NEW YORK STATE BAR ASSOCIATION

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Moving Towards Civil Gideon

2014 Legal Assistance Partnership Conference

Hosted by:
The New York State Bar Association
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NEW YORK STATE BAR ASSOCIATION
2014 PARTNERSHIP CONFERENCE

AB. IMPLEMENTING FEDERAL RIGHTS: THE AMERICAN PRIVATE ENFORCEMENT MODEL

AGENDA

September 12, 2014
1:30 p.m. – 3:00 p.m.

1.5 Transitional CLE Credits in Professional Practice.
Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted.

Panelists:
Peter Dellinger, Esq., Senior Attorney, Empire Justice Center
Jonathan Feldman, Esq., Senior Attorney, Empire Justice Center

I.	**Theory and Practice of Enforcing Employment and Civil Rights In USA**	**1:30 pm – 1:40 pm**
II.	**Determining Attorneys' Fees in Fee Shifting Cases**	**1:40 pm – 1:50 pm**
III.	**Examples of Various Statutory Enforcement Mechanisms**	**1:50 pm – 2:20 pm**
IV.	**Legal Services Programs and Attorneys' Fees**	**2:20 pm – 2:30 pm**
V.	**Problems and Issues In Private Rights Enforcement**	**2:30 pm – 2:50 pm**
VI.	**Question & Answer**	**2:50 pm – 3:00 pm**

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Substantive Outline

AB. IMPLEMENTING FEDERAL RIGHTS: THE AMERICAN PRIVATE ENFORCEMENT MODEL

OUTLINE

I. THEORY AND PRACTICE OF ENFORCING EMPLOYMENT AND CIVIL RIGHTS IN USA

A. British Rule vs. American Rule

1. In Britain, and indeed in most Western democracies, the party that loses in litigation must pay, not only its own litigation costs, but for the time expended by opposing counsel. This is known as the "British Rule" concerning attorneys' fees.
2. By contrast, "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). However, Congress is authorized to carve out specific exceptions to this general rule – and it has done so in the area of environmental, employment, consumer and civil rights protections. In a number of these statutes, Congress has stipulated that private plaintiffs who prevail can recover attorneys' fees from the defendants.
3. In so doing, "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975).
4. According to Sean Farhang, plaintiffs' fee shifting statues and enhanced damages "have been *purposefully and self-consciously used by legislators since the founding of the modern American regulatory state in the late nineteenth century*, most commonly associated with the passage of the Interstate Commerce Act of 1887." *The Litigation State*, p. 63. The Supreme Court recognized the importance of private enforcement civil rights laws in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968):
5. When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

B. Disadvantages of Private Enforcement:

1. Produces fragmented and sometimes incoherent policy; empowers judges to make policy who may not have expertise
2. Judicial rulings may be inconsistent and contradictory leading to different rights in different rights in different states
3. Weakens administrative capacity to implement coherent regulatory scheme
4. Limits or excludes prosecutorial discretion
5. Discourages cooperation with government regulators and voluntary compliance
6. Weakens policy implementation by legislative and executive branches
7. Subverts legislative supremacy, lack of accountability

C. Benefits of Private Enforcement:

1. Multiplies resources devoted to prosecuting enforcement actions and enhances efficient use of scarce resources allowing administrators to focus on agency priorities.
2. Shifts the costs of regulation off of governmental budgets onto the private sector. Private enforcement is "more or less self-funding".
3. Takes advantage of private information to detect violations. Private litigants "have knowledge about violations that far exceeds what the administrative state could achieve through monitoring".
4. Encourages legal and policy innovation. Private litigants "are more likely to press for innovations in legal theories and strategies that could expand the parameters of liability."
5. Emits a clear and consistent signal that violations will be prosecuted. With adequate incentives, private enforcement produces "durable and consistent enforcement pressure".
6. Limits the need for governmental intervention by the bureaucracy in the economy and society. Private litigation "is less visible and more ambiguous as a form of state intervention."
7. Helps "facilitate participatory and democratic governance." Defending and advancing rights through litigation is "a form of active and direct citizen participation in the enterprise of self-government, constituting a valuable and important facet of democratic life."

D. Attorney's Fees calculation: Origins and use of the lodestar method for determining fees in fee generating cases.

1. [T]he "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to the prevailing market rates in the relevant community. Developed after the practice of hourly billing had become widespread, the lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. Second, the lodestar method is readily administrable, and . . . the lodestar calculation is "objective," and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010) (citations omitted)

E. Prevailing party" requirement to obtain attorney fees

1. The Supreme Court has held that a prevailing party is one who has been awarded some relief by a court, as through an enforceable judgment on the merits or a court-ordered consent decree. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 603–04 (2001); *Texas State Teachers Assoc. v. Garland Ind. School Dist.*, 489 U.S. 782, 792, (1989) (at a minimum plaintiff must receive some relief on his claim before he can be said to prevail); *Oil, Chemical, and Atomic Workers Intl. Union, AFL–CIO v. Dept. of Energy*, 288 F.3d 452, 457 (D.C.Cir.2 002) (to be eligible for attorney's fees, FOIA plaintiffs must have been awarded some

relief by a court). The relief requirement emphasizes the practical impact of the lawsuit, and the Supreme Court has repeatedly held that the relief must be real in order to qualify for fees. *Farrar v. Hobby,* 506 U.S. 103, (1992); *Buckhannon,* 532 U.S. at 641 n. 13, (Ginsburg, J., dissenting) and cases cited therein.

2. For instance, in *Rhodes v. Stewart,* 488 U.S. 1, 4 (1988), the Court held that a plaintiff who obtains a declaratory judgment but obtains no real relief whatsoever is not a prevailing party. *See also Hewitt,* 482 U.S. at 761, (judicial statement that plaintiff's rights were violated does not affect the relationship between the plaintiff and the defendant; to be a prevailing party, plaintiff must gain relief of substance). Furthermore, the Supreme Court has emphasized that the relief is actual when it changes the legal relationship between the parties. That is because

> a. [i]n all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.[emphasis in original] *Hewitt,* 482 U.S. at 761.

3. The mere moral satisfaction of being wronged is insufficient to trigger prevailing party status. *Id.* at 762; *Cady v. City of Chicago,* 43 F.3d 326, 330 (7th Cir.1994) (holding that unless plaintiff "can point to a direct benefit or redressed grievance other than the 'psychic satisfaction' of ending 'invidious discrimination,' he does not emerge as a prevailing party"); *see also Richardson v. Continental Grain Co.,* 336 F.3d 1103, 1106 (9th Cir.2003) (although plaintiff succeeded on a legal issue, attorney's fees unavailable because no actual relief obtained, "only the possibility of future relief"). *Petersen v. Gibson*, 372 F.3d 862, 865 (7th Cir. 2004).

II. DETERMINING ATTORNEYS' FEES IN FEE SHIFTING CASES

A. Lodestar Amount:

1. In order to determine the appropriate fee award, courts typically start with a determination of the "lodestar" amount, which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

2. The Supreme Court has endorsed the lodestar approach as the superior method to be used in determining an award of attorneys' fees. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

3. The "lodestar calculation is 'objective,' and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results. *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010) (internal citation omitted).

4. The lodestar calculation results in a "presumptively reasonable fee". *Perdue v. Kenny A.*, 559 U.S. 542, 551–52 (2010).

5. It is legal error for a court to fail to calculate the lodestar "as a starting point". *Millea v. Metro–North R.R. Co.*, 658 F.3d 154, 166–67 (2d Cir. 2011).

6. Although the lodestar approach results in a "presumptively reasonable" fee, it is not "conclusive in all circumstances." *Perdue v. Kenny A.*, 559 U.S. at 553.

7. In "rare circumstances," a court may adjust the lodestar "when the lodestar method "does not adequately take into account a factor that may properly be considered in determining a reasonable fee.' *Perdue v. Kenny A.*, 559 U.S. at 554

8. "The reasonableness of a fee award does not depend on whether the attorney works at a private law firm or a public interest organization". *Blum v. Stenson*, 465 U.S. at 894; *Arbor Hill*, 522 F.3d at 184 n.1.

B. <u>Determining the Reasonable Hourly Rate:</u>

1. The Second Circuit's "forum rule" generally requires courts to "use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee." *Simmons v. N.Y.C. Transit Authority*, 575 F.3d 170, 174 (2d Cir. 2009) (quotations omitted), accord, *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 522 F.3d 182, 183–84, 190–93 (2d Cir. 2008).

2. Hourly rates charged for legal services are generally considered to be reasonable where "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984).

3. In determining the applicable hourly rate, the court may also consider "rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district". *Farbotko v. Clinton County of New York*, 433 F.3d 204, 209 (2d Cir. 2005).

4. The burden is on the fee applicant to produce satisfactory evidence-in addition to the attorney's own affidavits-regarding the requested hourly rates. *Blum v. Stenson*, 465 U.S. 886, 895, n. 11 (1984).

5. It is now accepted that current hourly rates, rather than historic rates, should be used when determining attorneys' fees awards. *Savoie v. Merchants Bank*, 166 F.3d 456, 464 (2d Cir.1999); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir.1998).

