



1997

Rules and Guidelines for the Management of Attorney's Fees

Catherine C. Blake
District Court of Maryland

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubl>



Part of the [Law Commons](#)

Recommended Citation

Blake, Catherine C. (1997) "Rules and Guidelines for the Management of Attorney's Fees," *University of Baltimore Law Review*: Vol. 27: Iss. 1, Article 2.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol27/iss1/2>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

RULES AND GUIDELINES FOR THE MANAGEMENT OF ATTORNEY'S FEES

Catherine C. Blake†

In response to the Supreme Court's affirmance of the "American Rule," that each party in a lawsuit shall ordinarily bear her own attorney's fees,¹ Congress passed a multitude of fee-shifting statutes.² The most frequently invoked are Title VII's provision for attorney's fees³ and the Civil Rights Attorney's Fees Awards Act of 1976.⁴ These statutes, and approximately two hundred others,⁵ authorize courts

† Judge, The United States District Court for the District of Maryland. B.A., *magna cum laude*, 1972, Radcliffe College; J.D., *cum laude*, 1975, Harvard University.

1. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 240 (1975). For the history of the American rule, see *id.* at 247-57. The Supreme Court has offered three justifications for this rule: (1) a party should not be punished for prosecuting or defending in good faith; (2) the possibility of having to pay the other party's attorney's fees might deter individuals of modest means from bringing a valid action; and (3) making fee determinations would unreasonably burden the judicial system. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); see also Martin P. Averill, Note, "Specters" and "Litigious Fog"?: *The Fourth Circuit Abandons Catalyst Theory in S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education of North Carolina*, 73 N.C. L. REV. 2245, 2251-52 (1995). The "English Rule," that attorney's fees are regularly awarded to the prevailing party, has two justifications: (1) the prevailing party should be compensated for *all* injuries caused by the defeated party; and (2) the possibility of having to pay the prevailing party's attorney's fees will deter frivolous litigation. See M. Isabel Medina, Comment, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana—An Argument Against the American Rule*, 61 TUL. L. REV. 1173, 1177 n.20 (1987).
2. See, e.g., The Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(4)(B) (1997); Family and Medical Leave Act of 1993, 29 U.S.C. § 2617(a)(3) (1997); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1997); Equal Employment Opportunity Act, 42 U.S.C. § 2000e-5(k) (1997); see also ALAN HIRSCH & DIANE SHEEHY, FEDERAL JUDICIAL CENTER, AWARDING ATTORNEY'S FEES AND MANAGING FEE LITIGATION 2 (1994) ("In [*Alyeska Pipeline's*] wake, such statutes proliferated."), available in (visited March 4, 1998) <<http://www.fjc.gov/attorfees/attyfees/attyfees.html>>.
3. See 42 U.S.C. § 2000e-5(k) (1997); see also *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).
4. See 42 U.S.C. § 1988; see also *Alyeska Pipeline*, 421 U.S. at 271.
5. See HIRSCH & SHEEHY, *supra* note 2, at 1 ("Almost 200 civil statutes authorize

to award reasonable attorney's fees to a prevailing party to be paid by the opposing party in the litigation. Despite the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation,"⁶ lawyers and judges frequently devote substantial amounts of time to preparing, opposing, and ruling on petitions for fee awards. This Article reports on the recent adoption of a set of rules and guidelines in the District of Maryland which are intended to promote efficient, practical, and fair management of attorney's fee awards. If these principles are successful, the bar, the court, and the parties to civil rights litigation should all benefit.

CASE LAW STANDARDS

The standards for determining a reasonable attorney's fee award under 42 U.S.C. § 1988 and related statutes are often quoted. The Supreme Court has held that "the proper first step in determining a reasonable attorney's fee is to multiply 'the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" ⁷ The resulting product is commonly known as the lodestar award.⁸ The Court noted that most of the factors articulated by the United States Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*⁹ are subsumed in the initial calculation of the "lodestar" award.¹⁰ Those factors¹¹ have been

fee awards to prevailing plaintiffs and, in some cases, prevailing defendants.").

6. *Hensley*, 461 U.S. at 437.

7. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)); see also *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994).

8. The lodestar award is "the product of reasonable hours multiplied by a reasonable rate." *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991) (citing *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565). "[W]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 564 (1986) (quoting *Blum*, 465 U.S. at 897). 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 . . ." *Hensley*, 461 U.S. at 434.

9. 488 F.2d 714 (5th Cir. 1974).

10. See *Hensley*, 461 U.S. at 434.

11. The *Johnson* factors are:

- (1) the time and labor required to litigate the suit; (2) the novelty and difficulty of the questions presented by the lawsuit; (3) the skill

adopted by the United States Court of Appeals for the Fourth Circuit.¹² Consideration of those factors in arriving at the reasonable rate and the reasonable number of hours ordinarily expended will produce a lodestar figure that results in fair compensation without further adjustment.¹³

LOCAL RULES

Like many other federal districts,¹⁴ the District of Maryland has for years addressed in its *Rules of the United States District Court for the District of Maryland (Local Rules)* the timing and, to some extent, the contents required for attorney's fee petitions at the conclusion of trial.¹⁵ Indeed, the Supreme Court encouraged trial courts to set

required properly to perform the legal service; (4) the preclusion of other employment opportunities for the attorney due to the attorney's acceptance of the case; (5) the customary fee for such services; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount in controversy involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the 'undesirability' of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) awards in similar cases."

