

Table of Contents

Volume 1

Chapter 1

Basic Fee Award Considerations: Fee Objectives and Law Practice Economics

- § 1:1 Introduction: The basic fee award issues of entitlement and calculation
- § 1:2 Major factors affecting fee entitlement and calculation
- § 1:3 Entitlement to fee award and who pays it
- § 1:4 —Exceptions to no-fee rule and their underlying economic objectives
- § 1:5 —Threshold entitlement conditions for authorized fee awards: Statutory fee entitlement
- § 1:6 Fee calculation: “Reasonable fee” guideline recognizes compensation scheme reflecting economics of the bar
- § 1:7 Economics of contingent-fee-award practice
- § 1:8 —Generally
- § 1:9 —Common fund
- § 1:10 —Statutory
- § 1:11 Procedures for obtaining and granting fee awards

Chapter 2

Common-Fund Fee Awards

- § 2:1 Rationale and origins of common-fund and substantial-benefit doctrines
- § 2:2 Historic computation guideline: Reasonable percentage of fund under circumstances involved
- § 2:3 The *Lindy* and *Johnson* cases—Lodestar and 12-factor approaches
- § 2:4 —Experience under *Lindy* and *Johnson* approaches
- § 2:5 Primary differences between common-fund and

- statutory fee award objectives support the use of the percentage approach in one and the lodestar approach in the other
- § 2:6 Actual practice results in comparable common-fund fee awards regardless of whether the percentage or lodestar method is used
- § 2:7 Emerging common-fund-fee formula: Reasonable percentage of fund after consideration of specified guidelines under particular circumstances involved
- § 2:8 —Percentage range of common-fund fee awards: Range median as norm
- § 2:9 —Deviation from percentage norm or range in exceptional cases
- § 2:10 *City of Burlington v. Dague* and common-fund fees
- § 2:11 Contingent-fee agreements with class representatives and class members
- § 2:12 Reasonable common-fund fee for multiple attorneys
- § 2:13 —Percentage of total fund for overall fee applies to multiple counsel collectively
- § 2:14 —Control of unnecessary duplication or excessive litigation efforts
- § 2:15 —Early use of nonjudicial representative to negotiate fee percentage with class counsel and to appoint lead counsel for plaintiffs
- § 2:16 Other methods to simplify the burdens on counsel and the court in fee determinations
- § 2:17 —Means for allocation of overall fee among multiple counsel
- § 2:18 Interim common-fund fee awards
- § 2:19 Costs reimbursement in common-fund cases
- § 2:20 Use of funds from prior settlement to litigate against nonsettling defendants
- § 2:21 Procedures for common-fund fee determinations
- § 2:22 Checklist for common-fund fee petitions
- § 2:23 Discovery related to common-fund fee application
- § 2:24 Fee-hearing requirements
- § 2:25 Who may share in common-fund fee award
- § 2:26 Objections to common-fund fee requests: Manner of objecting and grounds for objections
- § 2:27 —Who may object
- § 2:28 Fee opinions: Sufficient findings for review
- § 2:29 Appeals of fee awards: Scope of review
- § 2:30 Interest on common-fund fee awards
- § 2:31 Collecting common-fund and structured-settlement fee awards

TABLE OF CONTENTS

§ 2:32 Chart: Examples of fee awards in common-fund cases

Chapter 3

Statutory-Fee-Award Entitlement

- § 3:1 Dual standard of fee entitlement in civil rights suits
- § 3:2 Prevailing-party status: Obtaining some of benefit sought and partial success sufficient
- § 3:3 —Nominal or declaratory relief obtained: *Farrar v. Hobby*
- § 3:4 —Fee and nonfee claims joined: Success on state claim only
- § 3:5 —Interim fee entitlement: Procedural versus merits success
- § 3:6 —Partial fee entitlement: Noncontestable minimum fee award
- § 3:7 —Obtaining benefits other than by judgment: Catalyst for voluntary action which moots case no longer renders a party prevailing under *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*
- § 3:8 Persons entitled to fee award
- § 3:9 Bar to or restrictions against statutory fee award
- § 3:10 —Special circumstances
- § 3:11 —Immunity doctrines: Federal and state governments and the judiciary
- § 3:12 —Rule 68 offer of judgment as limit to statutory fees otherwise awardable: *Marek v. Chesney*
- § 3:13 —Waiver of statutory fees as condition of defendant's settlement offer, not an invalid practice: *Evans v. Jeff D.*