C. <u>Determining Reasonably Expended Hours:</u>

1. With respect to the time expended, "[c]ounsel for the prevailing party must exercise 'billing judgment'; that is, he must act as he would under the ethical and market restraints that constrain a private sector attorney's behavior in billing his own clients". *Lunday v. City of Albany*, 42 F.3d 131, 133 (2nd Cir. 1994).

2. Contemporaneous billing records are required. *New York State Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir.1983)

3. In order to properly assess whether hours were reasonably expended, the application should include "contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir.1998).

4. "Hours that are excessive, redundant, or otherwise unnecessary are to be excluded, and in dealing with such surplusage, the court has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998).

5. Factors such as inefficiency, clerical and unbillable tasks, redundancy, and a those less than fully detailed time records should be considered. *See Hensley v. Eckerhart*, 461 U.S. at 434.

6. "The relevant issue, however, is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2nd Cir. 1992).

7. Further judicial reductions after the exercise of billing judgment:

a. Attorneys who exercise billing judgment by eliminating unsupported entries in connection with submission of their motion ought not be discouraged from doing so fully and adequately by a further judicial reduction that would leave them in a worse position than an attorney who fails to exercise billing judgment by such culling and thus overstates the hours claimed in a fee petition. *Ladd v. Thomas*, 47 F.Supp.2d 236, 240 (D. Conn. 1999).

III. EXAMPLES OF VARIOUS STATUTORY ENFORCEMENT MECHANISMS

Examples of Attorneys' Fees as a Means of Promoting Enforcement:

A. Fair Labor Standards Act, 29 U.S.C. 216

1. The Fair Labor Standards Act ("FLSA") of 1938 was designed to rectify and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C.A. § 202(a).

2. FLSA has 4 major statutory components:

a. Outlaws child labor in interstate commerce;

b. Sets minimum wage rate for employees covered by Act

c. Establishes overtime rate 1.5 times pay rate for employee hours worked over 40;

d. Equal Pay Act- no discrimination in pay based on sex for same work. 29 U.S.C. 206(d).

3. **Enforcement**

a. The legislative history of the Fair Labor Standards Act reflects Congress's intent "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945).

b. FLSA provides several methods for recovering unpaid minimum and/or overtime wages:

i. The Wage and Hour Division of the Department of Labor may investigate and supervise payment of back wages;

ii. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages;

iii. An employee may file a private suit, in either state or federal court, for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs; 29 U.S.C. 216(b):

a) "Any employer... shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.... **The court in such action shall**, in addition to any judgment awarded to the plaintiff or plaintiffs, **allow a reasonable attorney's fee to be paid by the defendant**, and costs of the action."

c. Only Secretary of Labor may enforce child labor provisions or obtain injunction. *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 750 F.2d 47, 51 (8th Cir.1984), *cert. denied*, 471 U.S. 1054, (1985)

4. **The Role and Importance of Private Enforcement in FLSA Actions**

a. According to the GAO, a total of approximately 8100 lawsuits claiming FLSA violations were filed in federal courts in 2012 (don't know how many workers) GAO Report 14-69 (December 2013)[1]

b. Of these 8100 FLSA suits, approximately 200 were filed by the DOL's Office of the Solicitor to enforce the requirements of the FLSA on behalf of workers. GAO Report 14-69 (December 2013).

c. An estimated 97 percent of FLSA lawsuits were filed against private sector employers, often from the accommodations and food services industry, and 95 percent of the lawsuits filed included allegations of overtime violations. GAO Report 14-69 (December 2013)

d. Almost one-quarter of all FLSA lawsuits filed (an estimated 23 percent) were filed by workers in the accommodations and food service industry, which includes hotels, restaurants, and bars. GAO Report 14-69 (December 2013)

e. Another 33% of all FLSA lawsuits were filed against employers in manufacturing; construction; and "other services" which included services such as laundry services, domestic work, and nail salons. GAO Report 14-69 (December 2013)

5. Judicial Recognition of the Importance of Attorney Fees for Enforcement of FLSA Actions

a. The "purpose of the FLSA attorney fees provision is to ensure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances," and an award of attorney fees "encourages the vindication of congressionally identified policies and rights". *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994)

b. FLSA attorney fees provision is "designed in part to secure legal representation for plaintiffs whose wage and hour grievances were too small, in

[1] Approximately 1200 of these FLSA suits were filed in federal courts in New York State. GAO Report 14-69 (December 2013)

terms of expected recovery, to create a financial incentive for qualified counsel to take such cases under conventional fee arrangements." *Estrella v. P.R. Painting Corp*., 596 F. Supp. 2d 723, 727 (E.D.N.Y. 2009).

c. *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 297-98 (D. Mass. 1943):

i. "The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulation effective private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage. The fear of this liability for double damages and attorney's fees not only aids compliance, but promotes the settlement of controversies at the conference table or in the administrative office rather than the courts."

d. "[A]ttorney fees are an integral part of the merits of FLSA cases". *Shelton v. M.P. Ervin*, 830 F.2d 182, 184 (11th Cir. 1987).

e. FLSA attorney's fee provision "must reflect the obvious congressional intent that the policies enunciated in FLSA Section 2 be vindicated, at least in part, through private lawsuits charging a violation of the substantive provisions of the wage act". *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 502 (6th Cir. 1984)

f. "Obviously Congress intended that the wronged employee should receive his full wages plus the penalty [liquidated damages] without incurring any expense for legal fees or costs." *Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946)

g. FLSA's attorney fees provision "exists to enable plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail and, thereby, to help ensure enforcement of the substantive provisions of the FLSA". *Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 952 (E.D. Wis. 2003)

6. **Why Prevailing FLSA Defendants Cannot Recover Attorneys' Fees:**

a. *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 297-98 (D. Mass. 1943).

i. "For the defendants, no countervailing arguments can be made for imposing on an unsuccessful plaintiff the costs of the defendant's lawyer. The defendant's vindication in a larger sense serves the interests of justice, but no more so than the successful defense of any suit. Therefore, the public is not more interested in aiding him than any other successful defendant. Moreover, to allow him to recover his out-of-pocket expenses would deter suits by the plaintiffs who under the Fair Labor Standards Act... are assumed, often correctly, to be necessitous persons requiring the protective hand of the legislature. Such deterrence runs counter to the policy of the Act in placing reliance for enforcement both upon private suits and public suits."

7. **Critical FLSA Compliance Tool: Attorney fees Commonly Exceed the Amount of Unpaid Wages**

a. It is commonplace and entirely consistent with the FLSA's legislative purpose for attorney's fee awards to exceed the amount of the plaintiff's recovered unpaid wages. Examples:

i. *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994) ($40,000 in attorney fees for recovery of $7,680 in wages and damages)

ii. *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 358 (5th Cir. 1990) (attorney's fees award of $9,250 for $1,698 in FLSA wages and damages)

iii. *Bonnette v. California Health & Welfare*, 704 F.2d 1465, 1473 (9th Cir. 1983) (award of $100,000 in attorney's fees for $20,000 in FLSA wages and damages);

iv. *Gonzalez v. Bustleton Servs., Inc.*, 2010 WL 3282623 (E.D. Pa 2010) (awarding attorneys' fees totaling $76,000 for obtaining $18,000 FLSA judgment).

v. *Albers v. Tri-State Implement, Inc.*, 2010 WL 960010 (D.S.D. Mar. 12, 2010) (awarding $43,797 in attorney fees for FLSA damages totaling $2,137.97);

vi. *King v. My Online Neighborhood, Inc.*, 2007 WL 737575 (M.D. Fla. Mar. 7, 2007) (approving settlement for $4,500 in unpaid wages and $10,500 in attorney's fees).

vii. *Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 962 (E.D. Wis. 2003) (awarding $36,204.88 in fees for FLSA damages totaling $3,540.00).

viii. *Griffin v. Leaseway Deliveries, Inc.*, 1992 WL 398381 (E.D. Pa. Dec. 31, 1992) (awarding $33,631.00 in attorney fees for of $17,467.20 FLSA award).

ix. *Holyfield v. F.P. Quinn & Co.*, 1991 WL 65928 (N.D. Ill. Apr. 22, 1991) (awarding $6,922.25 in attorney's fees for $921.50 FLSA judgment).

x. *Elwell v. Weiss*, 03-CV-6121 (W.D.N.Y. 2007) ($70,000 attorneys' fees paid for obtaining $610 FLSA judgment).

B. <u>42 U.S.C. § 1988</u>

1. **Attorney's Fees**

a. "[(b)] In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an

act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

2. **Discretionary attorneys' fees awards in Civil Rights Cases: How "may" is usually considered "shall":**

a. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, (1968) the Supreme Court first modified the hostile judicial approach to fee awards under statutes containing discretionary fee award provisions.

b. The case arose under Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations and which provides that a "court, in its discretion, may allow the prevailing party ...a reasonable attorney's fee." .' 42 U.S.C. s 2000a—3(b).

c. Consistent with the practice of early federal cases, this provision, prior to *Newman*, was construed to be oriented toward punishment, not toward incentive, and was limited to the defendant who litigated in bad faith.

d. The *Newman* Court held that the discretion granted by the statute was a limited one that ought to be exercised in favor of fee awards in all but exceptional cases: "One who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Newman*, 390 U.S. at 402.

i. When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees-not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. *Id.*

3. **The Critical Importance of Attorneys' Fees for Enforcement of Civil Rights Laws**

a. As the legislative history of Section 1988 makes clear, Congress believed that the awarding of attorneys' fees is critical to the enforcement of the civil rights laws. The House Report, H.Rep.No.1558, 94th Cong., 2d Sess. (1976) (House Report), states:

i. "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the

United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, (the proposed legislation) is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law."

