THE LAW OF ATTORNEYS' FEES: WHAT YOU NEED TO KNOW

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INTRODUCTION

The information contained in this handbook is, of necessity, general in nature and is not intended to apply to any specific factual situation. This handbook was written in April 2006, and users are strongly urged to conduct their own legal research in order to update the information contained herein.

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THE LAW OF ATTORNEYS' FEES

1. Statutory Attorneys' Fees and Costs – Background

a. American Rule – The general rule in the United States, known as the "American Rule," is that a successful litigant generally may not recover attorneys' fees from an opponent. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975) (rejecting "private attorney general" theory as a basis for award of attorneys' fees in public law case). Absent a statutory basis, fees will only be awarded in cases involving bad faith and cases which confer a "substantial benefit" upon non-parties or which create a "common fund." *See id.* at 257-59.

b. Civil Rights Fee Statutes

i. Congress, in a variety of public interest and civil rights statutes, has allowed courts to award attorneys' fees and costs. The major fee statutes in the disability rights area are:

(1) Americans with Disabilities Act (ADA), 42 U.S.C. § 12205

(2) Rehabilitation Act, 29 U.S.C. § 794a(b)

(3) Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3)(B)

(4) Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988 (fees for cases brought pursuant to 42 U.S.C. §§ 1977-1981, 1983, 1985, 1986)

(5) Fair Housing Act, 42 U.S.C. § 3613(c)(2)

(6) Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (fees for suits against the federal government, including SSI cases)

ii. Not all disability civil rights statutes include statutory provisions for recovery of attorneys' fees. For example:

(1) The Air Carrier Access Act, 49 U.S.C. § 41705, which prohibits disability-based discrimination by airlines, does not include a fee provision, and fees under 42 U.S.C. §

1988 are not available since any claims under the statute (to the extent the statute is subject to private enforcement at all) would be filed against private entities.

(2) The P&A statutes – the DD Act, 42 U.S.C. §§ 15041-43, the PAIMI Act, 42 U.S.C. §§ 10801-10807, and the PAIR Act, 29 U.S.C. § 794e – do not include provisions for attorneys' fees.

(a) Fees may be available through 42 U.S.C. § 1988 in P&A lawsuits against public entities, but they would not be recoverable in such suits against private facilities (although P&As might argue the common law "substantial benefit" theory in such cases).

(b) In *Virginia Office for Protection & Advocacy v. Reinhard*, 405 F.3d

185, 189-90 (4th Cir. 2005), the court held that the Virginia P&A system could not recover attorneys' fees under 42 U.S.C. § 1988 because it had no authority to bring suit under 42 U.S.C. § 1983. The court reasoned that the Virginia P&A system is not a "person" authorized to sue under Section 1983 because it is a state-created agency and, thus, a sovereign. *West Virginia Advocates, Inc. v. Bd. of Educ. of Monongalia County*,

Civil Action No. 1:05C89, 2005 WL 2076620 at *2 (N.D. W. Va. Aug. 19, 2005), distinguished *VOPA*, holding that a P&A that is a non-profit corporation (rather than a state agency) is a "person" entitled to sue under Section 1983, at least to the extent that the P&A is suing in its representative capacity on behalf of an individual.

2. Step One In Determining Attorneys' Fees: Establishing Prevailing Party Status

a. Entitlement of Prevailing Parties to Attorneys' Fees

i. Most of the fee statutes cited above grant the courts discretion to award attorneys' fees to the prevailing party (though the IDEA allows an award of fees only to the prevailing plaintiff). As discussed below, the standards for "prevailing party" status differ between plaintiffs and defendants.

2. The civil rights fee statutes cited above are not mandatory. Rather, they grant the courts discretion to award fees and costs. Nevertheless, the Supreme Court has recognized that plaintiffs who prevail under these statutes – which have the primary purpose to facilitate private suits to enforce important laws – "should ordinarily receive an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam). *See generally* 1 Mary Francis Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 10.02 at 10-9-10-10 (1999).

B. When Is A Plaintiff The Prevailing Party?

1. General Standard – In order to be considered a "prevailing party" entitled to attorneys' fees, (1) the lawsuit must achieve some material alteration in the legal relationship

of the parties; and (2) the change must be judicially sanctioned in some way. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 605 (2001); *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989); *Vacchio v. Ashcroft*, 404 F.3d 663, 674 (2d Cir. 2005); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No. 69*, 374 F.3d 857, 865 (9th Cir. 2004).

