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Prevailing Party and Defending Attorney Fees Claims in Section 1983 and Employment Cases

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STATUTORY AUTHORITY FOR ATTORNEY FEES and COSTS

- American Rule:

  Requires each party to bear his/her own attorney fees and costs unless there is a fee shifting statute with explicit statutory authority which permits the prevailing party to recover attorney fees. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 (2001)

Statutory Authority

- Statutory Authority Provides Basis to Award Attorney Fees in Federal Cases

  - Civil Rights Act, 42 U.S.C. Section 1983 – Section 1988 provides: "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983)
    - Ensures "effective access to the judicial process" for persons with civil rights grievances. *Hensley*, 461 U.S. at 429.
    - First determination is whether the plaintiff is a prevailing party, second is whether "award of attorney's fees should be granted to the prevailing party" and third is "what amount would be reasonable under the specific circumstances of the case." *Feldman v. Pro Football, Inc.*, 806 F. Supp.2d 845, 847 (D. Md. 2011)

Statutory Authority

- Title VII of the Civil Rights Act of 1964 - Section 706(k) of Title VII, 42 U.S.C. § 2000e–5(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee * * *."

- Rehabilitation Act - The 1978 amendments added virtually identical language as Title VII to the Rehabilitation Act in Section 505(b), 29 U.S.C. § 794a(b) - "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee * * *."

Statutory Authority

- Americans with Disabilities Act (ADA) - 42 U.S.C.A. § 12205 provides: "[T]he court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs."

- Other Statutory Authority –
  - Age Discrimination in Employment Act (ADEA) - 29 U.S.C. § 626(b)
  - Fair Labor Standards Act (FLSA) - 29 U.S.C. § 216(b)
  - Equal Pay Act (EPA) - 29 U.S.C. § 216(b)
  - Equal Access to Justice Act - 28 U.S.C. § 2412(d)(1)(A)
  - Family and Medical Leave Act (FMLA) - 29 U.S.C.A. § 2617(A)(3)
  - ERISA - 29 U.S.C. § 1132(g)(1)
  - FHAA - 42 U.S.C. § 3613(c)(2)

Legal Standard
Who is Entitled to Attorney's Fees?
"The Prevailing Party"

- Defined:

A "prevailing party" for attorney fee-shifting purposes in a federal civil rights is one who is "able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."

Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989); *See also Hensley v. Eckerhart*, 461 U.S. 424 (1983)

Prevailing Party - Defined

- Must obtain at least some relief on the merits of his/her claim. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).
  - Enforceable judgments
  - Comparable relief through a consent decree or settlement.

Prevailing Party - Defined

- The relief secured by the plaintiff must directly benefit him at the time of the judgment or settlement.
- "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

Farrar, 506 U.S. at 111-12 (1992)

Prevailing Party - Defined

- Definition clarified by Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 604 (2001), which held that there must be a **material alteration in the legal relationship of the parties** to support an award of attorney's fees (ADA and FHAA claims).
  - Rejection of catalyst theory, i.e., that the litigation brought about the voluntary or unilateral change in defendant's conduct which was not insubstantial.

Prevailing Party - Defined

- "Enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney fees."

- There must be a **judicial imprimatur** that changes the legal relationship of the parties.

- "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." *Buckhannon*, 532 U.S. at 605 (rejecting the catalyst theory). (But see catalyst theory authorized by statute – FOIA)

Prevailing Party - Defined

- A settlement with a court-ordered consent decree has the judicial imprimatur necessary to change the legal relationship of the parties and supports an award of attorney fees. *Buckhannon*, 532 U.S. at 604; *Grissom v. The Mills Corporation*, 549 F.3d 313, 318 (4th Cir. 2008).

- Nominal damages can support an award of attorney fees. *Farrar v. Hobby*, 506 U.S. 103 (1992).

  - Jury award of one dollar in compensatory damages sufficient to support award of $350,000 in attorney fees where significant public purpose was served by the litigation. *Mercer v. Duke University*, 401 F.3d 199 (4th Cir. 2005)

Prevailing Party - Defined

- "The Supreme Court has emphasized that 'the prevailing party inquiry does not turn on the magnitude of the relief obtained.' " *Sanchez v. City of Austin*, 774 F.3d 873, 878-79 (5th Cir. 2014) (quoting *Farrar*)

- The small amount a jury awarded to plaintiff when compared to the larger amount she was seeking in the case was relevant to the amount of fees awarded, but plaintiff was the prevailing party and entitled to fees. *Mcafee v. Boczar*, 738 F.3d 81 (4th Cir. 2014).