4. **Critical Compliance Tool: §1988 Attorneys' Fees Exceed the Amount of Damages**

a. *Kassim v. City of Schenectady*, 415 F.3d 246, 251-52 (2d Cir. 2005) (citations omitted; emphasis added):

i. [T]he district court declined to award the full requested lodestar-based fee of $65,400, premised on 477.5 hours of attorney time. Instead, the court allowed an aggregate of ninety hours, as between plaintiff's two attorneys, resulting in a fee of $12,000. . . . In reviewing plaintiff's application for attorney's fees, the court stated, in apparent astonishment: "This results in a total legal fee application of $75,825 for a case in which plaintiff received a verdict of $2500."

ii. [However], § 1988 was enacted in part to secure legal representation for plaintiffs whose constitutional injury was too small, in terms of expected monetary recovery, to create an incentive for attorneys to take the case under conventional fee arrangements. Reasoning that a rule calling for proportionality between the fee and the monetary amount involved in the litigation would **effectively prevent plaintiffs from obtaining counsel** in cases where deprivation of a constitutional right caused injury of low monetary value, we have repeatedly rejected the notion that a fee may be reduced **merely because the fee would be disproportionate** to the financial interest at stake in the litigation. If the district court reduced the fee in the belief that the claimed hours were simply disproportionate in a case involving a $2500 injury, without regard to the reasonableness of the attorney's expenditure of time in responding to the particular circumstances, this was error.

iii.

C. <u>IDEA, 20 U.S.C. § 1415(i)(3)(B).</u>

1. IDEA (Individuals with Disabilities Education Act) first authorized in 1975

2. *Smith v. Robinson,* 468 U.S. 992 (1984) – Supreme Court holds that the IDEA does not authorize an award of attorneys' fees to the prevailing party.

3. In 1986, Congress amends the IDEA to overturn *Smith* and provide for attorneys' fees.

4. Debate centers on whether 1) fees will be permitted for work on administrative proceedings (Congress says yes) and 2) whether nonprofit legal services organizations should have their fees capped (Congress says no).

5. In 1997, during reauthorization of the IDEA, amendment proposed that would require courts to consider the effect of a fee award on a school district's finances. Amendment tabled, in response to Sen. Harkin's statement: "Let's retain the parity between the fees provisions in the IDEA with the fees provisions in other civil rights statutes."

6. For a detailed discussion of these issues, *see* Michael D. Hampden, Legal Services for Children, Inc., Attorney's Fees under the IDEA, PLI Third Annual School Law Institute (2003).

D. <u>ADA, 42 U.S.C. § 2101, et seq. and Title VII, 42 U.S.C. §2000e-5</u>

1. The ADA provides that a district court "in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. This language is nearly identical to the analogous provision governing attorney's fees in employment discrimination cases litigated under Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e–5(k), and we apply the same standard as under Title VII. *See Bercovitch v. Baldwin School, Inc.,* 191 F.3d 8, 10–11 (1st Cir.1999); *Bruce v. City of Gainesville,* 177 F.3d 949, 951 (11th Cir.1999). Under that standard, fees should be awarded to prevailing *defendants* only when the plaintiff's "claim was frivolous, unreasonable, or groundless, or ... the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422, (1978)

2. *Parker v. Sony Pictures Entertainment, Inc*., 260 F.3d 100, 111 (2d Cir. 2001).

3. "Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. § 706(f)(1). One aspect of complete relief is an award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67-68 (1980)

E. <u>Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692(a), et seq.</u>

1. Congress passed the FDCPA in 1968 in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors [which] contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."15 U.S.C. §1692(a).

2. "Unlike most private tort litigants, a plaintiff who brings an FDCPA action seeks to vindicate important rights that cannot be valued solely in monetary terms, and Congress has determined that the public as a whole has an interest in the vindication of the statutory rights." *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995) *citing City of Riverside v. Rivera,* 477 U.S. 561 (1986) (internal citations omitted).

3. In this respect, "the FDCPA enlists the efforts of sophisticated consumers... as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from

the deterrent effect of civil actions brought by others." *Jacobson v. Healthcare Financial Services, Inc*., 516 F.3d 85, 91 (2nd Cir 2008).

4. Section 1692k(a) of the FDCPA authorizes an award of actual damage. or "up to $1,000 in statutory damages per plaintiff for any violation of the act, with the exact amount to be imposed falling within the court's discretion." *Simon v. Worldwide Filing Services, Inc.* 2013 WL 644383, 2 (W.D.N.Y. 2013)

5. FDCPA statute does not provide for injunctive relief in private actions. See 15 U.S.C. § 1692k. Second Cir has not decided whether the FDCPA permits private plaintiffs to seek injunctive relief, but has noted "that every federal appeals court to have considered the question has held that it does not." *Hecht v. United Collection Bureau, Inc*., 691 F.3d 218, 224 (2nd Cir 2012).

6. **Attorney Fees Under the FDCPA:**

   a. The FDCPA provides for the recovery of reasonable attorney's fees and costs by successful litigants. See 15 U.S.C. § 1692k (a)(3) (permitting recovery of, "in the case of any successful motion to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court").

   b. "The FDCPA provides for fee-shifting as a matter of course to successful plaintiffs. *Ryan v. Allied Interstate, Inc.*, 882 F. Supp. 2d 628, 630 (S.D.N.Y. 2012). The mandatory fee-shifting provision of the FDCPA was intended to eliminate "unscrupulous practices" by debt collectors. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir.1996).

   c. In civil rights litigation, Congress enacted Section 1988 authorizing attorneys' fees awards for prevailing plaintiffs "precisely because the expected monetary recovery in many cases was too small to attract effective legal representation." *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 425–426 (2d Cir. 1999). "Since recovery under the FDCPA is [also] generally small, the same rationale applied in civil rights cases applies to awards of attorney's fees under the fee-shifting provisions of the FDCPA." *Miller v. Midpoint Resolution Group, LLC*, 608 F.Supp.2d 389, 397 n. 4 (W.D.N.Y. 2009).

   d. As in civil rights cases, courts typically use the lodestar method to determine reasonable attorneys' fees in FDCPA litigation. *Kapoor v. Rosenthal*, 269 F.Supp.2d 408, 412 (S.D.N.Y. 2003); *Miller v. Midpoint Resolution Group, LLC*, 608 F.Supp.2d at 395.

7. **Attorneys' Fees Problems and Issues in FDCPA Cases**

   a. <u>Lower Hourly Rates Awarded FDCPA Cases:</u>

      i. **W.D.N.Y. Rates:**

         a) "Based upon its review of FDCPA cases litigated in the Western District of New York, the court finds that the prevailing local hourly rates of $250 for experienced attorneys, $175 for newer attorneys, and $75 for paralegal staff provide a reasonable basis for calculation of the award of fees in this case." *Ortez v.*

First Asset Recovery Grp., LLC, 2014 WL 1338835 (W.D.N.Y. 2014).

ii. **E.D.N.Y Rates:**

a) "Courts in this district regularly award hourly rates ranging from $250 to $350 for experienced attorneys in FDCPA cases." *Hirsch v. ANI Mgmt. Grp., Inc.*, 2013 WL 3093977 (E.D.N.Y. 2013) citing *Crapanzano v. Nations Recovery Ctr., Inc.*, 2011 WL 2847448, at *2 (E.D.N.Y. 2011), adopted by 2011 WL 2837415 (E.D.N.Y.2011) (finding $250 to be a reasonable hourly rate in an FDCPA case); *Garland v. Cohen & Krassner,* 2011 WL 6010211, at *10 (E.D.N.Y. 2011) (awarding $300 for a partner with twenty years of experience in an FDCPA case).

iii. **N.D.N.Y. Rates:**

a) "Courts in the Northern District of New York have determined the reasonable hourly rates in this District, i.e., what a reasonable, paying client would be willing to pay, were $210 per hour for an experienced attorney, $150 per hour for an attorney with four or more years' experience, $120 per hour for an attorney with less than four years' experience, and $80 per hour for paralegals." *Van Echaute v. Law Office of Thomas Landis, Esq.,* 2011 WL 1302195 (N.D.N.Y. 2011) (internal citations omitted) .

iv. **S.D.N.Y. Rates:**

a) "This case was resolved quickly-for only $500–and did not involve complex factual or legal issues. Courts in this district generally approve fees of $200–$325 per hour in FDCPA cases and reject fee requests over that amount." *O'Toole v. Allied Interstate, LLC,* 2012 WL 6197086 (S.D.N.Y. Dec. 12, 2012).

b) But *see Tolentino v. Friedman,* 46 F.3d 645, 653 (7th Cir. 1995): "Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law."