Trimper v. City of Norfolk, 58 F.3d 68, 73 (4th Cir. 1995).

12. See *id.*; Spell v. McDaniel, 824 F.2d 1380, 1402 n.18 (4th Cir. 1987); Daly v. Hill, 790 F.2d 1071, 1077 (4th Cir. 1986).
13. See Blum, 465 U.S. at 898-902; Trimper, 58 F.3d at 73-74; National Wildlife Fed'n v. Hanson, 859 F.2d 313, 318-19 (4th Cir. 1988) (quoting Daly, 790 F.2d at 1078).
14. See HIRSCH & SHEEHY, *supra* note 2, at 111-17 for a discussion of other districts' local rules, guidelines, and written opinions. See *id.* at apps. A, D & E for examples of local rules and guidelines.
15. D. Md. R. 109.2 provides:
 - a. *Time for filing.* Unless otherwise provided by statute, Local Rule 109.2.c. or otherwise ordered by the Court, any motion (including motions filed under Fed. R. Civ. P. 11) requesting the award of attorney's fees must be filed within fourteen days of the entry of judgment for all services performed prior thereto. The motion may be supplemented to request fees for any work done thereafter in connection with any post-trial motion. A motion seeking fees for services performed on appeal shall be filed within fourteen days of the issuance of the mandate by the Court of Appeals or, in the event of review by the Supreme Court, within fourteen days of the entry of judgment by the Supreme Court. Non-compliance with these time limits shall be deemed to be a waiver of any claim for attorney's fees.
 - b. *Contents.* Any motion requesting the award of attorney's fees must set forth the nature of the case, the claims as to which the party

such deadlines in *White v. New Hampshire Department of Employment Security*.¹⁶ The Court held that a request for attorney's fees under 42 U.S.C. § 1988 did not constitute a motion to alter or amend judgment subject to the ten-day limit of the Federal Rules of Civil Procedure,¹⁷ but that district courts were free to adopt local rules establishing timeliness standards for filing fee petitions.¹⁸

FORMULATION OF RULES AND GUIDELINES IN THE DISTRICT OF MARYLAND

While the *Local Rules* provided a general outline of the format to be followed in an attorney's fee petition, it did not address many of the specific, recurring issues that judges and lawyers routinely encountered when dealing with a particular petition.

In October 1996, Chief Judge J. Frederick Motz convened an *ad hoc* committee on attorney's fee awards to consider the formulation of rules and guidelines for addressing attorney's fee awards in the District of Maryland.¹⁹ Over the course of several meetings between

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. Any motion for attorney's fees in civil rights and discrimination cases shall be prepared in accordance with the Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases that are an appendix to these Rules.

Id.

16. 455 U.S. 445, 453 (1982).

17. FED. R. CIV. P. 59(e).

18. See *White*, 455 U.S. at 454; see also *Marryshow v. Flynn*, 986 F.2d 689, 693-94 (4th Cir. 1993) (permitting amendment of attorney's fee petition that was timely filed under local rule); *Jackson v. Beard*, 828 F.2d 1077, 1079-80 (4th Cir. 1987) (filing of post-judgment motions did not delay running of time under local rule to file attorney's fee petition).

19. The court was fortunate to have a distinguished group of practitioners from a variety of geographical and career backgrounds who were willing to serve on the committee. By current practice or past experience, the committee members represented the plaintiffs' bar, the defense bar, public interest lawyers, the Maryland Attorney General's Office, and large, medium, and solo-practice firms from both the Northern and Southern Divisions of the District of Maryland. Members included attorneys Susan Goering, George W. Johnston, Fred R. Joseph, Andrew D. Levy, Susan Sugar Nathan, and Ralph Tyler. District

October 1996 and February 1997, the committee developed and recommended to the court a proposed set of rules and guidelines. In March 1997, the proposed rules and guidelines were approved with minor changes and sent out for public comment. After consideration of the comments received, the *Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases*²⁰ (*Rules and Guidelines*) was adopted as Appendix B to the *Local Rules* effective July 1, 1997. As the court and the bar gain experience in the use of the *Rules and Guidelines*, the committee will monitor their fairness and effectiveness so that modifications may be proposed if necessary and considered in conjunction with the court's periodic revision of the *Local Rules*.²¹ The following is an overview and discussion of some of the major provisions of the *Rules and Guidelines* and the reasons for their adoption.

UNIFORM FORMAT AND QUARTERLY STATEMENTS

One of the principal purposes of the *Rules and Guidelines* was to promote uniformity and consistency for the benefit of judges reviewing fee petitions as well as lawyers preparing or opposing them. A common topic of fee litigation is the adequacy of time and billing

Judges J. Frederick Motz and Catherine C. Blake and Magistrate Judge William Connelly also participated.