- An award of declaratory and/or injunctive relief supports an award of attorney fees. *Lefemine v. Wideman*, - U.S. - , 133 S. Ct. 9 (2012).

Prevailing Party - Defined

- Catalyst theory – rejected by Supreme Court (in resolving a dispute among the circuits) but may be supported by legislation:
  - FOIA – 5 U.S.C. Section 552(a)(4)(E)(ii) – provides for attorney's fees if, among other reasons, litigation brought about voluntary change or unilateral action by defendant which was not insubstantial.
  - ERISA – 29 U.S.C. § 1132(g)(1) gives the court discretion to award either party a "reasonable attorney's fee" in "any action." The Supreme Court held that *Buckhannon* did not apply to ERISA based on the lack of "prevailing party" language. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010).
  - Various environmental statutes (Endangered Species Act, Clean Air Act, etc.) that provide for fees "whenever appropriate."

Prevailing Party - Defined

WHAT THE COURTS ARE SAYING:

- D.C. Circuit: three-part test : "(1) there must be a court-ordered change in the legal relationship between the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." *Autor v. Pritzker*, 843 F.3d 994, 996 (D.C. Cir. 2016).

- Third Circuit: A prevailing party is one who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *J.O. ex rel. C.O. v. Orange Tp. Bd. of Educ.*, 287 F.3d 267, 271 (3d Cir. 2002); *Mancini v. Northampton Cty.*, 836 F.3d 308, 320-21 (3d Cir. 2016)

- Fourth Circuit: "A person may not be a prevailing party 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." *S-1 and S-2 v. State Bd. of Ed. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994)

Prevailing Party - Defined

- Fifth Circuit: "A 'material alteration' results when there is a 'judgment for damages in any amount, whether compensatory or nominal,' because even a nominal award 'forc[es] the defendant to pay an amount he otherwise would not pay.' Such a change in the parties' relationship can be effectuated through an enforceable judgment or…a consent decree or settlement." *Grisham v. City of Fort Worth*, 837 F.3d 564, 568 (5th Cir. 2016)

- Sixth Circuit: " 'A plaintiff crosses the threshold to 'prevailing party' status by succeeding on a single claim, even if he loses on several others and even if that limited success does not grant him the 'primary relief' he sought.' " *Binta B. ex rel. S.A. v. Gordon,* 710 F.3d 608, 620 (6th Cir. 2013).

- Eighth Circuit: " '[A] judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party.' " *Advantage Media, L.L.C. v. City of Hopkins, Minn.*, 511 F.3d 833, 838 (8th Cir. 2008)

Prevailing Party - Defined

- Eleventh Circuit: (Unpublished case)
  - "The characteristic shared by judicial actions that pass *Buckhannon*'s test is that such actions entail district court oversight and enforcement authority. *See Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 279-81 (4th Cir. 2002). Whereas private settlements "do not entail . . . judicial approval and oversight" and therefore cannot satisfy *Buckhannon*, consent decrees and settlement agreements approved by the court—which do satisfy *Buckhannon*—involve an "obligation to comply" with the court's directives. *Id.* (internal quotation marks omitted); *see also Roberson v. Giuliani*, 346 F.3d 75, 83 (2d Cir. 2003) ("In the case of both consent decrees and private settlement agreements over which a district court retains enforcement jurisdiction, the district court has the authority to force compliance with the terms agreed upon by the parties.")."

Aaron-Brush, et al. v. Attorney General State of Alabama, No. 16-10028 (11th Cir. Jan. 30, 2017)

Prevailing Party - Defined

- *Aaron v. Alabama* – 11th Circuit:
  - Plaintiffs contended the district court's directives during the status conference constituted a judicially sanctioned change in the parties' relationship within the meaning of *Buckhannon*.
  - But 11th Circuit noted the district court's directives were too informal to satisfy *Buckhannon*'s test. The record reflected that after the parties jointly notified the district court that a recent Supreme Court case on same-sex marriage resolved the legal issues in the case, the court basically moderated the parties' agreements to satisfy the couple's concerns about their ability to exercise their marital rights in Alabama. Rather than direct the parties to act or else face the court's enforcement, the district court supplied the parties with suggestions for facilitating the defendants' voluntary compliance.
  - Defendants' agreement to comply with SC ruling "was the impetus for the parties' resolution of their dispute. Thus, on this record, the Aaron-Brushes have not demonstrated that they benefitted from a judicially sanctioned change in their legal relationship with the defendants such that they must be deemed prevailing parties under § 1988(b)."