b. <u>Disproportionate Ratio of Fees to Damages:</u>

i. In response to plaintiff's attorneys' fees request for $3853, the court in *Solomon v. Allied Interstate, LLC*, 2013 WL 5629640 (S.D.N.Y. 2013) awarded only $1125, stating:

a) "I conclude that this entire routine FDCPA case could have been prosecuted by an associate, at a rate of $125 per hour, in about half the time that it took five attorneys and four paralegals to handle the case...[A] single associate could have handled the matter in about nine hours. The $125 per hour rate reflects of the average of the rates found by Judge Griesa in *Muise. See Muise,*

2012 WL 4044699, at *1 ("These rates are more than adequate to ensure that firms like Kimmel and Silverman, P.C., will continue to bring meritorious FDCPA cases."). Further, no reasonable client would pay nearly $4,000 to collect only $1,000."

ii. However, the court in *Halecki v. Empire Portfolios, Inc.*, 952 F. Supp. 2d 519, 521 (W.D.N.Y. 2013), expressly rejected this disproportionate damages/fees argument:

a) Initially, the defendants protest that the efforts expended were grossly out of proportion to the ultimate settlement of the matter for $4,000. However, the FDCPA is a fee shifting statute, and as the Second Circuit has recently emphasized:

1) "[e]specially for claims where the financial recovery is likely to be small, calculating attorneys' fees as a proportion of damages runs directly contrary to the purpose of fee shifting statutes: assuring that ... claims of modest cash value can attract competent counsel. The whole purpose of fee-shifting statutes is to generate fees that are *disproportionate* to the plaintiff's recovery." *Millea v. Metro–North R.R. Co.*, 658 F.3d 154, 169 (2d Cir.2011) (emphasis in original). (finding that district court erred in reducing lodestar figure of $144,792 in FMLA case wherein plaintiff recovered only $612.50, because the factors relied upon by the district court, including the disproportion between the amount recovered and the fees sought, are already represented in the lodestar calculation via attorney time records).

F. <u>Examples of Statutory Rights with Caps on Fees:</u>

1. **Equal Access to Justice Act, 28 U.S.C.§ 2412(d)(1)(A)**

a. EAJA sets the hourly-rate "cap" on attorney fees at $125 per hour, adjustable for increases in the cost of living or other special factors justifying a higher fee such as limited availability of qualified attorneys. The applicable Consumer Price Index (CPI) rate may depend upon your specific location within New York State (e.g., upstate vs. downstate, or urban vs. rural), and may result in an upward adjustment that is substantially higher than $125 per hour. *See, e.g., Howard v. Astrue*, 2009 WL 2383097 (E.D.N.Y. July 30, 2009) (adjusting hourly rate to $171, based on the CPI). The Second Circuit has held that enhancement of EAJA fees should be calculated at the rate appropriate for the year in which the services were rendered, not at the current rate. *Kerin v. U.S. Postal Service*, 218 F.3d 185,194 (2d Cir. 2000). District courts in the Second Circuit have held $100 per hour to be a reasonable rate for clerks or law students. *See Sylvester v. City of New York*, 2006 WL 3230152, at *10 (S.D.N.Y. November 8, 2006). Clerical

tasks should not be billed at the attorney rate, if at all. *See, e.g., Salvo v. Commissioner of Social Security*, 751 F.Supp.2d 666 (S.D.N.Y. 2010).

b. In addition to the $125-per-hour cap on fees, the government can avoid paying fees altogether if its position was "substantially justified." However, the burden of proving such justification rests with the government and may be satisfied only by a "strong showing." *Eames v. Bowen*, 864 F.2d 251, 252 (2d Cir. 1988). *See also Scarborough v. Principe*, 541 U.S. 401, 414-15 (2004), *quoting* H.R.Rep. No. 96-1005, at 10: "[T]he strong deterrents to contesting Government action that currently exis[t] require that the burden of proof rest with the Government." Louise M. Tarantino and Christopher J. Bowes, based on materials prepared by Kirk B. Roose, EAJA Applications 101: Ten Steps to Obtaining Government Fees in a Civil Action (2011)

2. **Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e (d)(3)**

a. The PLRA limits the attorneys' fees prisoners can recover compared to other civil rights litigants. Most of the limitations do not affect prisoners directly, since prisoners proceeding *pro se* cannot recover attorneys' fees, but they will affect the ability of prisoners to secure lawyers to represent them.

b. Fees under 42 U.S.C. § 1988 are barred in "any action brought by a prisoner" except when the fees are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" under a statute that allows fees to be awarded. 42 U.S.C. § 1997e(d)(1)(A) (2006). It is unclear whether this provision bars fee awards in cases that are settled, rather than cases that go to trial. Several courts have held injunctive proceedings that are settled may support an award of fees if there are findings of legal violation or a record that supports such findings. Fees may also be awarded if they are "directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d)(1)(B)(ii) (2006)*; see West v. Manson*, 163 F. Supp. 2d 116, 120 (D. Conn. 2001) (holding fees are recoverable for post-judgment monitoring).

c. The statute says that fees must be "proportionately related to the court ordered relief for the violation." 42 U.S.C. § 1997e(d)(1)(B)(i) (2006). It does not say in what proportion. Defendants may be required to pay fee awards of up to 150 percent of any damages awarded—**but no more**. 42 U.S.C. § 1997e(d)(2) (2006)*; see Pearson v. Welborn*, 471 F.3d 732, 742–44 (7th Cir. 2006) (holding fees limited to $1.50 where plaintiff recovered only $1.00 in nominal damages); *Boivin v.Black*, 225 F.3d 36, 40–46 (1st Cir. 2000) (undertaking an extensive analysis of the constitutional basis for the fee cap and arriving at the same conclusion, that fees are limited to 150% of recovered nominal damages); *Clark v. Phillips*, 965 F. Supp. 331, 334 (N.D.N.Y. 1997) (holding fees of $7921.96 to be proportionately related to $10,000 damage award).

d. Hourly rates for lawyers are limited to 150 percent of the Criminal Justice Act ("CJA") rates for criminal defense representation set forth in 18 U.S.C. § 3006A. Courts have disagreed as to whether this means 150 percent of the rates

authorized by the federal Judicial Conference or the actual, lower rates paid in the district based on how much money Congress actually provides. In any case, however, both rates are **much lower than the market rates** that lawyers usually charge and that are awarded in non-prisoner cases, and they will probably discourage many lawyers from taking prisoners' cases. (Although the hourly rate is higher than the Criminal Justice Act rates, lawyers defending clients under the CJA get paid for their time whether they win or lose.)

e. Prisoners are also directly affected by the provision stating that "up to" twenty-five percent of a damage judgment is to be applied to the fee award. If the fee award is not greater than 150 percent of the judgment, defendants must pay the rest. Most courts have held that the term "up to" allows the courts some discretion in determining how much of a winning prisoner-plaintiff's damage award must be applied to attorneys' fees. Several courts have mistakenly assumed that the twenty-five percent figure is mandatory, or have applied it without discussing the question. Finally, a majority of courts have rejected arguments that the PLRA attorneys' fees restrictions deny equal protection. A Jailhouse Lawyer's Manual, Chapter 14: The Prison Litigation Reform Act, Columbia Human Rights Law Review (8th Edition 2009)

3. **Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415 (i) (3) (c) and 2006 District of Columbia Appropriations Act §122; Pub.L. No. 109-115, 119 Stat. 2396, 2519 (2005)**

a. **Caps on Fees in the District of Columbia (pre-2009)**

i. Sec. 122. (a) None of the funds contained in this Act may be made available to pay –

a) [(1)] the fees of an attorney who represents a party in an action or an attorney who defends an action brought against the District of Columbia Public Schools under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) **in excess of $4,000** for that action . . .

ii. 2006 District of Columbia Appropriations Act § 122; Pub.L. No. 109-115, 119 Stat. 2396, 2519 (2005), cont'd in effect, Revised Continuing Appropriations Resolution, § 101(a)(9), Pub.L. No. 110-5, 121 Stat. 8, 9 (2007) (emphasis added) [NOTE: CAP NOT RENEWED SINCE 2009]

b. **Explicit ban on enhancement to lodestar**

i. No bonus or multiplier may be added to the prevailing market rate. *See* 20 U.S.C. s. 1415 (i) (3) (c).