20. D. MD. R. app. B. [hereinafter RULES AND GUIDELINES]. The complete RULES AND GUIDELINES are set forth as Appendix of this Article. As the title indicates, the RULES AND GUIDELINES are intended to cover the great majority of fee petitions litigated in the District of Maryland; that is, those brought under 42 U.S.C. § 1988, the various discrimination statutes, 20 U.S.C. § 1415(e)(4)(B) of the Individuals with Disabilities Education Act, 29 U.S.C. § 2617(a)(3) of the Family and Medical Leave Act, and similar "prevailing party" provisions which the Supreme Court generally considers analogous to 42 U.S.C. § 1988. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Combs v. School Bd.*, 15 F.3d 357, 360 (4th Cir. 1994). The rules do not specifically apply to Social Security cases, claims under ERISA, or the various intellectual property statutes, class actions, and other less frequently invoked fee provisions. See RULES AND GUIDELINES, *supra*, at n.1. In other cases, a guideline may be useful by analogy. Indeed, the principles applicable under 42 U.S.C. § 1988 generally apply to bankruptcy cases. See *Harman v. Levin*, 772 F.2d 1150, 1150 (4th Cir. 1985). The United States Bankruptcy Court for the District of Maryland, however, has its own attorney's fee guidelines. See D. MD. BANKR. R. app. D.
21. For example, as reasonable market rates change, the court will periodically need to reevaluate the specific dollar amounts enumerated in the RULES AND GUIDELINES, *supra* note 20, §§ 3-4. See generally *infra* note 29 (detailing current rules).

records provided in support of a fee petition.²² Although the time and billing maintained for an individual lawyer's or firm's practice may be satisfactory to its clients, it may be unacceptable to the court or to opposing counsel who is trying to determine or challenge the validity of a particular claimed item in a fee petition.²³

Accordingly, the committee proposed, and the court adopted, mandatory rules regarding the billing format and method of recording time to be used in submission of fee applications.²⁴ The advantages of a uniform billing format have been discussed among the bar and its major corporate clients for some time. In May 1995 a *Uniform Task-Based Management System: Litigation Code Set*²⁵ (*ABA Code Set*) was published as the result of collaborative efforts of the ABA Section of Litigation, the American Corporate Counsel Association, and a group of corporate clients and law firms.²⁶ The system divides the litigation process into five "phases," breaks those phases down into "tasks," and identifies "activity codes" to be used to designate specific work within each task.²⁷ Clients indicated that use of the *ABA Code Set* facilitated easier review and comparison of the bills they received for legal services, as well as the ability to develop a data base for budgeting and cost projection.²⁸

However, after experimentation with the *ABA Code Set*, the committee recommended against its adoption. One of the firms represented on the attorney's fee committee expressed concerns about the system after its experimental phase. In particular, there was concern expressed on behalf of smaller practitioners for whom a substantial investment of time and software might be required to implement its use. Instead of adopting the *ABA Code Set*, the committee formulated its own rules, identifying ten litigation phases or categories under which time should be recorded and then reported on the fee application.²⁹ In general, preparation, investigation, and

22. See *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179-80 (4th Cir. 1994); *Daly v. Hill*, 790 F.2d 1071, 1079-80 (4th Cir. 1986).

23. See, e.g., *Rum Creek*, 31 F.3d at 180; *Daly*, 790 F.2d at 1079-80.

24. See generally RULES AND GUIDELINES, *supra* note 20.

25. AMERICAN BAR ASSOCIATION, UNIFORM TASK-BASED MANAGEMENT SYSTEM: LITIGATION CODE SET (1995).

26. See Angela Ward, *Uniform Code Assigned for Every Task and Any User Easier Method for Counsel to Compare, Analyze Bills*, CORP. LEGAL TIMES, Aug. 1995, at 32. These efforts were coordinated and supported by the accounting firm Price Waterhouse. See *id.*

27. See *id.*

28. See *id.*

29. See RULES AND GUIDELINES, *supra* note 20, § 1(b). These phases are:

travel time should be recorded under the category to which they relate.³⁰ As noted, this section of the *Rules and Guidelines* is mandatory.³¹

The court and the committee anticipate several benefits from the use of a uniform format. First, it should save time for both the judge reviewing the fee petition and the lawyers preparing or opposing it. The judge will be able to determine the amount of hours reasonably expended on each aspect of the case more easily; the prevailing party's lawyer will have a model for organizing and presenting time that she knows will be accepted by the court; and the lawyer deciding whether to challenge the petition will be able to discern on which tasks his opponent may have spent excessive amounts of time. Second, it will permit development of a database that will provide more accurate comparison of the fees requested in particular types of cases and will be useful to the court in its overall management of attorney's fee petitions. Third, as further discussed below, the uniform format should assist in the process of settling cases where attorney's fees are involved.

The accurate evaluation of a potential attorney's fee award is often critical to achieving settlement in civil rights cases.³² In the

-
- (1) Case development, background investigation and case administration (includes initial investigations, file setup, preparation of budgets, and routine communications with client, co-counsel, opposing counsel, and the court)
 - (2) Pleadings
 - (3) Interrogatories, document production and other discovery
 - (4) Depositions (includes time spent preparing for depositions)
 - (5) Motions practice
 - (6) Attending court hearings
 - (7) Trial preparation and post-trial motions
 - (8) Attending trial
 - (9) ADR [and]
 - (10) Fee petition preparation.