Prevailing Party - Defined

No Award of Attorney Fees –

- Reversal of directed verdict by plaintiff– No award of fees - *Hanrahan v. Hampton*, 446 U.S. 754 (1980)

- Obtained a judicial pronouncement that the defendant has violated the constitution unaccompanied by 'judicial relief' – No award of fees – *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)

- The Fifth Circuit identified two limited types of cases upholding a full denial of fees: (1) "situations in which the plaintiff filed under section 1983 to recover what was essentially a tort claim for private monetary damages," which "did not require injunctive relief or confer significant civil rights to the public" and (2) cases in which "even though the plaintiffs received the benefits desired from their litigation, their efforts did not contribute to achieving those results." *Grisham v. City of Fort Worth, Texas*, 837 F.3d 564, 568–69 (5th Cir. 2016).

What About Prevailing Defendants?

- Statutory attorney fee provisions do not distinguish between prevailing plaintiffs and prevailing defendants. Both may recover. *See EEOC v. Clay Printing Co.,* 13 F.3d 813, 817 (4th Cir.1994).

- More stringent standard for prevailing defendants established in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978)
  - Prevailing plaintiffs ordinarily entitled to attorneys' fees unless special circumstances militate against such an award. *Christiansburg Garment,* 434 U.S. at 417 (Title VII case).

Prevailing Defendants

- The standard is quite generous and effectuates Congress's intent for plaintiffs to serve as " 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority." *Id.* at 416.
- It "promotes the vigorous enforcement of Title VII [and other civil rights statutes] by making it easier for plaintiffs of limited means to bring meritorious actions." *Id.* at 420.
- The same policy considerations do not apply in the context of prevailing defendants and they are not afforded the same generous standard set for prevailing plaintiffs.

Prevailing Defendants

- While Congress sought to encourage vigorous prosecution of meritorious Title VII actions by making it easier for a plaintiff to bring such a case, it also desired "to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420.

- To accommodate these competing considerations, the Supreme Court held in *Christiansburg Garment* that prevailing defendants may obtain attorney's fees in a Title VII if the district court:

  > "finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. (but no subjective bad faith is required).

Prevailing Defendants

- Awarding attorney's fees to a prevailing defendant is "a conservative tool, to be used sparingly in those cases [in] which the plaintiff presses a claim which he knew or should have known was groundless, frivolous, or unreasonable." *Arnold v. Burger King Corp.,* 719 F.2d 63, 65 (4th Cir.1983); *see also Glymph v. Spartanburg Gen. Hosp.,* 783 F.2d 476, 479 (4th Cir.1986) ("District courts should award such fees sparingly....").

- Great deference is given to the trial court's assessment of whether a plaintiff's claim was frivolous, unreasonable, or groundless.

Calculating Fees

- File a Fee Petition asserting a reasonable fee and reasonable time spent

- What is a reasonable fee? The Lodestar Approach –
  - Court determines the Lodestar amount – "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's service." *Hensley v. Eckerhard,* 461 U.S. 424, 433 (1983). *See also U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d, 356 (4th Cir. 2009).

Calculating Fees

- Includes attorney fees, expert fees for consultation and testimony, and related litigation expenses.

- "[A]ttorneys' fees and expenses are inseparably intertwined" such that they are "equally vital component of the costs of litigation." *Daly v. Hill*, 790 F.2d 1071, 1083 (4th Cir. 1986).

- Additional fees accrued for successful appeals are permissible.

Calculating Fees

- Fourth Circuit has outlined three-step process:
  - Determine the lodestar figure by multiplying number of reasonable hours expended times a reasonable rate, using the *Johnson* factors, described below.
  - Subtract fees for hours spent on unsuccessful claims unrelated to successful ones.
  - Award some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.