G. Examples of Statutory Rights with No Fees:

1. **Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. 1801 et seq.**

a. "In essence, the AWPA establishes a "statutory contract" for farm workers. The failure, under AWPA, to give a written disclosure of the terms and conditions of employment, to comply with those terms and conditions, and the intentional

provision of misleading information are also classic signs of claims under contract law." *Villalobos v. Vasquez-Campbell*, 1991 WL 311902 (W.D. Tex. 1991). *See also* NY Wage Theft

b. **Relief under AWPA, 29 U.S.C. §1854(c):**

i. [(1)] If the court finds that the respondent has intentionally violated any provision of this chapter... it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

ii. [(2)] In determining the amount of damages to be awarded under paragraph (1), the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation.

c. **AWPA contains No Attorneys' Fees Provision:**

i. Unlike many civil rights statutes, AWPA lacks an attorney fee-shifting provision. *Bobadilla-German v. Bear Creek Orchards, Inc.,* 2009 WL 3448212 (D. Or. Oct. 21, 2009) *aff'd in part, rev'd in part,* 641 F.3d 391 (9th Cir. 2011).

ii. "Although the plaintiffs' main recovery was based upon the AWPA, they cannot receive an attorneys' fee under that statute because it has no fee-shifting provision." *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1316 (M.D. Fla. 2001).

d. **Alternative Methods of Obtaining Attorneys' Fees under AWPA**:

i. <u>Attorneys' Fees from AWPA Class Action Damages:</u>

a) If Plaintiffs prevail on their individual or class claims for violation of AWPA, any attorney fees awarded to counsel in connection with such claim will come from the damages awarded. The Court may take this into account when considering the adequacy of any award of damages. *Bobadilla-German v. Bear Creek Orchards, Inc.*, 2009 WL 3448212 (D. Or. Oct. 21, 2009) *aff'd in part, rev'd in part,* 641 F.3d 391 (9th Cir. 2011).

ii. <u>Amount of AWPA Damages Awarded Should Include Attorney Fees:</u>

a) "Plainly, it ought not to be cheaper to violate the Act and be sued than to comply with the statutory requirements. Nor should a worker who sues for violations find recovery inadequate to cover his personal costs in filing suit, testifying, and paying attendant attorney's fees, recovery of which is not allowed by the Act...

Awards should be adequate to encourage workers to assert their statutory rights. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-33 (5th Cir. 1985).

b) *But see Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1327 (M.D. Fla. 2001) ("Congress did not authorize an award of an attorneys' fee to a successful AWPA claimant. It is therefore illogical to think that any attorneys' fee should be influenced by the result on an AWPA claim. If Congress had wanted an AWPA claim to have an impact upon an attorneys' fee, it would have included a fee-shifting provision in that Act.)".

iii. <u>AWPA Issues Interrelate or Overlap with Other Claims:</u>

a) A successful FLSA claim carries with it recovery of attorneys' fees. 29 U.S.C. § 216(b). This recovery extends to time spent on AWPA issues to the extent that those issues interrelate and overlap with FLSA ones. *Diaz v. Robert Ruiz, Inc.*, 808 F.2d 427, 429 (5th Cir.1987).

b) "Plaintiffs' claims under the FLSA and the AWPA all arose from the identical nucleus of facts. Accordingly, this Court deems it appropriate that attorneys' fees should include all hours reasonably spent on the litigation as a whole. *De Leon v. Trevino*, 163 F. Supp. 2d 682, 685 (S.D. Tex. 2001).

c) "While only the FLSA provides for attorneys' fees, both of these actions arise out of the same core facts. Accordingly, this Court deems it appropriate that attorneys' fees should include all hours reasonably spent on the litigation as a whole." *Gooden v. Blanding*, 686 F. Supp. 896, 897 (S.D. Fla. 1988).

d) "To the extent that the AWPA claims intertwine with the common law contract claims and the FLSA claims, the time expended on the AWPA claims should give rise to attorneys' fees... The claims under the Agricultural Workers Protection Act, the Fair Labor Standards Act, and breach of contract all arose from the identical nucleus of facts. This Court awards Plaintiffs their reasonable attorneys' fees for *all* hours worked on this action." *Villalobos v. Vasquez-Campbell*, 1991 WL 311902 (W.D. Tex. Nov. 15, 1991).

e) *But see Herrera v. Singh*, 103 F. Supp. 2d 1244, 1253 (E.D. Wash. 2000): It is established under [Wash. Rev. Code E § 49.48.030] that attorney fees are recoverable in successful actions for lost wages due to wrongful discharge. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wash.2d 426, 449-50, 815 P.2d 1362 (1991). While Washington State law regarding wrongful discharge permits recovery of attorney's fees, the AWPA does not. In cases

where attorney fees are authorized for only some of the claims, "the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues.

2. **NYS Human Rights Law ("HRL"), Executive Law §§296-301**

a. Article 15 of the New York Executive Law, which is known as the State Human Rights Law, is a broad anti-discrimination statute prohibiting discrimination in employment, private and public housing, and health care as it relates to public accommodation rights, apprentice training programs, Exec. Law § 296, and credit, Exec. Law § 296(2). The HRL prohibits discrimination on the basis of race, color, sex (gender), age, national origin, creed, disability, predisposing genetic characteristics, sexual orientation, military status, marital status, domestic violence victim status, as well as a prior conviction record. The New York State Human Rights Law applies to employers with four or more employees. The statue "provides the broadest remedy for discrimination on the job". 13A N.Y. Practice, Employment Law in New York § 4:366 (2d ed.)

b. New York was the first state to enact a human rights law "to insure that every individual has an equal opportunity to participate fully in the economic, cultural, and intellectual life of the state." 3 N.Y. Exec. Law § 290(3), N.Y. Exec. Law Art 15. In 1945, the Ives-Quinn Anti-Discrimination law went into effect making New York the first state in the nation to enact legislation prohibiting discrimination in employment based on race, creed, color, and national origin. In 1968, the Ives-Quinn Anti-Discrimination Law was renamed the Human Rights Law, and the State Commission against Discrimination was renamed the New York State Division of Human Rights.

c. In 1974, the Human Rights Law was broadened to protect people with disabilities; in 1991, the statue was amended to protect families in the area of housing; in 1997, the Law was changed to include an express provision requiring reasonable accommodations in employment for persons with disabilities; in 2002, the Law was amended to protect both religious practices and religious observances.

d. In 2003, the Sexual Orientation Non-Discrimination Act was passed so to include sexual orientation among the protected traits/characteristics; and in 2003, the Human Rights Law was extended to encompass military status. In 2009, the statute was amended to provide protections for domestic violence victims from employment discrimination, and in 2011 it was amended to protect domestic workers from sexual harassment and discrimination based on gender, race, religion or national origin.

e. The Human Rights Law declares that "[t]he opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status" is a civil right. Exec. Law § 291(1). Disability and predisposing genetic conditions are also covered by the statute, along with sexual

orientation and status as a victim of domestic violence. Exec. Law § 296(21). Remedies include back pay, reinstatement, and unlimited compensatory damages.

f. **Types of Discrimination Administrative Complaints filed with the Division of Human Rights (2012**)

Race and Color:	33.4%
Disability:	32.4%
Opposing Discrimination/ Retaliation:	25.3%
Sex:	23.2%
Age:	17.8%
National Origin:	15.9%
Creed:	5.7%
Criminal Record:	5.3%
Sexual Orientation:	4.9%
Marital Status:	2.7%
Other:	5.1%

g. **Similarities and Differences Between HRL and Federal Civil Rights Statues**

i. State and federal courts have found many similarities between the substance of discrimination claims and defenses under the HRL and federal civil rights discrimination statutes including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504). See *Camarillo v. Carrols Corp*., 518 F.3d 153, 158 (2d Cir.2008); *Helmes v. South Colonie Cent. School Dist.*, 564 F.Supp.2d 137, 152 (N.D.N.Y. 2008) citing *Weinstock v. Columbia Univ*., 224 F.3d 33, 42 n. 1 (2d Cir. 2000); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 n. 3 (2004); *Reeves v. Johnson Controls World Servs*., *Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998); 6 *New York City Bd. of Educ. v. Sears*, 83 A.D.2d 959, 960 (2d Dep't 1981); *Lightfoot v. Union Carbide Corp*., 110 F.3d 898, 913 (2d Cir.1997), but there are many important differences. Here are some examples of exclusive HRL protections:

a) No federal civil rights statute prohibits discrimination based on predisposing genetic characteristics, sexual orientation, domestic violence victim status, or a prior conviction record, as under the HRL.

ii. Employers with fewer than 15 employees are not covered by Title VII or Title I of the ADA; the HRL covers employers with four or more employees. (Note, however, that under the federal law, Section 504, there is no requirement regarding the minimum number of employees.)

iii. The Age Discrimination in Employment Act protects only individuals over the age of 40; the HRL covers all persons age 18 and older.

iv. The ADA specifically excludes Gender Identity Disorder from classification as a disability, 42 U.S.C. § 12211(b); the HRL covers such persons.

v. The ADA specifically excludes current drug users from its protection. 42 U.S.C.A. § 12114. The New York Human Rights Law treats drug addiction as a disability. *Doe v. Roe, Inc*., 160 A.D.2d 255. The HRL regulation 9 NYCRR § 466.1(h), provides that alcoholism and drug addiction are diseases and the law protects individuals who are recovered/recovering alcoholic or drug addicts (but not individuals who currently use drugs illegally)

h. **Attorneys' Fees under the HRL**

i. "With respect to cases of housing discrimination only, in action or proceeding at law under [Exec. Law § 297 or Exec. Law § 298]... the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party. However, the prevailing... defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous." Exec Law 297(10).

ii. In all other respects, "[t]he Human Rights Law of the State of New York does not authorize an award of counsel fees for work done in either state administrative or judicial proceedings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67 (1980).

iii. A prevailing plaintiff in a state court discrimination case may bring an action in federal for attorneys' fees under Title VII. *Ballard v. HSBC Bank USA, N.A.*, 827 F. Supp. 2d 187 (W.D. N.Y. 2011).