Id.

30. *See id.* § 1(b) n.2.

31. *See id.* ("Mandatory Rules Regarding Billing Format, Time Recordation, and Submission of Quarterly Statements" (emphasis added)).

32. The settlement judge must recognize the potential for practical, if not actual, conflicts between a lawyer and her client on the subject of attorney's fees, particularly because defendants are often interested in a complete settlement for a negotiated amount of money, regardless of how the plaintiff and her lawyer intend to divide it. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 723 n.6 (1986) ("[A]n attorney . . . can be put in the position of either negotiating for his client or negotiating for his attorney's fees"); *White v. New Hamp-*

District of Maryland, United States Magistrate Judges often conduct settlement conferences at the request of the parties and at the encouragement of District Judges. The District's uniform scheduling order suggests holding a settlement conference at the conclusion of discovery and permits it at the early stages of litigation if both sides think it would be helpful. The *Rules and Guidelines* explicitly permit the judicial officer or private mediator conducting the conference to request time records in the litigation phase format from all counsel.³³ These records will ordinarily be submitted separately, on an *ex parte* basis, together with the other information the judge receives from each side in advance of the conference. This information allows the settlement judge to discuss with each side and, to the extent appropriate, share with the opposing side, information concerning the likely amount of any fee award and the anticipated costs of further litigation, which can be of great assistance in achieving resolution of the case.

Another mandatory provision intended to facilitate settlement is the requirement that counsel who may be seeking fees submit to opposing counsel quarterly statements showing the amount of time spent on the case and the value of that time.³⁴ To alleviate concerns about disclosing an attorney's work-product, the quarterly statements do not need to be in the litigation phase format or otherwise reveal how counsel's time was spent.³⁵ Frequently, however, defense counsel attempting to evaluate a client's risks and benefits must do so without sufficient information. For example, in weighing the risks and benefits of a possible settlement offer or offer of judgment under *Federal Rule of Civil Procedure* 68, defense counsel has no ready way to assess the amount of attorney's fees the plaintiff will claim.³⁶ This may be particularly true for public agency lawyers who do not maintain billing records for their work. The quarterly statements provide such information and put defense counsel on notice of a client's potential exposure if the plaintiff prevails.

In some cases, of course, there is no settlement and the judge

shire, 455 U.S. 445, 454 n.15 (1982) ("Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.").

33. See RULES AND GUIDELINES, *supra* note 20, § 1(d).

34. See *id.* § 1(c).

35. See *id.*

36. For a discussion of the relationship between FED. R. CIV. P. 68 and attorney's fees, see *Sheppard v. Riverview Nursing Ctr.*, 88 F.3d 1332, 1337-38 (4th Cir. 1996).

must rule on a fee petition filed by the prevailing party.³⁷ At this stage, the litigation phase format will apply to both parties if the judge presiding over the fee dispute finds it appropriate to require the opposing party to disclose her attorney's fees.³⁸ This situation often occurs when there is a dispute about the reasonable number of hours counsel has expended. While there are many reasons fee amounts will differ, the time expended by the losing side on a particular aspect of the litigation bears at least some relevance to the reasonableness of the time claimed by the prevailing side.³⁹

REIMBURSABLE EXPENSES

In addition to the uniform format, the other mandatory aspects of the *Rules and Guidelines* are the provisions setting rates for certain reimbursable expenses.⁴⁰ In the Fourth Circuit, a prevailing party is entitled to compensation for reasonable litigation expenses "which are normally charged to a fee-paying client, in the course of providing legal services,"⁴¹ provided they are properly documented.⁴² To avoid litigation over issues such as the rate for mileage and in-house copying, the committee recommended a uniform approach to the reimbursement of expenses.⁴³ This uniform approach to reimbursement will make counsel aware in advance that they can recover certain expenditures; for example, the actual cost of computerized research. Nevertheless, the party seeking fees must be prepared to show that the expense was reasonably incurred; thus, for example,

37. Where the defendant is the prevailing party, fees will ordinarily be awarded only upon a showing that the plaintiff's claim was "frivolous, unreasonable, or without foundation," or that "the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978); accord *Hutchinson v. Staton*, 994 F.2d 1076, 1079, 1080-81 (4th Cir. 1993).

38. See RULES AND GUIDELINES, *supra* note 20, § 1(d)-(e).

39. See generally *id.* § 1.

40. See *id.* § 4. "Mileage is compensable at 0.30 per mile." *Id.* § 4(b). "In house copying is compensable at 0.15 per page; commercial copying at actual cost." *Id.* § 4(c).

41. *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (quoting *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979)).

42. See *Trimper v. City of Norfolk*, 58 F.3d 68, 77 (4th Cir. 1995) (upholding the lower court's decision to deny attorney's fees based upon inadequate documentation); *Daly v. Hill*, 790 F.2d 1071, 1087 (4th Cir. 1986) (Kellman, J., dissenting) (noting that it was within the trial court's discretion to determine whether attorney's fees were properly documented).