2. The Impact of *Buckhannon*: Rejection of The Catalyst Theory and More

a) (Until the Court's 2001 decision in *Buckhannon*, a plaintiff was deemed to be the prevailing party if he could simply point to a resolution of the case that changed the legal relationship between him and the defendant. *See Texas State Teachers Ass'n*, 489 U.S. at 792. As a result, the vast majority of appellate courts held that the plaintiff was the prevailing party if the defendant took voluntary action (*e.g.*, change in conduct) that afforded the plaintiff some of the relief she sought through

the litigation so that the litigation was deemed the "catalyst" for the relief. *Kasza v. Browner*, 133 F.3d 1159, 1175 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 544 (3d Cir. 1994); *Little Rock School Dist. v. Pulaski County Special School Dist., No. 1*, 17 F.3d 260, 262 (8th Cir. 1994); *Stewart v. McGinnis*, 5 F.3d 1031, 1039 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994); *Paris v. U.S. Dep't. of Housing & Urban Dev.*, 988 F.2d 236, 241 (1st Cir. 1993). *Contra S-1 v. State Bd. of Educ.*, 21 F.3d 49, 51-52 (4th Cir.) (en banc) (rejecting catalyst theory), *cert. denied*, 513 U.S. 876 (1994).

b) In *Buckhannon*, the Court unequivocally rejected the catalyst theory as a basis for prevailing party status because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties. ... A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, 532 U.S. at 605 (emphasis in original).

c) *Buckhannon* did not simply reject the catalyst theory of recovery of attorneys' fees; its reasoning and language

impacts cases that are not merely mooted by a change in the defendant's conduct. *Buckhannon*'s requirement of a judicial *imprimatur* to secure prevailing party status affects cases that are settled, those in which interim relief is secured, those settled by means other than a consent decree, and those in which post-judgment relief is secured.

d) Although *Buckhannon* involved a fee claim in an ADA and Fair Housing Act case, its holding has been applied to most other fee-shifting statutes.

(1) IDEA – *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65, 75 (2d Cir. 2005); *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 22 & n.18 (1st Cir. 2005); *Alegria v. District of Columbia*, 391 F.3d 262, 265-69 (D.C. Cir. 2004); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No. 69*, 374 F.3d 857, 865; (9th Cir. 2004); *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 475-77 (7th Cir. 2003); *G. ex rel. R.G. v. Fort Bragg Dependent School*, 343 F.3d 295, 310 (4th Cir. 2003); *John T.*

ex rel. Paul T. v. Delaware County Intermediate Unit, 318 F.3d 545, 556-58 (3d Cir. 2003).

(2) Equal Access to Justice Act – *Carbonell v. Immigration and Naturalization Service*, 429 F.3d 894, 898-99 (9th Cir. 2005); *Vacchio v. Ashcroft*, 404 F.3d 663, 672-74 (2d Cir. 2005); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1377-79 (Fed. Cir. 2002).

(3) 42 U.S.C. § 1988 – *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005); *Roberson v. Guiliani*, 346 F.3d 75, 79 n.3 (2d Cir. 2003); *Labotest, Inc. v. Bonta*, 297 F.3d 892, 895 (9th Cir. 2002); *Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159, 164-65 (3d Cir. 2002); *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002).

3. Judgments – *Buckhannon* unequivocally states that plaintiffs who secure judgments are prevailing parties. *Buckhannon*, 532 U.S. at 604.

a) If a case is mooted after there has been a substantive ruling on the merits, it should not strip the plaintiff of his prevailing

party status (unlike in *Buckhannon*, where the case was mooted prior to any substantive ruling). *See Palmetto Properties, Inc. v. County of Dupage*, 375 F.3d 542, 549-51 (7th Cir. 2004) (holding that the plaintiff was the prevailing party since the court had granted partial summary judgment in its favor even though the county, after the ruling, mooted the case by amending the ordinance), *cert. denied*, 543 U.S. 1089 (2005); *County of Morris v. Nationalist Movement*, 273 F.3d 527, 536 (3d Cir. 2001) (holding that the counter-claimant was the prevailing party where he had

secured a declaratory judgment that the county ordinance was unconstitutional even though, pending appeal, the case became moot).