Chapter 4

Statutory-Fee Calculation

- § 4:1 Basic statutory-fee guidelines: Value of time spent, with adjustments
- § 4:2 Fee calculation
- § 4:3 Burden of proof for time/rate elements and challenges
- § 4:4 Hourly rate test: Prevailing market rate in relevant community

ATTORNEY FEE AWARDS 3D

- § 4:5 —Prevailing market rate issues
- § 4:6 —Billing rates for noncontingent services
- § 4:7 —Rates of salaried attorneys, law clerks, and paralegals
- § 4:8 —Delayed compensation rates: Current or historical rates
- § 4:9 —Uniform or variable rates: Different activities or partner doing associate work
- § 4:10 —Expert and specialist rates
- § 4:11 —Rate and percentage restrictions under particular statutes
- § 4:12 Relevant community for rates
- § 4:13 —Geographical community: Forum, out-of-state, national rates
- § 4:14 —Legal specialty community: General or similar specialty rates
- § 4:15 Evidence of prevailing rates
- § 4:16 Compensable and noncompensable time expended for initial lodestar calculation
- § 4:17 —Relation of unsuccessful claims to successful ones: *Hensley v. Eckerhart* test
- § 4:18 —Unsuccessful motions during successful litigation
- § 4:19 —Related legal proceedings or activities
- § 4:20 —Related nonlegal activities
- § 4:21 —Fee application time
- § 4:22 —Postjudgment hours
- § 4:23 —Appeal time on merits and fee issues
- § 4:24 Reasonable time expended for compensable categories of activity
- § 4:25 —Excessive hours disallowed: Particular tasks and unnecessary duplication by multiple counsel
- § 4:26 —Reconstructed time records
- § 4:27 Lodestar adjustments, upward or downward, to reach reasonable fee
- § 4:28 Burden of proof for adjustments
- § 4:29 Multipliers: Quality, contingency, delay in payment
- § 4:30 —Quality multiplier only for exceptional results and for superior services not reflected in hourly rates: *Delaware Valley*
- § 4:31 —Results obtained with superior efficiency or economy which render the lodestar unreasonably low
- § 4:32 —Contingency multiplier for risk of loss, economics of practice: *Delaware Valley* and *City of Burlington v. Dague*
- § 4:33 —Delay in payment adjustment

TABLE OF CONTENTS

- § 4:34 Other *Johnson* factors supporting final-fee adjustments
- § 4:35 —Fee statute objectives as supporting fee adjustment
- § 4:36 Effect of contingent-fee contract with client
- § 4:37 Recommended use of multipliers
- § 4:38 Overall fee reasonableness when limited results obtained
- § 4:39 —Partial success on merits, appeals, and fee time:
Hensley v. Eckerhart
- § 4:40 —Damages recovered no ceiling for civil rights fees:
Riverside v. Rivera
- § 4:41 Costs reimbursement under fee-award statutes
- § 4:42 —Reimbursable costs
- § 4:43 —Expert fees and costs

Chapter 5

Fees for Prevailing Defendants

- § 5:1 Guidelines for fees to prevailing defendants
- § 5:2 Pro se plaintiffs and defendant awards
- § 5:3 The partially prevailing defendant
- § 5:4 Amount of fees
- § 5:5 Calculation of fees to prevailing defendants
- § 5:6 Chart: Decisions awarding or denying fees to defendants