iv. "Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. § 706(f)(1). One aspect of complete relief is an award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67-68 (1980)

i. **Proposed Women's Equality Act:**

i. Part C would amend Exec. Law. 297 to provide for attorney's fees in employment or credit discrimination cases when sex is a basis of discrimination and retain the existing allowance for attorney's fees in housing and housing related credit cases. It would similarly amend Exec. Law 296-a to permit the awarding of attorney's fees in credit discrimination cases when sex is a basis of discrimination in matters

brought before the Department of Financial Services. Assembly Bill No. A08070 (2013)

IV. LEGAL SERVICES PROGRAMS AND ATTORNEYS' FEES

A. Historical difficulty for poor people in finding attorneys to help them enforce rights when violated

1. If fees were not available for civil rights cases, "aggrieved but impecunious parties would be hard-pressed to find qualified attorneys to commence cases for them, since they would have no assurance of being compensated." *Solla v. Berlin*, 106 A.D.3d 80, 93 (First Dep't 2013)

B. Legal Services Corporation (LSC) Regulatory Restriction on Fees

1. "In 1996, facing mounting pressure to curtail some of the more controversial activities conducted by some recipient programs, Congress enacted § 504 of the 1996 Act, which supplemented, and in some instances reinforced, the restrictions on LSC-funded recipients with more stringent requirements. For example, three of the 1996 Act restrictions, which also happen to be challenged by plaintiffs in their cross-appeals, prohibit recipients from participating in class action lawsuits, seeking certain types of attorneys' fees, and in-person solicitation of clients. 1996 Act § 504(a)(7), (13), & (18); *see* 45 C.F.R. pts. 1617, 1638, & 1642." *Brooklyn Legal Services. Corp. v. Legal Services. Corp.*, 462 F.3d 219, 222 (2d Cir. 2006) (internal citations omitted).
2. All the restrictions were included in subsequent appropriations laws through the March 2009 appropriations bill for the 2009 fiscal year. The December 2009 appropriations bill for the 2010 fiscal year struck out the paragraph requiring LSC to sanction any program that "claims … or collects and retains attorneys' fees. Consolidated Appropriations Act of 2010 § 533, Pub. L. No. 111-117, 123 Stat. 3034 ("Section 504(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996 (as contained in Public Law 104-134) is amended by striking paragraph (13)"). (Sadly, other restrictions on legal services programs were not repealed).
3. In commenting upon the regulatory attorneys' fees restriction, the Legal Services Corporation stated:

    a. "Moreover, LSC agrees that the restriction imposes unnecessary burdens on recipients and places clients at a disadvantage with respect to other litigants. Specifically, the ability to make a claim for attorneys' fees is often a strategic tool in the lawyers' arsenal to obtain a favorable settlement from the opposing side. Restricting a recipient's ability to avail itself of this strategic tool puts clients at a disadvantage and undermines clients' ability to obtain equal access to justice.

    The attorneys' fees restriction can also be said to undermine one of the primary purposes of fee-shifting statutes, namely to punish those who have violated the rights of persons protected under such statutes. In addition, in a time of extremely tight funding, the inability of a recipient to obtain otherwise legally available

attorneys' fees places an unnecessary financial strain on the recipient. If a recipient could collect and retain attorneys' fees, it would free up other funding of the recipient to provide services to additional clients and help close the justice gap. fundamental, the restriction results in clients of grantees being treated differently and less advantageously than all other private litigants, which LSC believes is unwarranted and fundamentally at odds with the Corporation's Equal Justice mission." Legal Services Corp., 71 FR 21507 (April 26, 2010)

4. In this respect, "[t]he elimination of the attorneys' fees restriction does not create any new substantive right to be awarded attorneys' fees, but removes the prohibition on the act of claiming, and collecting and retaining such fees. As such, the elimination of the restriction restores to LSC grantees and their clients the same right to claim, collect and retain those fees as other litigants in cases where attorneys' fees are permitted or mandated to be awarded under state and Federal law. CLASP Regulatory -Policy Memorandum 2010-2, found at http://www.nlada.org/Publications/CLASPMemo10_02

C. IRS Private Letter Ruling 135328-09

1. The IRS determined that when a litigant had no obligation to pay attorneys' fees and the fees were not sought on behalf of the taxpayer, but directly by a legal aid organization, an award of attorneys' fees is not to be included as part of the taxpayer's gross income. This Letter Ruling only applies to the taxpayer requesting it and only under the specific circumstances of the particular case. Nevertheless, it indicates that IRS may likely follow it when a retainer agreement states that a legal services program is not charging its client a fee and an award of attorneys' fees is made directly to the program.

V. PROBLEMS AND ISSUES IN PRIVATE RIGHTS ENFORCEMENT

A. Elimination of the "Catalyst Theory" in Obtaining Fees - Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources

1. Under *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), "[e]ssentially, in order to be considered a 'prevailing party' [to enable a plaintiff to take advantage of a federal fee-shifting statute] ..., a plaintiff must not only achieve some 'material alteration of the legal relationship of the parties,' but that change must also be **judicially sanctioned**." *Roberson v. Giuliani*, 346 F.3d 75, 79–80 (2d Cir.2003) (quoting *Buckhannon*, 532 U.S. at 603, 121 S.Ct. 1835). *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65, 67 (2d Cir. 2005) (emphasis added).

2. *Buckhannon* concerned the fee-shifting provisions of the Americans with Disabilities Act of 1990 ..., 42 U.S.C. § 12205, and the Fair Housing Amendments Act of 1988 ..., 42 U.S.C. § 3613(c)(2), but the decision expressly signaled its wider applicability." *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65, 75 (2d Cir. 2005) (citations omitted). *Buckhannon* has since been broadly applied to a variety of statutes containing fee-shifting provisions.

3. In IDEA cases, the Second Circuit has adopted a relatively liberal standard for ascertaining compliance with *Buckhannon*. *See A.R. ex rel. R.V. v. New York City*

Department of Education, 407 F.3d 65, 76 (2d Cir.2005) (holding that an administrative order entered and signed by an independent hearing officer ("IHO") in IDEA proceedings, which sets forth or incorporates the terms of the parties' agreements, confers prevailing party status on the parents; reasoning that, "[a]lthough not 'judicial,' such an order changes the legal relationship between the parties: Its terms are enforceable, if not by the IHO itself, then by a court, including through an action under 42 U.S.C. § 1983.") (citations omitted). *Maria C. ex rel. Camacho v. Sch. Dist. of Philadelphia*, 142 F. App'x 78, 82 (3d Cir. 2005)

4. Interestingly, the First Department has declined to follow *Buckhannon* in interpreting the New York State Equal Access to Justice Act (State EAJA). Reasoning that the state statute in question differs substantially from the federal civil rights statutes at issue in *Buckhannon*, the First Department has held that the "catalyst theory" still enables prevailing plaintiffs to recover fees. *Solla v. Berlin*, 106 A.D.3d 80, 93, 961 N.Y.S.2d 55, 65 (First Dep't 2013). However, because State EAJA only applies to actions against the State, and contains other restrictions on fees, as well, the First Department's holding will have a limited impact, as a practical matter.

B. Arbitration

1. For many decades after President Calvin Coolidge signed the Federal Arbitration Act of 1925 (FAA), 9 U.S.C. § 1 *et seq*., courts refused to enforce agreements that mandated arbitration of statutory employment claims on public policy grounds. In the mid-1980s, however, the Supreme Court began to reject those public policy arguments and upheld some employment arbitration agreements. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court began eliminating judicial enforcement of federal statutory rights by holding that claims arising under the Age Discrimination in Employment Act (ADEA) are arbitrable. Since then, the Supreme Court has determined that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command". *CompuCredit Corp. v. Greenwood*, 565 U.S. ——, 132 S.Ct. 665, 669 (2012) (internal citations omitted). Additionally, the "burden of showing such legislative intent lies with the party opposing arbitration." *Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 75–76 (2d Cir. 1998).

2. As a result, if an employee voluntarily and knowingly enters into a written agreement to arbitrate a discharge or other employment dispute, any subsequent state or federal court action to enforce statutory civil rights arising from the dispute may be preempted by the Act. *See* e.g. *Desiderio v. National Association of Securities Dealers, Inc*., 191 F.3d 198 (2d Cir. 1999) (Title VII); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013) (FLSA); *Steele v. L.F. Rothschild & Co., Inc.*, 701 F. Supp. 407, 408 (S.D.N.Y. 1988) (Equal Pay Act). Further, Section 118 of the Civil Rights Act of 1991 specifically encourages the use of "alternative means of dispute resolution," including arbitration, to resolve controversies arising under Title VII, the ADA, and 42 U.S.C.A. § 1981. Consumer federal statutory rights may also be subject to arbitration. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, (2000) (Truth in

Lending Act and Equal Credit Opportunity Act), however, debt collectors sued under the FDCPA "will almost always be a third party, removed from the consumer's agreement containing the arbitration clause." Richard M. Alderman, The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration, 24 Loyola Consumer Law Review 586, 588 (2012). Finally, suits brought under the New York Human Rights Law § 296 can be precluded by compulsory arbitration. *Ciago v. Ameriquest Mortgage Co.*, 295 F. Supp. 2d 324, 334 (S.D.N.Y. 2003).

C. Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany & Albany County Board of Elections, 522 F.3d 182 (2d Cir. 2008) and Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542 (2010)

1. In *Arbor Hill*, the Second Circuit endeavored to alter unilaterally the traditional attorneys' fees paradigm. Rather than the lodestar, the Circuit opined, courts should use a market-based approach, and should base a fee award on "the rate a paying client would be willing to pay." This approach was particularly alarming to civil rights and legal services attorneys. As one commentator has observed,

2. *Arbor Hill*'s presumptively reasonable fee is unworkable with respect to civil rights claims with low damages. "When . . . the damages in a federal lawsuit are [very low] . . . , it is fanciful to ask what rate a paying client would be willing to pay to bring that lawsuit, much less to "attract competent counsel." And the same is true for a low-income worker's claim for minimum wages or unpaid overtime, or a disabled employee challenging the denial of a reasonable accommodation, or a citizen seeking vindication for being locked up without probable cause. *Arbor Hill*, taken at its word, would preclude a fee award in such small damages cases, despite their importance, since a rational paying client would not bring suit, and therefore would not pay attorney fees." John A. Beranbaum, *Attorney Fees: The Death of Arbor Hill*, 84 New York State Bar Journal (Feb. 2012).

3. Fortunately, the *Arbor Hill* doctrine was short-lived. In 2010, the Supreme Court affirmed the primacy of the lodestar approach in no uncertain terms, *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), and the Second Circuit quickly fell into line, pledging allegiance to the lodestar approach and implicitly abandoning *Arbor Hill*. See Beranbaum, supra; *Millea v. Metro-North R.R. Co.*, 658 F.3d 154 (2d Cir. 2011).

D. Attorney Fee Waivers: *Jeff D.*

1. In *Evans v. Jeff D.*, 475 U.S. 717, 741-743 (1986), the Supreme Court held that defendants may ask a plaintiff to waive his or her right to statutory attorney's fees as a condition of a settlement offer . The Court also ruled that it is acceptable to conduct simultaneous negotiation of attorney's fees and liability on the merits. This ruling presents singular difficulties for legal services attorneys attempting to obtain attorneys' fees as part of settlement negotiations.

2. *Jeff D.* was a class action brought by Idaho Legal Aid Society on behalf of disabled children who suffered from emotional and mental disabilities and who had been institutionalized by the State of Idaho. "Because the Idaho Legal Aid Society is prohibited from representing clients who are capable of paying their own fees, it made no

agreement requiring any of the respondents to pay for the costs of litigation or the legal services it provided[.]" *Id*. at 717.

3. The plaintiffs did not seek damages, but only requested injunctive relief designed to improve their conditions of care. One week before trial, the defendants "offered virtually all of the injunctive relief [plaintiffs] had sought in their complaint." *Evans v. Jeff D.*, 475 U.S. at 722. Further, the defendants' proposed relief was "more than the district court in earlier hearings had indicated it was willing to grant" *Id*. (internal citations omitted). This proposed settlement was conditioned on plaintiffs' acceptance of on a complete waiver of all statutory attorney's fees and costs.

4. Plaintiffs' attorneys faced an ethical dilemma. Acting in the best interests of their clients, Idaho Legal Aid accepted the settlement agreement, but filed a motion requesting the district court not to approve the agreement's waiver of fees and costs. *Id*. at 723. On appeal, the Ninth Circuit invalidated the fee waiver provision of the settlement agreement and remanded the case to the district court for the purpose of the determination of a reasonable fee. *Id*. at. 725. The State defendants appealed to the Supreme Court, which overruled the Ninth Circuit, and approved the defendants' fee waiver settlement tactics. *Id*.

5. *Jeff D*. makes plaintiffs' lawyers particularly vulnerable to fee-related conflicts of interest. An attorney is obligated to inform a client of any serious settlement offer, and this duty includes counseling a client to accept any offer that includes sufficient relief on the merits. If the offer is conditioned on a waiver of attorney fees, then the attorney can be bound by the client's decision. *Jeff D*. sanctions this waiver. *Jeff D*. also sanctions lump-sum settlement offers. Often, a defendant is willing to settle for a maximum dollar amount, but is indifferent as to how that amount is divided between the client or class and counsel. Again, plaintiff's attorney is placed in a serious dilemma between the expectations and rights of the client/class as a whole and the attorneys' entitlement to fees.

6. The legal reasoning underlying *Jeff D.* reveals a fundamental misunderstanding of the role and importance of attorneys' fees in enforcing civil rights in the United States. In *Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 401-402 (1968), the Supreme Court recognized that "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts" In *Jeff D*, these attorneys' fees became part of an "arsenal of remedies available to combat violations of civil rights," one which could be bargained away as part of any settlement on the merits. Id. at 732. Instead of a critical component of a national enforcement policy, Jeff D. Court considered attorneys' fees to be:

> a. "a powerful weapon that improves [a victim's] ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial. For aught that appears, it was the "coercive" effect of respondents' statutory right to seek a fee award that motivated petitioners' exceptionally generous offer...In this case, the District Court did not abuse its

discretion in upholding a fee waiver which secured broad injunctive relief, relief greater than that which plaintiffs could reasonably have expected to achieve at trial". *Id*. at 742-743.

7. **Possible Responses to *Jeff D*. Fee Waivers**

   a. **<u>Separate Client's Remedies from Attorney Fees Issue</u>**

      i. The common wisdom is that if defendant's counsel suggests that attorneys' fees and client's relief be negotiated together or a lump sum settlement, plaintiffs' counsel "should object, and try to secure agreement that the two will be negotiated separately, or alternatively, that fees will be determined by the court after relief for the plaintiff has been agreed upon." 13 N.Y.Prac., Employment Litigation in New York § 6:28. Sadly, this tactic "is spectacularly unsuccessful." Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 Geo. J. Legal Ethics 499, 529 (2004). Few lawyers succeed with this tactic on more than an occasional basis. *Id*.

      ii. "Attorneys can try to get the defendant to separate future offers into separate amounts by asking the defendant "how they are coming up with their numbers." The defendant may be calculating the lump sum by adding damages to a fee award. A more common method is to make a counter offer. The counter offer will include a damages award larger than the total amount of the first offer plus a separate fee award. This means that the lawyer improves the result for the client while still getting fees into the equation. The final series of offers and counter offers will usually involve separate sums for fees and damages." *Id*. at 530-531 (footnotes omitted).

      iii. "There is an important exception to this pattern. This is when the early lump-sum offer seems adequate for the client. In this situation, attorneys will often recommend that the client accept the offer, requiring the lawyer to forgo a fee. Attorneys are reluctant to ask a client to support the pursuit of fees in the early stages of litigation because the cost to the client could be very high compared to the benefit to the attorney's organization. Thus, public interest lawyers can miss out on recovering fees due to lump-sum offer". Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 Geo. J. Legal Ethics at 530 (footnotes omitted).

   b. **<u>Prior Client Agreement</u>**

      i. "Lawyers can only get genuine client support for pursuing fee awards if the client is supportive of the wider political goals of the lawyer's organization. This gives lawyers an incentive to seek out and select clients who are sympathetic to their goals. In cases where the lawyer anticipates a need for client support the lawyer might consider selecting clients especially carefully." Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 Geo. J. Legal Ethics at 517. For legal services attorneys, the better practice is for:

a) public interest counsel [to] explain the financial details of the litigation well in advance to their clients, [because] few clients will, against the advice of counsel, leap to accept a settlement that deprives counsel of fair compensation and themselves of any provision for costs. In my experience, respected counsel do not and should not undertake public interest representation until an understanding is had with clients as to the range of appropriate settlements. *Moore v. National Ass'n of Securities Dealers, Inc.*, 762 F.2d 1093, 1112 n. 1 (D.C. Cir. 1985) (Wald, concurring).

ii. "It is legitimate to ask clients to support the pursuit of attorney's fees. Lawyers must still take care, however, to ensure that they do not pressure clients to make an 'altruistic' decision. It is only legitimate to pursue fees with genuine support from the client. Otherwise, the attorney will be acting against the interests the client in violation of Model Rule 1.7(b)(1)." Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 Geo. J. Legal Ethics at 515 (footnotes omitted).

c. **Fee Enhancements**

i. In the past, courts had "the authority to add a bonus to the lodestar figure to compensate counsel for factors such as the risk and complexity of the case, results achieved, and quality of work done by the prevailing attorney." *New York Association for Retarded Children v. Carey*, 711 F.2d at 1153. An enhancement to the lodestar may be permissible in "rare" or "exceptional" cases. See *Krieger v. Gold Bond Building Products*, 863 F.2d 1091 (2nd Cir. 1983). However, in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554-556 (2010), the Supreme Court limited fee enhancements to three very rare and difficult situations:

a) First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes...

b) Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted...

c) Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988

presumably understands that payment of fees will generally not come until the end of the case, if at all.... Compensation for this delay is generally made "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989) (internal quotation marks omitted). But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

d. **Importance of Making Settlement Offers in Attorneys' Fees Cases:**

i. *See Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 956 (E.D. Wis. 2003) *aff'd*, 93 F. App'x 81 (7th Cir. 2004):

a) [M]ost importantly, from the beginning, there was very little money at issue in this case; and the City has only itself to blame for the disproportionality between the attorneys' fees incurred and the amount Heder recovered. Heder reasonably offered to settle the matter for $2,281 before the lawsuit was filed. The City refused, chose to litigate the legal issues, filed a counterclaim against Heder, and then chose to appeal, causing the attorneys' fees to climb higher and become more disproportionate to the amount of damages at issue. Heder then offered to settle the attorneys' fee issue for $25,000 in December 2002. Again the City refused, forcing Heder to file a fee petition in order to recover and again causing the fees in increase. Neither Heder nor Olson should be forced to swallow expenses incurred largely as result of the City's approach to this litigation. *See City of Riverside v. Rivera*, 477 U.S. 561, 580–81 n. 11,(1986) (plurality opinion) ("The [defendant] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.") (internal citation and quotation marks omitted).