b) A declaratory judgment, though, without judicial relief, may not be sufficient to award attorneys' fees. *Buckhannon*, 532 U.S. at 605-06 ("we have not awarded attorney's fees where the plaintiff ... acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by '*judicial* relief'") (emphasis in original); *Peterson v. Gibson*, 372 F.3d 862, 866 (7th Cir. 2004). *But see County of Morris v. Nationalist*

Movement, 273 F.3d at 536 (holding, but with little analysis, that the counter-claimant who secured a declaratory judgment was a prevailing party).

c) Technical/De Minimis Judgments – While the Supreme Court has recognized that a person who secures a technical or de minimis judgment on the merits (e.g., nominal damages) is a prevailing party, it has held that such a person is not entitled to any attorneys' fees because a fee award would be unreasonable under the circumstances. *Farrar v. Hobby*, 506 U.S. 103, 112, 114-16 (1992).

(1) In her concurrence in *Farrar*, Justice O'Connor suggested several factors to examine in determining whether a win is so de minimis as to warrant a reduction or denial in fees: (1) the difference between the amount sought and the judgment

recovered; (2) the significance of the legal issue on which the plaintiff prevailed; and (3) the public purpose served by the litigation. *Id.* at 121-22 (O'Connor, J., concurring). *See also Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996) (applying O'Connor factors and indicating that first factor bears the most weight and second the least).

(2) In *P.N. ex rel. M.W. v. Clementon Bd. of Educ.*, ___ F.3d ___, 2006 WL 861191 at *7-*8 & n.8 (3d Cir. Apr. 5, 2006), the court rejected the defendant's assertion that it is necessary to establish a new right or expand the law in order to secure attorneys' fees; held that even a court order that required the defendant to provide a child with an individual education plan may be sufficient to be a prevailing party; and indicated that

an award of $425 in an IDEA case "can hardly be regarded as de minimis."

(3) In *Thomas v. City of Tacoma*, 410 F.3d 644, 648-49 (9th Cir. 2005), the court held that *Farrar* did not warrant the categorical denial of attorneys' fees when the plaintiff recovered $35,000 in compensatory and punitive damages, though remanding to the district court to determine whether a reduction in fees was appropriate in light of the plaintiff's partial success.

4. Consent Decrees – *Buckhannon* states unequivocally that plaintiffs who secure consent decrees are prevailing parties. *Buckhannon*, 532 U.S. at 604 ("Although a consent decree does not always include an admission of liability by the defendant ... it is nonetheless a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'") (citation omitted).

5. Purely Private Settlement Agreements – In *dicta*, the *Buckhannon* Court wrote: "Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." *Buckhannon*, 532 U.S. at 604 n.7. Thus, it appears that purely private settlements with no judicial approval or oversight will not confer prevailing party status on the plaintiff. *See Peterson v. Gibson*, 372 F.3d at 867. The Ninth Circuit, however, has suggested that *Buckhannon*'s statement about private settlement agreements would not bind it because it is *dictum*. *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n.5 (9th Cir.) (though the court held that the district court's retention of jurisdiction to decide the fee issue was "sufficient judicial oversight" to justify an award of fees), *cert. denied*, 537 U.S. 820 (2002).

6. Settlement Agreements with Judicial Involvement

a) Between purely private settlement agreements, on the one hand, and consent decrees, on the other hand, are a range

of situations in which federal lawsuits are resolved with some sort of judicial involvement, approval, or oversight, raising the question as to how much judicial involvement is necessary to create prevailing party status.

b) The Eighth Circuit has taken the most restrictive approach. In a split decision, the court indicated that *Buckhannon* limits prevailing party status only to those plaintiffs who secure judgments or consent decrees, thus rejecting prevailing party status for the plaintiffs who secured a court-approved class action settlement agreement over

which the district court retained jurisdiction for purposes of enforcement. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

c) The Ninth Circuit has taken the most liberal approach. In *Barrios v. California Interscholastic Federation*, 277 F.3d at 1134 n.5, as noted above, the court has dismissed as mere *dictum* the *Buckhannon* Court's statement that purely private settlement agreements do not confer prevailing party status on the plaintiffs and held that the district court's retention of jurisdiction solely for the purpose of assessing entitlement to attorneys' fees was sufficient judicial involvement to create prevailing party status. Similarly, in *Richard S. v. Dep't of Developmental Services*, 317 F.3d 1080, 1087-88 (9th Cir. 2003), the court held that the plaintiffs were prevailing parties

simply because the parties stated the terms of the agreement on the record before a magistrate judge, the agreement was reduced to writing and filed with the district court, and the court retained jurisdiction to resolve the issue of attorneys' fees.