Volume 2

Chapter 6

Procedures for Obtaining and Settling Statutory Fees

- § 6:1 Policy favoring fee settlements
- § 6:2 —Simultaneous merits/fee-settlement negotiations and fee-waiver-settlement conditions
- § 6:3 —Fee limitation by successful Rule 68 offer is compatible with § 1988 policy for fee award on obtaining settlement
- § 6:4 Standing to seek fees or take fee appeal
- § 6:5 Timing of fee application for final or interim fees:
Bifurcation of entitlement/amount issues
- § 6:6 Checklist for statutory-fee applications
- § 6:7 Discovery related to fee application

- § 6:8 Supporting affidavit of applicant to meet burden of proof
- § 6:9 Proof of prevailing market rates
- § 6:10 Documentation of proof of reasonable hours expended
- § 6:11 Arguments supporting appropriate adjustments to
time/rate product
- § 6:12 Evidentiary hearing requirements
- § 6:13 Fee-award opinion: Sufficient explanation for appellate
review
- § 6:14 Interest on statutory fee awards
- § 6:15 Multiple defendants: Joint or allocated liability and time
spent against dismissed defendants
- § 6:16 Appeals of statutory fee awards
- § 6:17 Collecting statutory fee awards against government
defendants

Chapter 7

Fee Award as Sanction to Remedy and Punish Improper Conduct of Adversary

- § 7:1 Introduction
- § 7:2 The bad-faith exception to the American no-fee rule
- § 7:3 Scope of power under the bad-faith exception
- § 7:4 Parties
 - § 7:5 —Pro se litigants
 - § 7:6 —Prevailing vs. nonprevailing parties
 - § 7:7 —Attorneys
 - § 7:8 —The government
- § 7:9 Nonparties
- § 7:10 Prelitigation bad-faith conduct
- § 7:11 Litigation bad-faith conduct
- § 7:12 Determination of bad faith
- § 7:13 Fees awarded under the bad-faith exception
- § 7:14 Fees for time spent on fee petition
- § 7:15 Appeals of sanctions under the bad-faith exception
- § 7:16 Rule 11: Sanctions for improper pleadings, motions, and
other papers filed
 - § 7:17 —Evolution of Rule 11
 - § 7:18 —Purposes of Rule 11
 - § 7:19 —Scope of Rule 11
- § 7:20 Liability under Rule 11—Attorneys

TABLE OF CONTENTS

§ 7:21	—Local counsel
§ 7:22	—Law firms and nonsigning attorneys
§ 7:23	—Pro se litigants
§ 7:24	—Clients
§ 7:25	—United States
§ 7:26	Reasonable prefiling inquiry
§ 7:27	—Time available for investigation
§ 7:28	—Reliance by the attorney on information from the client
§ 7:29	—Attorney expertise
§ 7:30	—Availability of evidence
§ 7:31	—Reliance on other attorneys
§ 7:32	—The litigant’s experience
§ 7:33	—Costs imposed on opposing party
§ 7:34	Continuing duty of attorneys to amend or withdraw documents
§ 7:35	Documents must be well-grounded in fact
§ 7:36	—No evidence to support filing
§ 7:37	Document must be warranted by law
§ 7:38	—Reasonable judgment on the merits
§ 7:39	Improper purposes
§ 7:40	Procedure for Rule 11 motions
§ 7:41	Allocation of sanctions
§ 7:42	Amount of fees awarded under Rule 11
§ 7:43	Appeal of Rule 11 sanctions
§ 7:44	Rule 16(f): Sanctions relating to pretrial conferences
§ 7:45	Rule 26(g): Sanctions relating to discovery requests, responses, and objections
§ 7:46	Rule 37: Sanctions involving requests for and compliance with discovery orders
§ 7:47	—Rule 37(a)(4)
§ 7:48	—Rule 37(b)
§ 7:49	—Rule 37(c)
§ 7:50	—Rule 37(d)
§ 7:51	—Rule 37(g)
§ 7:52	Appellate Rule 38 and 28 U.S.C.A. § 1912: Sanctions for appeals
§ 7:53	Objective standard of Appellate Rule 38
§ 7:54	Persons liable for sanctions under Appellate Rule 38
§ 7:55	—Pro se litigants
§ 7:56	Procedural and due-process considerations
§ 7:57	Amount of fees awarded under Appellate Rule 38