McAfee v. Boczar, 738 F. 3d 81, 88 (4th Cir. 2013)

Calculating Fees

- Other Circuits have similar steps:
  - First: "Flexibility is a hallmark of the lodestar approach," and can – but does not have to – involve two different hourly rates for core and non-core (copying, other simpler) tasks. *Matalon v. Hynnes,* 806 F.3d 627, 638 (1st Cir. 2015)
  - Sixth: Look at lodestar, then adjust based on several factors, including the most important factor: the degree of success obtained. *Hines v. City of Columbus, Ohio*, No. 16-3333, 2017 WL 253669 (6th Cir. Jan. 20, 2017) (unpublished)
  - Seventh: begin by computing lodestar, then adjust based on the *Johnson* (or "*Hensley*," from *Hensley v. Eckerhart* , 461 U.S. 424 (1983)) factors.) *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014); *see also Klein v. City of Laguna Beach*, 810 F.3d 693, 698 (9th Cir. 2016) (same).

Calculating Fees

- The *Johnson* Factors - 12 factors considered by court to assess overall reasonableness set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)

- But Supreme Court in *Perdue v. Kenny A.*, 559 U.S. 542 (2010) cautions that the *Johnson* approach emphasizes subjective considerations and should be used as relevant factors, as opposed to a strict method, in helping the court determine the reasonableness of the fees.

Calculating Fees

The *Johnson* Factors:

- Time and labor required;
- The novelty and difficulty of the questions;
- The level of skill required to perform the legal service properly;
- The preclusion of other employment by the attorney due to the acceptance of the case;
- The customary fee;
- Whether the fee is fixed or contingent;
- The time limitations imposed by the client or the circumstances;
- The amount involved and the results obtained;
- The experience, reputation, and ability of the attorneys;
- The "undesirability" of the case;
- The nature and length of the professional relationship with the client; and
- Awards in similar cases.

Calculating Fees

- Guidelines for determining Attorney Fees under the Lodestar Method
  - Example – Maryland has issued *Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases* – Federal Court Local Rules, Appendix B (http://www.mdd.uscourts.gov/LocalRules)
    - Hourly rates: Admitted to bar – (as of 2016)
      - less than 5 years $150 – 225
      - 5 – 8 years $165 – 300
      - 9 – 14 years $225 – 350
      - 15 – 19 years $275 – 425
      - 20 years or more $300 – 475
      - Paralegal and law clerks $95 - 150

Calculating Fees

- Reasonable out-of-pocket expenses at actual cost, mileage at official government travel rate and copy costs are also permitted

Other requirements:

*Billing format and time organization

*Limit on number of lawyers charging time for various appearances

*Submission of quarterly reports to opposing counsel

Calculating Fees

- Example – The District of Columbia established rates in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, remanded*, 746 F.2d 4 (D.C. Cir. 1984), *cert denied*, 472 U.S. 1021 (1985).
  - Rates updated – known as the *Laffey* Matrix – and maintained by the United States Attorney's Office for the District of Columbia