43. See RULES AND GUIDELINES, *supra* note 20, § 4.

unlimited use of the fax machine or express delivery services is not encouraged.

COMPENSABLE TIME

In other areas of the fee petition, the court adopted a more flexible approach by setting guidelines that will yield to the necessities of a particular case. Nonetheless, these guidelines provide a framework for determining, under most circumstances, what will and will not be approved as a reasonable expenditure of time. Without attempting to cover all possible areas of dispute, this framework focuses on issues that have most often been the source of disagreement between the parties and the court. Encouraging efficient use of lawyers' time and avoiding duplication of efforts are central to the approach taken by the court.⁴⁴ These parameters are consistent with the United States Court of Appeals for the Fourth Circuit's admonition that "in seeking attorney's fees under section 1988, attorneys are under a duty to minimize expenses."⁴⁵

For example, the guidelines provide that ordinarily only one lawyer for each separately represented party should be compensated for attending depositions and hearings.⁴⁶ As this is a guideline and not a rule, a party seeking fees for two lawyers is permitted to explain why two lawyers were necessary or, perhaps, more efficient than preparing one lawyer to handle the hearing alone.⁴⁷ Further, this guideline is not meant to establish an unequal playing field; if the defendant is paying for more than one attorney to attend a hearing or deposition, courts should consider this as a factor when determining the reasonableness of having more than one lawyer present for the plaintiff.⁴⁸

Another area covered by the guidelines is compensation for intra-office conferences.⁴⁹ The committee and the court recognized

44. *See id.*

45. *Trimper*, 58 F.3d at 76. Indeed, an outrageously excessive request for fees may be denied in its entirety. *See Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993).

46. *See Trimper*, 58 F.3d at 76 (citing *Daly*, 790 F.2d at 1080); *Goodwin v. Metts*, 973 F.2d 378, 383-84 (4th Cir. 1992); *Daly*, 790 F.2d at 1080.

47. An example provided in a footnote to the RULES AND GUIDELINES provides: two attorneys at a deposition may be reasonable where a less senior attorney organized numerous documents important to a deposition, but the witness is critical to the case and should be examined by a more senior attorney. *See* RULES AND GUIDELINES, *supra* note 20, § 2(b) n.3.

48. *Id.*

49. *Id.* § 2(e).

that there may be a legitimate need for junior attorneys to confer with senior attorneys. Also, attorneys handling different aspects of the litigation may need to meet and confer. However, this is one of the aspects of a fee petition that is subject to the greatest potential for abuse and that is the most difficult to evaluate.⁵⁰ As a guideline, the court has chosen to compensate only one lawyer for intra-office conferences, but the time may be charged at the rate of the most senior lawyer participating.⁵¹ Nonetheless, the guidelines recognize an exception for cases requiring regular meetings as an aspect of efficient management.⁵²

Another aspect of the guidelines that has been the subject of debate in court opinions, as well as among the committee members, is compensation for travel time. Travel expenses, where necessary and reasonable, have been recognized as compensable by the Fourth Circuit.⁵³ Several other courts apply a test of necessity and reasonableness for travel time as well.⁵⁴

Assuming travel time itself has been found necessary and reasonable, courts have nonetheless been divided on the appropriate hourly rate to be applied in compensating such time.⁵⁵ After consid-

50. *See, e.g., Goodwin*, 973 F.2d at 383-84 (discussing the duplication of efforts through the overstaffing of attorneys).

51. Specifically, RULES AND GUIDELINES, *supra* note 20, § 2(e) provides: "Compensation may be paid for the attendance of more than one lawyer at periodic conferences of defined duration held for the purpose of work organization and delegation of tasks in cases where such conferences are reasonably necessary for the proper management of the litigation." *Id.*

52. *See id.*

53. *See Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988); *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 623-24 (4th Cir. 1978).

54. *See In re North*, 59 F.3d 184, 194-95 (D.C. Cir. 1995) (disallowing both travel time and travel expenses caused by the unjustified use of out-of-town counsel); *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984) (finding that where the amount of time spent in travel was reasonable, the appropriate billing rate was the same as that set for other time spent working on the case); *McDowell v. Moore*, 635 F. Supp. 280, 283 (W.D.N.C. 1986) (reducing fee request where court could not determine necessity or reasonableness of employing out-of-town counsel).

55. The United States Court of Appeals for the Seventh Circuit supports the use of the full hourly rate, unless the time is also being used to perform work for another client. *See Henry*, 738 F.2d at 194; *see also Crumbaker v. Merit Sys. Protection Bd.*, 781 F.2d 191, 193-94 (Fed. Cir. 1986) (following *Henry* in a case awarding fees under 5 U.S.C. § 7701(g)(1)(1986)), *modified*, 827 F.2d 761 (Fed. Cir. 1987); *Mallory v. Harkness*, 923 F. Supp. 1546, 1556-57 (S.D. Fla. 1996), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (compensating travel time at full hourly rate). Another line of cases, however, supports the application of a reduced

ering the case law and the geography of the State and the District of Maryland, the committee and the court reached a compromise: "Up to 2 hours of travel time (each way and each day) to and from a court appearance, deposition, witness interview, or similar proceeding that cannot be devoted to substantive work may be charged at the lawyer's usual rate. . . . [Additional time] may be charged at one-half of the lawyer's usual rate."⁵⁶