d) Most other appellate courts have adopted an approach midway between the Eighth and Ninth Circuits, holding that prevailing party status will be conferred on the plaintiff when he secures a settlement agreement that is embodied in a court order and there is some form of continuing jurisdiction. *See T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003); *Roberson v. Guiliani*, 346 F.3d 75, 81-83 (2d Cir. 2003); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003); *Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159, 165 (3d Cir. 2002); *American Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1320-21 (11th Cir. 2002); *Smyth ex rel. Smyth v.*

Rivero, 282 F.3d 268, 281-83 (4th Cir.), *cert. denied*, 537 U.S. 825 (2002); *accord Doe v. Hogan*, ___ F. Supp. 2d ___, 2006 WL 758364 at *5-*6 (S.D. Ohio Mar. 27, 2006).

e) In contrast, mere judicial involvement in settlement negotiations or a judicial acknowledgment that a case has been settled will not be sufficient in most jurisdictions to confer prevailing party status on the plaintiff. *See T.D. v. LaGrange School Dist. No. 102*, 349 F.3d at 479; *Smyth ex rel. Smyth v. Rivero*, 282 F.3d at 281-82; *Oil, Chemical & Atomic Workers Internat'l Union v. Dep't of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002); *Dorfsman v. Law School*

Admissions Council, Inc., Civil Action No. 00-0306, 2001 WL 1754726 (E.D. Pa. Nov. 28, 2001).

7. Preliminary Injunctions/Interim Relief

a) Because the legal relationship between the parties must change for the plaintiff to be deemed "prevailing," purely procedural or interim victories (e.g., obtaining a preliminary injunction or successfully defending against a motion to dismiss) has generally been deemed insufficient (both before and after *Buckhannon*) to transform a plaintiff into a prevailing party, even though it effects some judicially sanctioned change in the parties' legal relationship. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1085-86 (8th Cir. 2006); *NAACP Detroit Branch v. Detroit Police Officers Ass'n. (D.P.O.A.)*, 46 F.3d 528, 531 (6th Cir. 1995); *LaRouche v. Kezer*, 20

F.3d 68, 72-76 (2d Cir. 1994). A preliminary injunction that simply maintains the status quo and is not a final ruling on the merits will not confer prevailing party status. *Northern Cheyenne Tribe v. Jackson*, 433 F.3d at 1086; *Dupuy v. Samuels*, 423 F.3d 714, 721-25 (7th Cir. 2005); *Thomas v. National Science Foundation*, 330 F.3d 486, 493 (D.C. Cir. 2003); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d at 558-60; *Dubuc v. Green Oak Township*, 312 F.3d 736, 753-54 (6th Cir. 2002); *Race v. Toledo-Davila*, 291 F.3d 857, 858 (1st Cir. 2002); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d at 276-77.

b) Yet, a preliminary injunction may be sufficient to confer prevailing party status on the plaintiff if it is "akin to final relief on the merits" because, for example, the party's claim for a permanent injunction becomes moot by the impact of the preliminary injunction. *See Northern Cheyenne Tribe v. Jackson*, 433 F.3d at 1086; *Dupuy v.*

Samuels, 423 F.3d at 719, 723 & n.4; *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 966 (D.C. Cir. 2004); *Richard S. v. Dep't of Developmental Services*, 317 F.3d at 1089.

8. Other Court Orders that Afford Less than Full or Final Relief – Aside from certain preliminary injunctions and court-approved settlements, courts have held that certain other court orders may be sufficient to confer prevailing party status on the plaintiff, even if he ultimately lost on final judgment or entered into a private settlement agreement. The key is whether there has been substantive involvement by the judge that provides the necessary judicial *imprimatur* on the change in the legal relationship of the parties and conferred at least some of the benefit sought.

a) *Carbonell v. Immigration and Naturalization Service*, 429 F.3d 894, 899-902 (9th Cir. 2005)

(alien was a prevailing party where court order incorporated a stipulation by the parties to stay his deportation because the order had the necessary judicial *imprimatur*, materially altered the legal relationship of the parties, and provided him with the desired relief).