  https://www.justice.gov/usao-dc/civil-division

Calculating Fees

- *Laffey* Matrix generally used for the Washington Metro area –

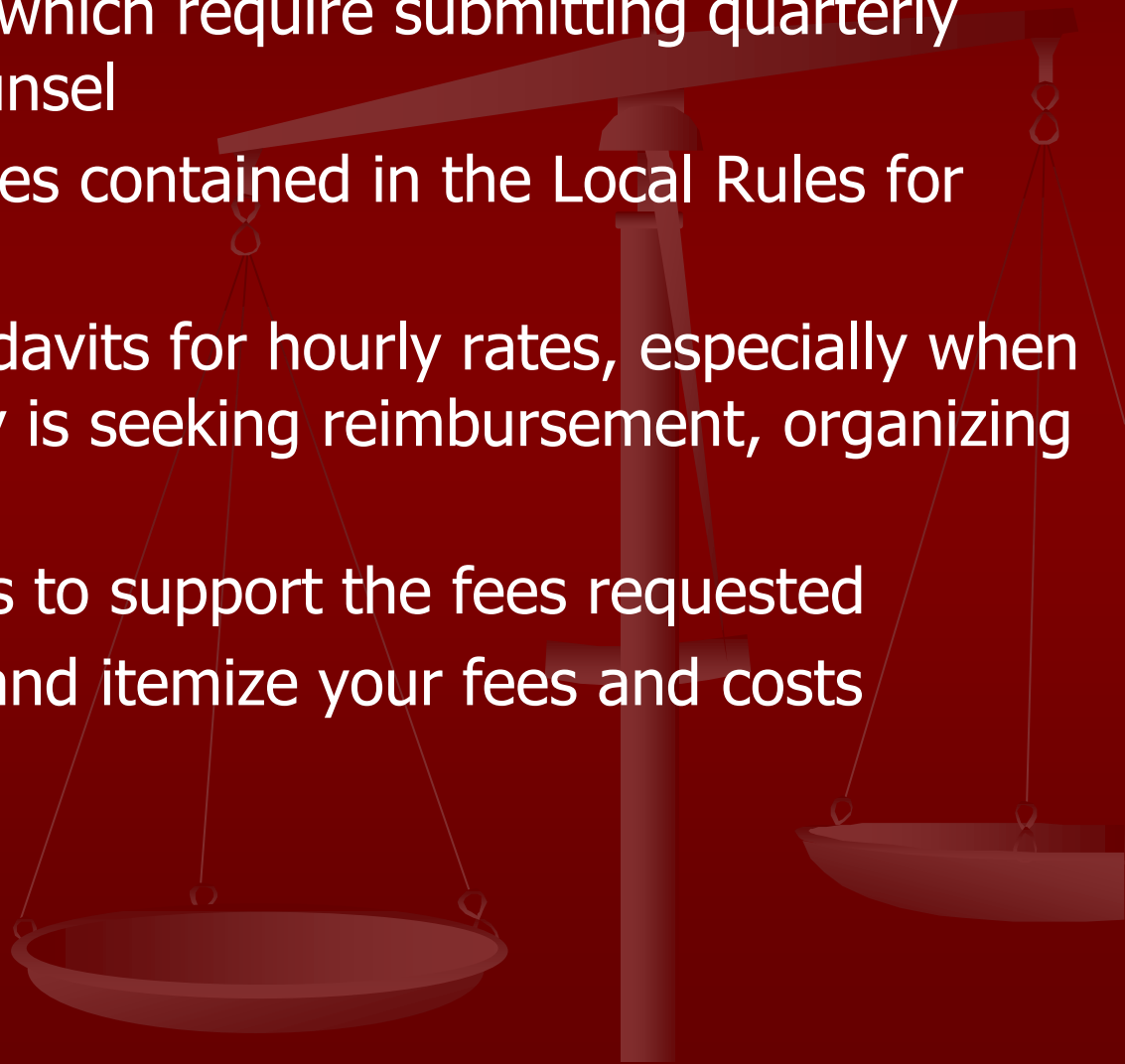
Experience	2015-16	2016-17
31+ years	$568	$581
21-30 years	530	543
16-20 years	504	516
11-15 years	455	465
8-10 years	386	395
6-7 years	332	339
4-5 years	325	332
2-3 years	315	322
Less than 2 years	284	291
Paralegals/Law Clerks	154	157

Calculating Fees

- Use of Lodestar by Other Circuits:
  - Seventh: Skeptical "about applying the Laffey Matrix outside Washington, D.C." Held that "conclusory affidavits from attorneys 'merely opin[ing]' on the reasonableness of another attorney's fee – unlike affidavits describing what 'comparable attorneys charge for similar services' – have little probative value." *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014)
  - Ninth: When petitioner failed to produce evidence to support his $175 hourly rate, court could rely on its own knowledge of local Fresno hourly rates to establish $125 rate. *Miller v. Schmitz*, 654 F. App'x 261, 262 (9th Cir. 2016) (unpublished)