- § 7:58 28 U.S.C.A. § 1927: Sanctions for unreasonable and vexatious attorney conduct
- § 7:59 Sanctions under Bankruptcy Rule 9011

Chapter 8

Attorney's Fees Under Securities Laws

- § 8:1 Introduction
- § 8:2 The Securities Act of 1933
- § 8:3 Fee awards in shareholder derivative suits
- § 8:4 Fee awards under the common-benefit theory
- § 8:5 Private Securities Litigation Reform Act of 1995

Chapter 9

Fee Awards Under Antitrust and RICO Statutes

- § 9:1 Introduction
- § 9:2 Attorney's fees under § 4 of the Clayton Act
- § 9:3 —Fee awards to state attorneys general in antitrust actions
- § 9:4 Attorney's fees under § 16 of the Clayton Act
- § 9:5 Actions under RICO

Chapter 10

Fee Awards Under the Civil Rights Attorney's Fees Awards Act

- § 10:1 Introduction
- § 10:2 Judicial construction
- § 10:3 *Hensley v. Eckerhart*
- § 10:4 *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*
- § 10:5 ***Blum v. Stenson***
- § 10:6 Defendant fee awards
- § 10:7 The Ethics in Government Act

TABLE OF CONTENTS

- § 10:8 —Subject of investigation
- § 10:9 — —But for requirement
- § 10:10 Chart: Fee awards in civil rights cases

Chapter 11

Fee Awards in Employment-Discrimination Suits

- § 11:1 Introduction
- § 11:2 *Hensley v. Eckerhart*: Prevailing-party status and results obtained
- § 11:3 Title VII actions
- § 11:4 —Fee awards in Title VII administrative proceedings
- § 11:5 The Civil Rights Attorney's Fees Awards Act of 1976
- § 11:6 Rule 68 offers of judgment
- § 11:7 —State proceedings and fees awards under the Civil Rights Attorney's Fees Awards Act
- § 11:8 The Equal Pay Act
- § 11:9 The Age Discrimination in Employment Act
- § 11:10 The federal wage and hour laws of the Fair Labor Standards Act
- § 11:11 Disability-related statutes
- § 11:12 Intervenors
- § 11:13 Defendant fee awards in employment-discrimination actions
- § 11:14 The lodestar approach to calculating attorney's fees
- § 11:15 Class actions in employment cases
- § 11:16 Chart: Fees awarded in employment-related cases

Volume 3

Chapter 12

Fee Awards in Suits for the Mentally or Physically Disabled

- § 12:1 Introduction
- § 12:2 The Health Care Quality Improvement Act
- § 12:3 The Americans with Disabilities Act

- § 12:4 The Education of the Handicapped Act and the Handicapped Children's Protection Act of 1986/Individuals With Disabilities Education Act
- § 12:5 The Rehabilitation Act
- § 12:6 The Civil Rights Attorney's Fees Awards Act
- § 12:7 Fee awards in social security disability cases
- § 12:8 —The Social Security Act
- § 12:9 —Interim benefits
- § 12:10 The Equal Access to Justice Act
- § 12:11 Chart: Fee awards in health-related cases

Chapter 13

Fee Awards in Suits for Prisoner, Pretrial Detainee, and Parolee Rights

- § 13:1 Introduction
- § 13:2 Constitutional challenges under the PLRA
- § 13:3 Nominal damages under the PLRA
- § 13:4 Fees for fees under the PLRA
- § 13:5 Sanctions under the PLRA
- § 13:6 Fees awarded under the PLRA
- § 13:7 Fee awards under the Civil Rights Attorney's Fees Awards Act before the PLRA
- § 13:8 Fee awards under the Equal Access to Justice Act
- § 13:9 Fee awards under the Criminal Justice Act
- § 13:10 Habeas corpus proceedings
- § 13:11 Chart: Fee awards in criminal justice cases

Chapter 14

Fee Awards Under the Voting Rights Act

- § 14:1 The Voting Rights Act
- § 14:2 The preclearance-review process and attorney's fees
- § 14:3 Chart: Fees awards in voting rights cases