b) *Vacchio v. Ashcroft*, 404 F.3d 663, 674 (2d Cir. 2005) (petitioner was the prevailing party where the court ordered his release on bail pending appeal, which involved an assessment of the merits and materially altered the legal relationship of the parties).

c) *Preservation Coalition of Erie County v. Federal Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) (plaintiff held to be the prevailing party after court determined that the defendant's environmental impact statement (EIS) was insufficient, ordered the defendant to develop a supplemental EIS, and the parties resolved the case by a settlement agreement embodied in a stipulation and order).

d) *Edmonds v. F.B.I.*, 417 F.3d 1319, 1322-27 (D.C. Cir. 2005) (plaintiff in FOIA case held to be the prevailing party where she secured partial summary judgment ordering the FBI to expedite its review of the requested documents and where it produced some documents in response – even though the court ultimately held that many additional documents need not be produced – since there was a judicial order that resulted in a material change in the parties' legal relationship).

e) *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d at 472-73, 479-80 (parents deemed prevailing party in IDEA case when the court ordered the school to evaluate the child to determine his eligibility for IDEA benefits, reimburse the parents for the cost of an aide and transportation to a private school, and the parties subsequently reached a private settlement (though the court held that the parents were not entitled to fees spent to negotiate the settlement)).

f) *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Cooperative, Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002) (plaintiff was the prevailing party based on acceptance of Rule 68 offer of judgment since it had the judicial *imprimatur* necessary for prevailing party status).

C. "Special Circumstances"

1. As noted above, the Supreme Court has held that a prevailing plaintiff in a civil rights statute ordinarily should be awarded attorneys' fees, but it indicated that this entitlement may be defeated in the presence of "special circumstances." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402.

2. The burden is on the non-prevailing party to make a strong showing that special circumstances warrant the denial of attorneys' fees. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 421 F.3d 417, 422 (6th Cir. 2005), *petition for*

cert. filed, 74 U.S.L.W. 3544 (U.S. Mar. 16, 2006) (No. 05-1194).

3. The case law identifies few overarching standards by which to assess whether special circumstances exist to justify a denial of fees. The Ninth Circuit, though, has stated that it will assess two generic factors: (1) whether allowing fees would further the purposes of the fee-shifting statute; and (2) whether the balance of equities disfavors a denial of fees. *Thomas v. City of Tacoma*, 410 F.3d at 648.

4. The federal courts, though, generally have been unreceptive to the array of alleged special circumstances asserted by defendants. *See, e.g., Thomas v. City of Tacoma*, 410 F.3d at 649 (plaintiff's failure to recover on all legal theories is not a special circumstance that warrants denial of fees, though it is relevant to the amount of fees recoverable); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d

1221, 1233 (10th Cir. 1997) (neither novelty of issues nor lack of intent to violate ADA were special circumstances precluding fee award); *Williams v. Hanover Housing Authority*, 113 F.3d at 1301-02 (defendant's good faith reliance even on settled law is not a special circumstance); *A.J. v. Kierst*, 56 F.3d 849, 863 (8th Cir. 1995) (simplicity of lawsuit not special circumstance); *Haster v. Illinois State Bd. of Elections Comm'rs.*, 28 F.3d 1430, 1443 (7th Cir. 1993) (plaintiff's wealth and ability to pay for representation not special circumstance), *cert. denied*, 513 U.S. 964 (1994).

D. When Is The Defendant The Prevailing Party?

1. The Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), held that a prevailing defendant may be awarded attorneys' fees only if the court finds that the plaintiff's claim was

"frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422.

2. Although courts are generally reluctant to award attorneys' fees to defendants, such awards are not without precedent. *See, e.g.*, *Flowers v. Jefferson Hosp. Ass'n.*, 49 F.3d 391, 392-93 (8th Cir. 1995) (more than $50,000 awarded to defendants); *Hutchinson v. Staton*, 994 F.2d 1076, 1080-81 (4th Cir. 1993) (awarding defendants nearly $600,000); *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 237 (5th Cir. 1990) (awarding fees to defendant); *Goldstein v. Costco Wholesale Corp.*, 337 F. Supp. 2d 771, 775-77 (E.D. Va. 2004) (awarding defendant $50,000 in case under Title III of the ADA); *Access Now, Inc. v. Town of Jasper*, No. 1:02-CV-059, 2004 WL 1873734 (E.D. Tenn. Jan. 7, 2004) (awarding defendant more than $31,000 in Title II ADA case for attorneys' and experts' fees).