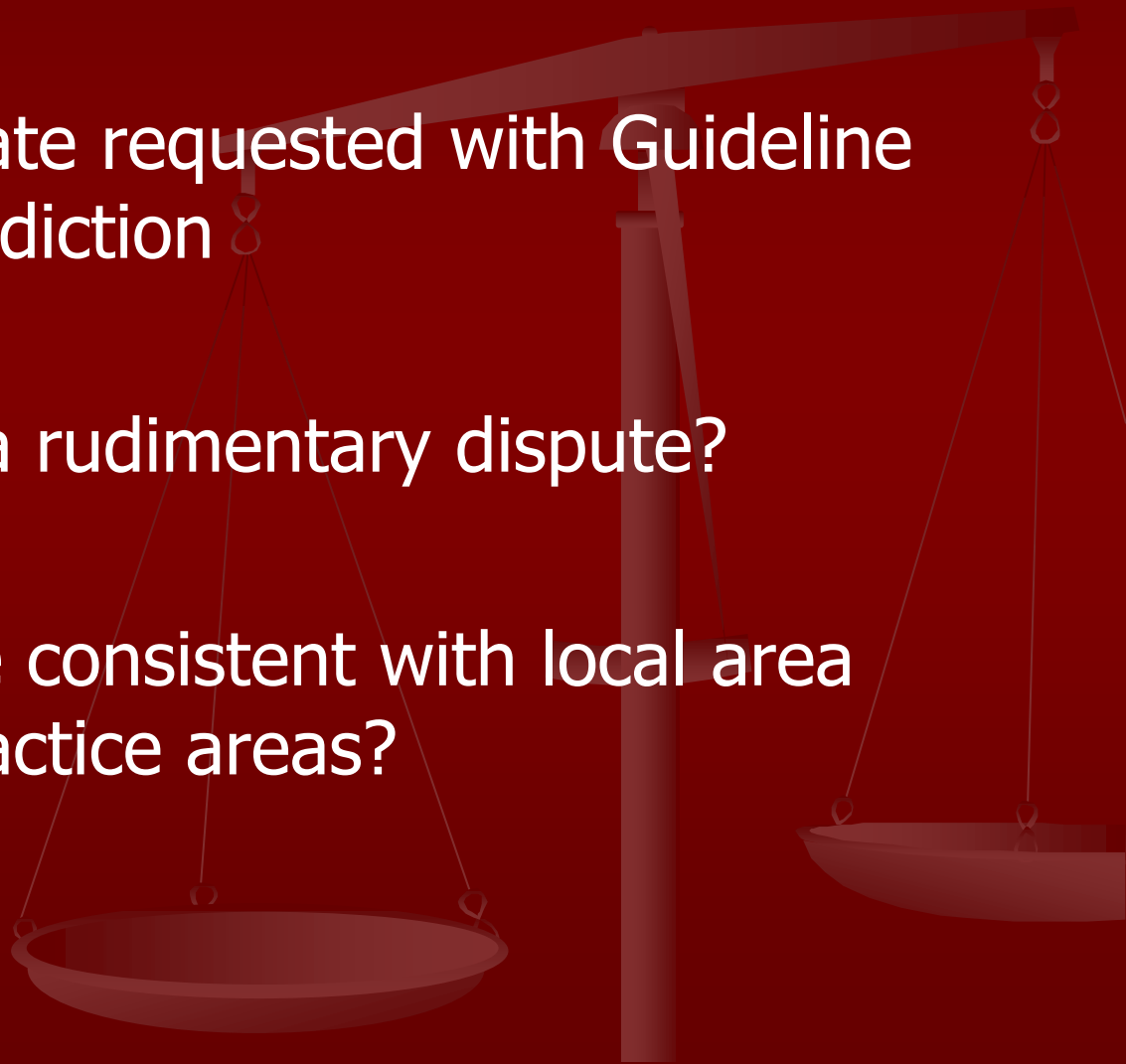
Tips for Filing Fee Petitions

- Burden rests with the fee applicant to establish reasonableness of a requested rate
- Follow any Local Rules which require submitting quarterly reports to opposing counsel
- Know the Guideline Rates contained in the Local Rules for your jurisdiction
- Use attorney's own affidavits for hourly rates, especially when more than one attorney is seeking reimbursement, organizing time and activity
- Use the *Johnson* factors to support the fees requested
- Attach documentation and itemize your fees and costs