TABLE OF CONTENTS

Chapter 15

Fee Awards in Housing and Public Accommodations Discrimination Suits and Land-Condemnation Cases

- § 15:1 Introduction
- § 15:2 The Fair Housing Act
- § 15:3 —Inability to finance litigation
- § 15:4 Discrimination in public accommodations
- § 15:5 Land-condemnation cases
- § 15:6 Chart: Fees awarded in housing-related cases

Chapter 16

Fee Awards in School Desegregation and Education Suits

- § 16:1 Introduction
- § 16:2 Fee awards in student-related actions
- § 16:3 Fee awards in teacher-related actions
- § 16:4 The Civil Rights Attorney's Fees Awards Act
- § 16:5 The Equal Access to Justice Act
- § 16:6 Chart: Fees awarded in education suits

Chapter 17

Fee Awards in Patent, Trademark, and Copyright Cases

- § 17:1 Introduction
- § 17:2 The Patent Act
- § 17:3 —Prelitigation conduct
- § 17:4 —Conduct during the course of litigation
- § 17:5 Amount of fees awarded
- § 17:6 The Lanham Act: Trademark infringement actions

- § 17:7 The Copyright Act
- § 17:8 Chart: Fee awards under intellectual property laws

Chapter 18

Fee Awards Under Environmental-Protection Statutes

- § 18:1 Introduction
- § 18:2 The Clean Air Act and the “whenever appropriate” language of environmental-fee statutes
- § 18:3 *Ruckelshaus* limits on fee awards to prevailing parties
- § 18:4 Toxic Substances Control Act: Explicit authorization of fees to nonprevailing parties
- § 18:5 The Clean Water Act and fee awards for agency review actions
- § 18:6 Eligibility of private plaintiffs with financial stake in environmental litigation for fee awards
- § 18:7 Attorney’s fees under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)
- § 18:8 Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C.A. § 1540(g)(4)
- § 18:9 Chart: Fees awarded in environmental cases

Chapter 19

Fee Awards Under the Truth in Lending Act and Other Consumer Credit Statutes

- § 19:1 Introduction
- § 19:2 Fee awards under the Truth in Lending Act
- § 19:3 Fees under the Fair Credit Reporting Act
- § 19:4 Attorney’s fees under the Fair Debt Collections Procedures Act
- § 19:5 Chart: Fees awarded under consumer statutes

Chapter 20

The Freedom of Information Act

- § 20:1 Introduction

TABLE OF CONTENTS

§ 20:2	The Freedom of Information Act
§ 20:3	The eligibility requirement
§ 20:4	Guidelines for discretionary fee awards under the Freedom of Information Act
§ 20:5	—Public benefit
§ 20:6	—Commercial benefit and nature of plaintiff's interest
§ 20:7	—Reasonable basis for withholding information
§ 20:8	—Other factors may be considered
§ 20:9	Amount of fee awards under the Freedom of Information Act
§ 20:10	Pro se litigation in Freedom of Information Act actions
§ 20:11	Chart: Fees awarded under the Freedom of Information Act from 1990 to date

Chapter 21

Fee Awards in Tax Cases

§ 21:1	Introduction
§ 21:2	The Equal Access to Justice Act
§ 21:3	—Prevailing-party status
§ 21:4	—The substantial-justification test
§ 21:5	The Tax Equity and Fiscal Responsibility Act (TEFRA)
§ 21:6	Threshold eligibility—Net-worth requirement
§ 21:7	—Exhaustion of administrative remedies
§ 21:8	Prevailing parties under TEFRA
§ 21:9	—The substantial-justification standard and the government's position
§ 21:10	Amount of fees awarded under TEFRA
§ 21:11	Chart: Fees awarded in tax cases

Chapter 22

Fee Awards Under the Bankruptcy Code

§ 22:1	Introduction
§ 22:2	Sanctions under the court's inherent authority in bankruptcy cases
§ 22:3	The debtor's attorney
§ 22:4	Judicial approval of retention
§ 22:5	Fee-award determinations in bankruptcy cases
§ 22:6	Interim compensation