HOURLY RATES

Finally, the committee and the court considered the issue of hourly rates. Ordinarily, to establish a reasonable hourly rate, applicants must provide specific evidence of the "prevailing market rates in the relevant community" for the type of work for which fees are sought.⁵⁷ The rate must be determined in light of the particular type of litigation involved, for example civil rights.⁵⁸ The reasonable rate for individual lawyers depends in part on their experience and qualifications, as well as the actual rate they can command on the market.⁵⁹ Additionally, the presiding judge is entitled to rely on her personal knowledge of prevailing market rates in the relevant community and on evidence of rates awarded in recent, similar cases.⁶⁰

hourly rate, usually half the full rate. *See* *Marryshow v. Flynn*, 986 F.2d 689, 693-94 (4th Cir. 1993) (upholding the magistrate judge's award of a reduced rate for travel time); *McDonald v. Armontrout*, 860 F.2d 1456, 1462-63 (8th Cir. 1988) (finding no error in an award for fees at half of the hourly rate); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 238 (2d Cir. 1987) (observing that it was not unusual for travel to be compensated at lower rates); *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (noting that counsel agreed that one-half of the hourly rate for travel time was reasonable); *Watkins v. Fordice*, 807 F. Supp. 406, 414 (S.D. Miss. 1992) (awarding compensation for travel time at one-half of counsel's hourly rate); *Sun Publ'g Co., Inc. v. Mecklenburg News, Inc.*, 594 F. Supp. 1512, 1520 (E.D. Va. 1984) (finding it unreasonable to pay an attorney the same rate for travel as for "in-court or other active time") *implied overruling recognized by* Board of Dirs., *Water's Edge v. Anden Group*, 135 F.R.D. 129 (E.D. Va. 1991).

56. RULES AND GUIDELINES, *supra* note 20, § 2(f)(ii)-(iii).

57. *Blum v. Stenson*, 465 U.S. 886, 895-96 & n.11 (1984); *see* *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995); *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987).

58. *See* *Buffington v. Baltimore County*, 913 F.2d 113, 130 (4th Cir. 1990).

59. *See* *Spell*, 824 F.2d at 1402; *Daly v. Hill*, 790 F.2d 1071, 1082 (4th Cir. 1986).

60. *See* *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994); *Spell*, 824 F.2d at 1402-03; *Sheppard v. Riverview Nursing Ctr.*, 870 F. Supp. 1369, 1377 (D. Md. 1994), *vacated and remanded on other grounds*, 88 F.3d 1332 (4th Cir.), *and cert. denied*, 117 S. Ct. 483 (1996).

Recognizing these principles, the committee and the court decided to establish two guideline ranges for hourly fees based on years of experience.⁶¹ While the applicable case law must control in a particular case, the ranges established in the *Rules and Guidelines* are nevertheless intended to provide some practical guidance in order to narrow the debate over the range of reasonable rates.

The task of identifying a true market rate for plaintiffs' attorneys may be quite difficult in an area where fee arrangements are ordinarily contingent. It is rare to find a civil rights plaintiff who pays a predetermined hourly rate for services regardless of the outcome. Generally, the rate necessary to achieve "effective access to the judicial process" for persons with civil rights grievances," the cornerstone of 42 U.S.C. § 1988, will differ from rates charged to other clients. Ordinarily, civil rights plaintiffs are charged higher rates than the rate necessary to achieve representation for most defendants because there is less certainty of payment in civil rights cases.⁶² Accordingly, the guideline ranges are based on two principal sources: (1) fees awarded in the District of Maryland in recent cases where the plaintiffs submitted affidavits attesting to the prevailing rates and judges relied on their personal knowledge of those rates, and (2) information concerning hourly rates generally paid to defense attorneys for discrimination and civil rights cases in the District of Maryland, with an upward adjustment to account for the risk of nonpayment to plaintiffs' lawyers if their clients do not prevail.⁶³ The reasonableness of the ranges established by the *Rules and Guidelines* is supported by the fact that both methods of identifying rates came to essentially similar results.

Comments received by the committee suggest that some practitioners may believe the *Rules and Guidelines* favor the defense in their treatment of the hours that will be compensated. Even if such

61. See RULES AND GUIDELINES, *supra* note 20, § 3. Those rates are "a. Lawyers admitted to the bar for less than eight years: \$135-170[;] b. [l]awyers admitted to the bar for more than eight years: \$190-225[;] c. [p]aralegals and law clerks: \$65." *Id.*

62. See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

63. In *City of Burlington v. Dague*, 505 U.S. 557 (1992), the Supreme Court held that the risk or contingency of nonpayment is not a basis for an upward adjustment of the lodestar fee, *see id.* at 561, and the RULES AND GUIDELINES do not contemplate such an adjustment. Risk of nonpayment, however, is a factor which the market validly considers in determining what rate is necessary to attract effective legal representation for a client who cannot pay if she does not prevail.

a tendency exists, however, it should be adequately offset by the court's and the committee's attempt to set hourly rates that recognize the genuine risks and difficulties inherent in plaintiffs' civil rights and employment claims.