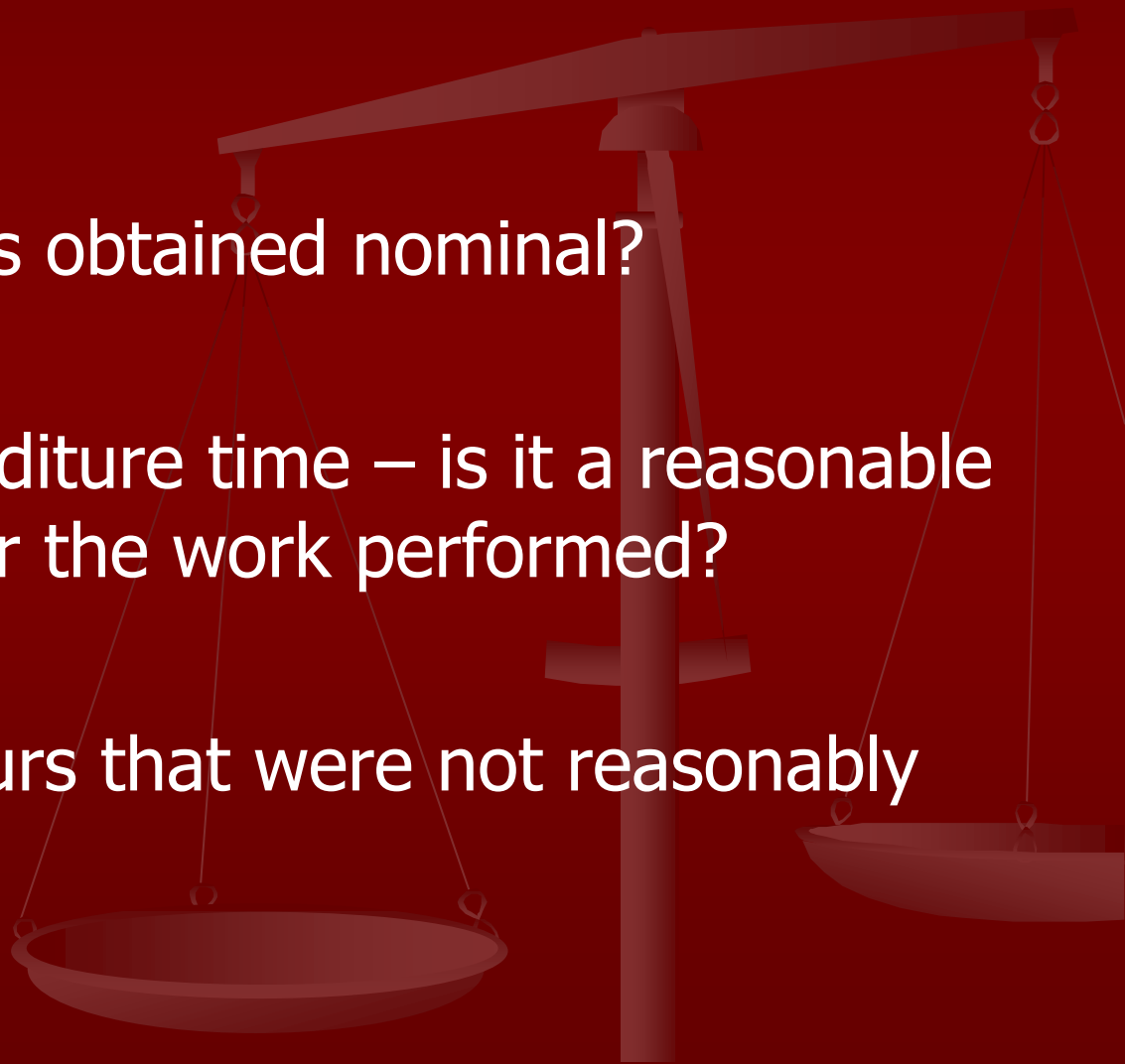
Tips for Opposing Fee Petitions

- Challenge through the *Johnson* factors
- Compare hourly rate requested with Guideline Rates in your jurisdiction
- Are fees high for a rudimentary dispute?
- Is support for rate consistent with local area rates in similar practice areas?



Tips for Opposing Fees

- Is attorney experienced in area for rate requested?
- Were the damages obtained nominal?
- Look at the expenditure time – is it a reasonable amount of time for the work performed?
- Try to exclude hours that were not reasonably expended.