- § 22:7 Conflicts of interest
- § 22:8 The attorney as trustee
- § 22:9 —Class action fees in bankruptcy
- § 22:10 Fees awarded in bankruptcy cases

Chapter 23

Fee Awards Under the Magnuson-Moss Warranty Act

- § 23:1 Introduction
- § 23:2 Entitlement and liability under the Magnuson-Moss Act fee provision

Chapter 24

Fee Awards Under Interpleader and Indemnity Statutes

- § 24:1 Interpleader actions
- § 24:2 Insurance companies as “disinterested parties”
- § 24:3 Indemnification-fee statutes
- § 24:4 Federal employee indemnification statutes
- § 24:5 Indemnification statutes in actions involving Native American land
- § 24:6 Indemnification provisions for criminal proceedings
- § 24:7 Chart: Fees awarded under interpleader and indemnity statutes

Chapter 25

Fee Awards Authorized for Federal Agency Participation

- § 25:1 Introduction
- § 25:2 Third-party participation-fee provisions

Volume 4

Chapter 26

Fee Awards Under the Equal Access to Justice Act

- § 26:1 Introduction
- § 26:2 Eligible proceedings
- § 26:3 The “position of the United States” clarified under the Revised Act
- § 26:4 The substantial-justification test
- § 26:5 —The substantial-justification test of reasonableness
- § 26:6 —The use of objective indicia in substantial-justification determinations
- § 26:7 Eligibility for fee awards
- § 26:8 Awards in social security actions
- § 26:9 Extent of fee awards
- § 26:10 —“Special factors” warranting a fee in excess of the \$75 per hour cap
- § 26:11 Fee awards under 28 U.S.C.A. § 2412(b)
- § 26:12 Final judgment and appeal
- § 26:13 Standard of review
- § 26:14 The Hyde Amendment
- § 26:15 Chart: Fees awarded under the Equal Access to Justice Act

Chapter 27

Fee Awards Under the Employee Retirement Income Security Act

- § 27:1 Introduction
- § 27:2 Fee awards under 29 U.S.C.A. § 1132(g)(1)
- § 27:3 Fee awards under 29 U.S.C.A. § 1132(g)(2)
- § 27:4 Defendant fee awards
- § 27:5 Chart: Fees awarded under ERISA from 1993 to date

Chapter 28

Fee-Award Statutes

- § 28:1 List of statutes

Chapter 29

Market Rates Upheld

§ 29:1 Chart: Market rates awarded by circuit

Chapter 30

Hours: By Specialty

§ 30:1 Chart: Total hours allowed by specialty

Appendices

- Appendix A Plaintiffs' Memorandum in Support of Motion for Attorney's Fees and Costs
- Appendix B Plaintiffs' Supplemental Brief in Support of Joint Application for Attorneys' Fees for Settlement and Response to Defendants' Written Objections
- Appendix C Amended and Supplemental Application for Attorneys' Fees and Request for Findings of Fact and Conclusions of Law
- Appendix D Class Counsel's Application for Attorney Fees and Costs
- Appendix E Memorandum of Law in Support of Plaintiffs' Attorneys Application for Attorney Fees and Costs from the Common Fund
- Appendix F Plaintiffs' Counsel's Notice of Motion, Motion, and Memorandum of Points and Authorities in Support of Motion for Award of Attorney's Fees and Expenses
- Appendix G Boyd Objectors' Reply Brief in Support of Objections to Stipulation of Settlement and in Opposition to Class Plaintiffs' and Defendant's Motions for Final Approval of Settlement and Award of Attorney's Fees
- Appendix H Kamuhanda Intervenors' Opposition to Preliminary Approval of Proposed Settlement
- Appendix I Brief in Support of Discovery
- Appendix J Supplemental Declaration of John F. Battaile III in Support of Class Counsel's Application for Award of Attorneys' Fees
- Appendix K Declaration of Rudolph J. Gerber

TABLE OF CONTENTS

Appendix L Final Approval Order and Judgment

Appendix M Attorney's Fees in Class Action Settlements: An
Empirical Study