These risks may indeed be somewhat greater in the Fourth Circuit than in other areas of the country because the Fourth Circuit has significantly restricted the circumstances under which a plaintiff may be deemed a prevailing party. Relying on the Supreme Court's opinion in *Farrar v. Hobby*,⁶⁴ a case where fees were sought, the court of appeals held that "[a] person may not be a 'prevailing party' plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in a § 1983 action."⁶⁵ The court of appeals further explained: "[T]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. 'Catalyst theory,' allowing that result, is no longer available for that purpose."⁶⁶ This additional barrier to the recovery of fees also must be considered by attorneys deciding whether to take on a potentially worthwhile, but time-consuming and expensive battle on behalf of an individual's civil rights.⁶⁷

64. 506 U.S. 103 (1992). Under *Farrar*, a judgment for nominal damages is sufficient to establish a plaintiff as a prevailing party, but if the only relief sought was monetary, nominal damages may not be a sufficiently successful result to warrant an award of fees. *See id.* at 114-15.

65. S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (7-6 decision) (adopting as its own Judge Wilkinson's dissenting opinion in S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ. of N.C., 6 F.3d 160, 168-72 (4th Cir. 1993)).

66. *Id.* (citing *Farrar*, 506 U.S. at 112-13, and *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979)); *see also* *Arvinger v. Mayor of Baltimore*, 31 F.3d 196, 202-03 (4th Cir. 1994); *Clark v. Sims*, 28 F.3d 420, 425 (4th Cir. 1994). While *Clark* reaffirmed the court of appeals's position in *S-1 and S-2*, the district court held on remand that *S-1 and S-2* does not foreclose application of the catalyst theory in evaluating a party's level of success after the plaintiff has been determined to be a prevailing party. *See Clark v. Sims*, 894 F. Supp. 868, 871 (D. Md. 1995) (mem.). The United States District Court for the District of South Carolina also adopted this narrow construction of *S-1 and S-2* in *Lucas v. Guyton*, 901 F. Supp. 1047, 1055-56 (D.S.C. 1995).

67. The Fourth Circuit apparently stands alone in its interpretation that *Farrar* rejects the catalyst theory. Other circuits that have considered the prevailing party issue post-*Farrar* have recognized the continued viability of the catalyst theory. *See Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Cady v. City of Chicago*, 43 F.3d

CONCLUSION

The *Rules and Guidelines* are intended to serve fairness by imposing some greater degree of predictability on the court. Arbitrary or unjustified reductions in fees compromise the even-handed enforcement of civil rights that is essential to the rule of law. While individual judges will vary in their approach to attorney's fees, as they do with other issues, the court has a collective responsibility to limit the arbitrary range of that variability. Lawyers and parties who comply with the *Rules and Guidelines*, exercise sound billing judgment, and present a well-supported petition to the court have a right to expect that judges in the District of Maryland also will abide by these principles. With the compliance of attorneys and judges alike, the *Rules and Guidelines* should further the congressional goal of awarding fair and reasonable fees that make possible the individual vindication of civil rights.

326, 328 n.2 (7th Cir. 1994); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 550 (3d Cir. 1994); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 17 F.3d 260, 263 n.2 (8th Cir. 1994); *Craig v. Gregg County, Tex.*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch. Dist. Bd. of Educ.*, 985 F.2d 255, 257-58 (6th Cir. 1993); *see also Averill*, *supra* note 1, at 2283 ("[T]he Fourth Circuit's lonely stance as the sole circuit to abandon catalyst theory . . . paints [it] as the least solicitous of civil rights enforcement . . .").

APPENDIX

RULES AND GUIDELINES FOR DETERMINING LODESTAR ATTORNEYS' FEES IN CIVIL RIGHTS AND DISCRIMINATION CASES¹1. *Mandatory Rules Regarding Billing Format, Time Recordation, and Submission of Quarterly Statements.*

a. Time shall be recorded by specific task and lawyer or other professional performing the task as set forth more fully in Local Rule 109.2.b.

b. Fee applications, accompanied by time records, shall be submitted in the following format organized by litigation phase.²

Case development, background investigation and case administration

(Includes initial investigations, file setup, preparation of budgets, and routine communications with client, co-counsel, opposing counsel, and the court)

Pleadings

Interrogatories, document production and other discovery

Depositions (Includes time spent preparing for depositions)

Motions practice

Attending court hearings

Trial preparation and post-trial motions

Attending trial

-
1. These rules and guidelines apply to cases in which a prevailing party would be entitled to reasonable attorneys' fees under 42 U.S.C. section 1988(b) and to cases brought under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans With Disabilities Act, the Rehabilitation Act, the Individuals With Disabilities Education Act, the Family and Medical Leave Act and equivalent statutes. They do not apply to Social Security cases.
 2. In general, preparation time and travel time should be reported under the category to which they relate. For example, time spent preparing for and traveling to and from a court hearing should be recorded under the category "Court hearings." Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category "Motions practice." Similarly, a telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category "Interrogatories, document production and other written discovery." Of course, each of these tasks must be separately recorded in the back-up documentation in accordance with Guideline 1(a).