Tips for Opposing Fees

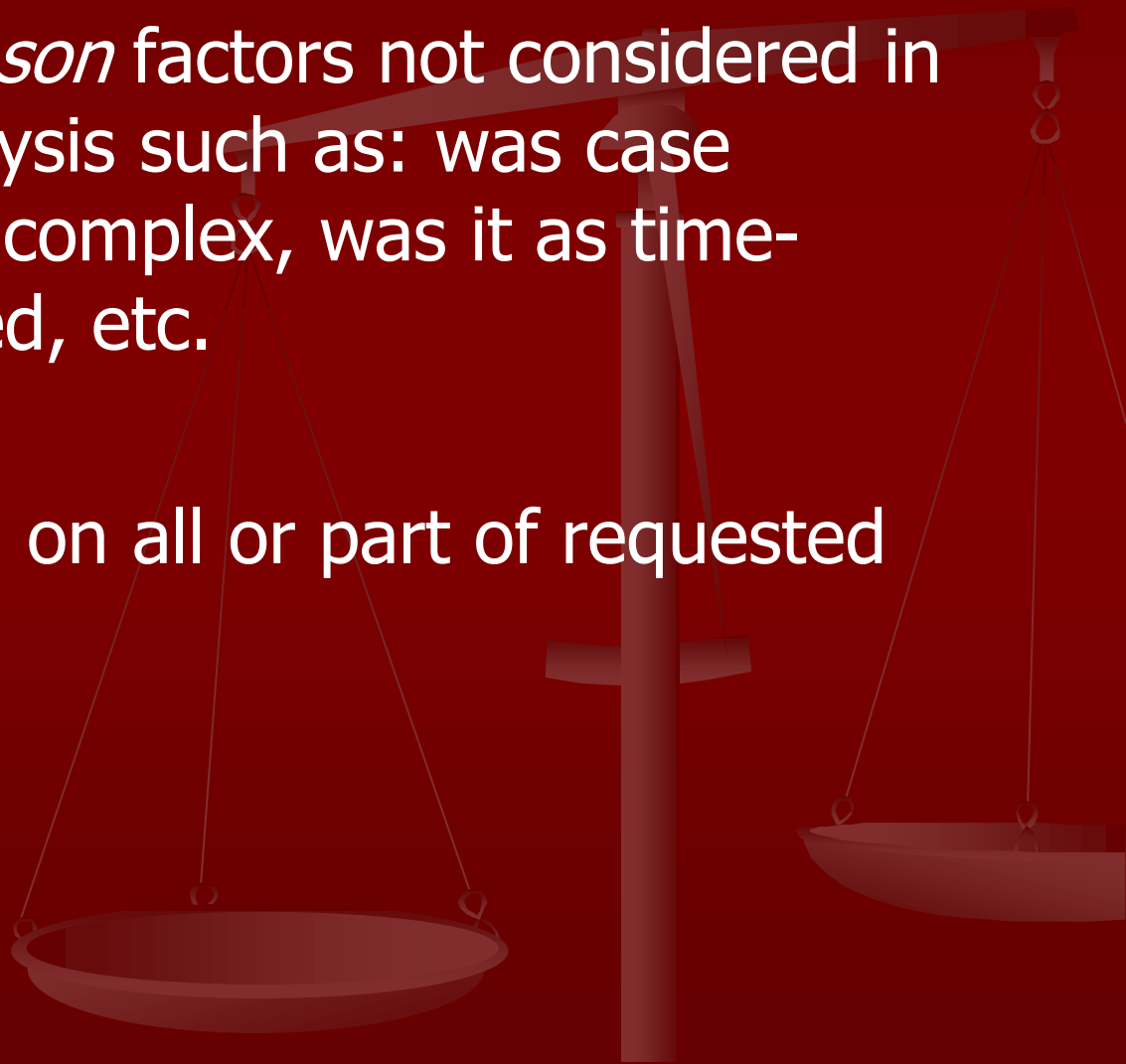
- Is there an itemization of dates, who performed the work, the time spent and a description of work performed?
- Are the time entries vague?
- Was the work done necessary?
- Is time consistent with experience, i.e., should attorney with such experience need as much time to complete task as itemized?

Tips for Opposing Fees

- Are the pleadings or papers form papers used by attorney time and again, requiring little time and effort in this particular case?
- Was time spent on unsuccessful claim or matter?
- Is much of work recycled from attorney's other work or cases?
- Is time spent on fee petition excessive?

Tips for Opposing Fees

- Review other *Johnson* factors not considered in rate and hour analysis such as: was case straightforward or complex, was it as time-consuming as noted, etc.
- Did Plaintiff prevail on all or part of requested relief?



Tips for Opposing Fees

- Is there a great discrepancy between the damages sought and the damages awarded? *See Mercer* case.

- Point Court to hours that should be subtracted – for time spent on unsuccessful claims unrelated to successful ones – Can the fees be separated out? If not, Court will not consider in reducing award.

Prevailing Party and Attorney's Fees

QUESTIONS?