Internal Revenue Service
#201015016

Internal Revenue Service

Number: **201015016**
Release Date: 4/16/2010
Index Number: 61.00-00

Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B05
PLR-135328-09

Date:
January 05, 2010

TY:

Legend

Taxpayer	=
Defendants	=
Legal Aid Organization 1	=
Legal Aid Organization 2	=
Law Firm	=
City	=
Year 1	=
Year 2	=
Year 3	=
Lawsuit	=
Order	=
$x	=
$y	=
$z	=
Act	=
Section X of Act	=

Dear :

This is in response to a request for a private letter ruling dated July 23, 2009, submitted on your behalf by your authorized representatives. You (Taxpayer) have requested a ruling that an award of attorneys' fees of $y awarded directly to Legal Aid Organization 1 and Law Firm in the Order is excludible from your gross income under the circumstances set forth below.

FACTS

In Year 1, Taxpayer was one of several named plaintiffs who brought Lawsuit against Defendants alleging that Defendants engaged in improper practices under the Act. Lawsuit was not a class action. Taxpayer was represented on a *pro bono* basis by Legal Aid Organization 1, Legal Aid Organization 2, and Law Firm. These organizations took the case to ensure that businesses like Defendants' comply with the Act.

Taxpayer entered into a Retainer Agreement with Legal Aid Organization 1. In the "Fees and Costs" section, the Retainer Agreement states that, "[Legal Aid Organization 1] will not charge [Taxpayer] a fee for its services." Law Firm joined Legal Aid Organization 1 as co-counsel and agreed to represent Taxpayer and the other plaintiffs at no charge. Legal Aid Organization 2 also represented the plaintiffs at no charge. Taxpayer did not enter into a retainer agreement or other contract for services with Legal Aid Organization 2 or Law Firm. Taxpayer has no obligation, contractual or otherwise, to pay any fees or other costs to Legal Aid Organization 1, Legal Aid Organization 2 or Law Firm.

Taxpayer and the co-plaintiffs prevailed in Lawsuit. In year 2, the court entered judgment and awarded Taxpayer $x, the maximum recovery under the Act. Under Section X of Act, plaintiffs are entitled to recover "the costs of the action, together with reasonable attorneys' fees and costs." In Year 2, Legal Aid Organization 1 and Law Firm filed a motion for attorneys' fees and costs. In Year 3, the court issued Order, awarding $z attorneys' fees and other costs to co-counsel, Legal Aid Organization 1 and Law Firm. The portion of the $z attorneys' fees attributable to Taxpayer's claim was $y.

LAW AND ANALYSIS

Taxpayer concedes that the $x award is taxable income but contends that the award of $y in attorneys' fees is not includible in Taxpayer's gross income under § 61 of the Internal Revenue Code ("Code").

Section 61(a) of the Code defines "gross income" as "all income from whatever source derived." The definition extends broadly to all economic gains (accessions to wealth) not otherwise specifically exempted from taxation under the Code. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-430 (1955).

In the context of legal services contracts (retainers), plaintiff typically agrees to pay attorneys a fee for service. The fee may be a flat fee or a contingency fee. Under either arrangement, the plaintiff has a contractual obligation to pay the attorneys' fees. If a court awards attorneys' fees to a successful plaintiff and the plaintiff uses the recovery to pay (or offset payment of) attorneys' fees, plaintiff must include the awarded attorneys' fees in gross income under § 61(a) of the Code. See Kenseth v.

Commissioner, 114 T.C. 399 (2000), affd. 259 F.3d 881 (7th Cir. 2001); O'Brien v. Commissioner, 38 T.C. 707, 712 (1962), affd. per curiam 319 F.2d 532 (3d Cir. 1963). The rationale is that the taxpayer receives the benefit of the payment, i.e., an economic gain through debt satisfaction. When a third party makes a payment to satisfy a taxpayer's (plaintiff's) obligation to a creditor (retained attorney), the taxpayer realizes an economic gain includable in gross income, even if the third party pays the creditor directly and the taxpayer never receives the payment. Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929).

The principle of Old Colony Trust Co. applies whether the attorneys' fees are paid on a contingency-fee basis or under a fee shifting statute. Sinyard v. Commissioner, 268 F.3d 756 (9th Cir. 2001), affg. T.C. Memo. 1998-364; Vincent v. Commissioner, T.C. Memo. 2005-95 (attorneys' fees awarded pursuant to a fee shifting statute or regulation must be included in the gross income of the plaintiff where the awards are in lieu of contingency-fee.) See also, Sanford v. Commissioner, 95 T.C.M. 1618 (2008); Green v. Commissioner, T.C. Memo 2007-39.

The Supreme Court has reached the same result. In Commissioner v. Banks, 543 U.S. 426 (2005), the Court held that the portion of plaintiff's recovery from a money judgment or settlement paid to plaintiff's attorney under a contingency-fee agreement is included in the plaintiff's gross income. The Supreme Court viewed the contingency-fee agreement as an attempted anticipatory assignment of a portion of the client's income (litigation recovery) to the attorney. In its discussion the Court explained that a taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party. Lucas v. Earl, 281 U.S. 111 (1930); Comm'r v. Sunnen, 333 U.S. 591, 604 (1948); Helvering v. Horst, 311 U.S. 112, 116-117 (1940).

Attorneys' fees awarded to a successful litigant are generally includible in the litigant's gross income under either the anticipatory assignment of income doctrine of Banks and Lucas v. Earl or under the payment of a liability doctrine enunciated in Old Colony Trust. Under both analyses, the litigant has an obligation, by express or implied agreement, to pay attorneys fees. Taxpayer's case is distinguishable because Taxpayer had no obligation to pay attorneys' fees. In fact, Taxpayer's agreement (retainer contract) expressly provided that Legal Aid Organization 1 would not charge Taxpayer any fee for legal services. In addition, Taxpayer had no retainer contract with (and did not otherwise agree to pay any fees to) Legal Aid Organization 2 or Law Firm for their legal services. Rather, Legal Aid Organization 1 and Law Firm requested attorneys' fees directly under the provisions of Section X of Act; they did not seek attorneys' fees on behalf of Taxpayer or in lieu of Taxpayer's contingency fee obligation.

We therefore conclude that the award of $y in attorneys' fees is not includible in Taxpayer's gross income under § 61 of the Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

William A. Jackson
Branch Chief, Branch 5
Office of Chief Counsel
(Income Tax & Accounting)

Biographies

Peter Dellinger is an attorney with the Empire Justice Center, a nonprofit law firm, in Rochester, New York, where he represents low-income clients in consumer, civil rights and employment matters. He received his B.A. degree from University of Toronto, and has an M.A. degree in American Government from American University. Before attending law school he was a Robert F. Kennedy Fellow, and after receiving his J.D. from the Antioch School of Law in 1981, he clerked for Judge John T. Curtin of the United States District Court for the Western District of New York.

Mr. Dellinger began his legal services career in the Midwest, where he directed a state-wide legal services program representing migrant farmworkers in minimum wage, employment, and immigration matters. During this time, he completed language course work at the Academia Hispano Americana in San Miguel de Allende, Mexico. He is admitted to practice in the District of Columbia, Ohio, and New York, and before the United States Tax Court and the United States Court of Appeals for the Second Circuit.

Jonathan Feldman is an attorney with the Empire Justice Center, a nonprofit law firm, in Rochester, New York, where he represents low-income clients in civil rights, education, and disability rights matters. He received his B.A. degree from Oberlin College. Upon graduating from New York University School of Law in 1988, he clerked for Judge James T. Giles of the United States District Court for the Eastern District of Pennsylvania.

Prior to joining Empire Justice, Mr. Feldman worked for the Education Law Center in Newark, NJ, and the Community Service Society in New York City. He has taught and published in the fields of civil rights law and education law. He has twice served as a visiting clinical professor of law; first at Syracuse University College of Law, where in 2007 he directed the Disability Rights Clinic, and most recently at Cornell University Law School, where in 2013 he directed the Legal Aid Clinic. He is the co-author of an education law textbook (Education Law, Fifth Edition [Routledge, 2014]).