract lawyers to handle civil rights claims is ever to be met, the formulation of attorney's fee awards must be structured so as to attract sole practitioners and lawyers from small general practice firms. The structure should contemplate a method of setting fee awards that is reasonably predictable. The courts can move toward such a structure by adopting the any-significant-issue test, by giving nonreduced fees in nominal damage cases, by standardizing hourly rates, and by providing modest upward adjustments in cases taken on a contingent fee basis.

Bringing a lawsuit to vindicate civil rights involves economic risk. Well-established law firms, whether large or small, are not likely to undertake such cases. The effectuation of the congressional goal depends upon a fee award structure which will attract risk takers.

\textsuperscript{116} 755 F.2d 608, 620 (8th Cir. 1985).
\textsuperscript{117} 762 F.2d 1218, 1333 (9th Cir. 1985).