ADR

Fee petition preparation

c. Counsel for a party intending to seek fees if the party prevails shall submit to opposing counsel quarterly statements showing the amount of time spent on the case and the total value of that time. These statements need not be in the "litigation phase" format provided in Guideline 1(b) or otherwise reflect how time has been spent. The first such statement is due at the end of the first quarter in which the action is filed.

d. Upon request by the judicial officer (or private mediator agreed upon by the parties) presiding over a settlement conference, counsel for all parties (with the exception of public lawyers who do not ordinarily keep time records) shall turn over to that officer (or mediator) statements of time and the value of that time in the "litigation phase" format provided in Guideline 1(b).

e. If during the course of a fee award dispute a judicial officer orders that the billing records of counsel for the party opposing fees must be turned over to the party requesting fees, those billing records shall be submitted in the "litigation phase" format.

2. *Guidelines re Compensable and Non-compensable Time.*

a. Where plaintiffs with both common and conflicting interests are represented by different lawyers, there shall be a lead attorney for each task (e.g., preparing for and speaking at depositions on issues of common interest and preparing pleadings, motions, and memoranda), and other lawyers shall be compensated only to the extent that they provide input into the activity directly related to their own client's interests.

b. Only one lawyer for each separately represented party shall be compensated for attending depositions.³

3. Departure from this guideline would be appropriate upon a showing of a valid reason for sending two attorneys to the deposition, e.g. that the less senior attorney's presence is necessary because he organized numerous documents important to the deposition but the deposition is of a critical witness whom the more senior attorney should properly depose. Departure from the guideline also would be appropriate upon a showing that more than one retained attorney representing the defendant attended the deposition and charged the time for her attendance. (If two lawyers from a public law office representing a defendant attend a deposition, the court should consider this fact and the role played by the second lawyer, i.e., whether she provided assistance, including representation of a separate public agency or individual defendant, or was present for merely educational purposes, in determining whether plaintiff should also be compensated for having a second lawyer at-

c. Only one lawyer for each party shall be compensated for client and third party conferences.

d. Only one lawyer for each party shall be compensated for attending hearings.⁴

e. Generally, only one lawyer is to be compensated for intra-office conferences. If during such a conference one lawyer is seeking the advice of another lawyer, the time may be charged at the rate of the more senior lawyer. Compensation may be paid for the attendance of more than one lawyer at periodic conferences of defined duration held for the purpose of work organization and delegation of tasks in cases where such conferences are reasonably necessary for the proper management of the litigation.

f. Travel.

i. Whenever possible time spent in traveling should be devoted to doing substantive work for a client and should be billed (at the usual rate) to that client. If the travel time is devoted to work for a client other than the matter for which fees are sought, then the travel time should not be included in any fee request. If the travel time is devoted to substantive work for the client whose representation is the subject of the fee request, then the time should be billed for the substantive work, not travel time.

ii. Up to 2 hours of travel time (each way and each day) to and from a court appearance, deposition, witness interview, or similar proceeding that cannot be devoted to substantive work may be charged at the lawyer's usual rate.

iii. Time spent in long-distance travel above the 2 hours limit each way that cannot be devoted to substantive work, may be charged at one-half of the lawyer's usual rate.

tend.)

4. The same considerations discussed in footnote 3 concerning attendance by more than one lawyer at a deposition also apply to attendance by more than one lawyer at a hearing. There is no guideline as to whether more than one lawyer for each party is to be compensated for attending trial. This must depend upon the complexity of the case and the role that each lawyer is playing. For example, if a junior lawyer is present at trial primarily for the purpose of organizing documents but takes a minor witness for educational purposes, consideration should be given to billing her time at a paralegal's rate.

3. *Guidelines re Hourly Rates.*⁵

- a. Lawyers admitted to the bar for less than eight years: \$135-170.
- b. Lawyers admitted to the bar for more than eight years: \$190-225.
- c. Paralegals and law clerks: \$65.

4. *Reimbursable Expenses*

- a. Generally, reasonable out-of-pocket expenses (including long-distance telephone calls, express and overnight delivery services, computerized on-line research and faxes) are compensable at actual cost.
- b. Mileage is compensable at \$0.30 per mile.
- c. In-house copying is compensable at \$0.15 per page; commercial copying is compensable at actual cost.

5. These rates are intended solely to provide practical guidance to lawyers and judges when requesting, challenging and awarding fees. The factors established by case law obviously govern over them. However, the guidelines may serve to make the fee petition less onerous by narrowing the debate over the range of a reasonable hourly rate in many cases. The guidelines were derived by informally surveying members of the bar concerning hourly rates paid on the defense side in employment discrimination and civil rights cases and adding an upward adjustment to account for the risk of nonpayment faced by a plaintiff's lawyer in the event that her client does not prevail. The guideline rates also are generally comparable to those applied by the court in several recent cases involving the award of fees to plaintiffs' counsel after considering affidavits submitted in support of such rates. They do not apply to cases governed by the Prison Litigation Reform Act, which sets an hourly rate by statute.