3. The *Christiansburg Garment* standard for fee awards is also applicable in fee claims

against losing intervenors, and fees will be awarded against such intervenors only if their action was "frivolous, unreasonable, or without foundation." *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989).

III. Step Two In Determining Attorneys' Fees: Establishing The Reasonableness Of The Fee Request

A. The Lodestar Approach

1. Once a plaintiff establishes that she is entitled to attorneys' fees as the prevailing party, she must demonstrate that the amount of the fee requested is "reasonable." This is determined by the "lodestar" calculation, which consists of multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

2. The fee applicant bears the burden to present evidence of the reasonableness of both the hours and the rates. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984); *Hensley*

v. Eckerhart, 461 U.S. at 434. Once the applicant has satisfied his burden, the party opposing the fee application has a burden of rebuttal that requires submission of evidence that challenges the accuracy or reasonableness of the hours and/or rates. *See Blum v. Stenson*, 465 U.S. at 892 n.5; *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992). It is not sufficient for the opposing party to contest evidence submitted by the fee applicant with mere arguments. *See People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1313 (7th Cir. 1996); *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *Brinker v. Guiffrida*, 798 F.2d 661, 668 (3d Cir. 1986).

B. Time Spent

1. Reasonableness of Time Spent

a) Courts will reduce hours that are excessive, repetitive, duplicative, or unnecessary. *See Cooper v. Pentecost*, 77 F.3d 829, 832 (5th Cir. 1996);

U.S. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1288 (7th Cir. 1995); *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1188 (3d Cir. 1995).

(1) Examples:

(a) In *Maldonado v. Houstoun*, 256 F.3d 181, 186-188 (3d Cir. 2001), the court (1) reduced from 276 to 120 the number of hours compensable for research and briefing the appeal; (2) reduced from 169 to 24 the number of hours compensable for preparing for oral argument; and (3) reduced the fee petition by 50 percent to reflect its limited success.

(b) In *Halde*

rman v. Pennhurst State Schoo l & Hosp., 49 F.3d 939 (3d Cir. 1995), the court reduced by 50% the

time spent in preparation of the proposed findings of fact since the various plaintiffs' counsel could

have coordinated their efforts. *Id.* at 943-44.

(c) In *Cooper v. Pentecost*, the Fifth Circuit held that hours

spent by two attorneys reviewing the same transcripts was properly eliminated. 77 F.3d at 832.

(d) In *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349 (8th Cir. 1997), the court held

that a reduction for time spent by multiple attorneys was not appropriate because the plaintiffs had

satisfactorily explained the use of several attorneys. *Id.* at 358-59.

b) Courts faced with billings that include duplicative, excessive, or unnecessary entries may either trim specific hours or make a lump sum cut. *U.S. EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d at 1288. One court has held that lump sum reductions are a "practical

means of trimming fat from a fee application; it is generally unrealistic to expect a trial court to evaluate and rule on every entry in an application." *Id.*

c) Billing Judgment

(1) It is essential that attorneys' exercise "billing judgment," i.e., that they review time spent and make adjustments to the hours prior to submission of the fee petition to the court. *See Hensley v. Eckerhart*, 461 U.S. at 434 ("[h]ours that are not properly billed to one's client also are not properly billed to one's adversary ....") (emphasis in original).

(2) To exercise billing judgment, you should do the following prior to submission of the fee request:

(a) Examine each attorney's and paralegal's hours to determine if they were reasonable and necessary or, instead, were duplicative or excessive.

Look particularly closely at travel, co-counsel conferencing, or "review file" time.

(b) Check that there are no major, inexplicable inconsistencies between attorneys (such as one attorney claiming that a conference call took two hours and another billing only one hour for it).

(c) Delete or reduce hours for work spent on claims that were not successful and on activities that are not compensable (such as clerical duties).

(3) The failure to exercise billing judgment carries great risk. *See Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92, 98-99 (4th Cir. 1993) (awarding no fees in request of over $500,000 due to failure to submit a proper request, including exercising billing judgment).

d) Practice Tips for Establishing Reasonableness of Rates:

(1) Always remember that the fee applicant bears the burden of proof. Thus, the fee petition should include detailed, contemporaneously maintained time sheets that show exactly how each attorney and paralegal spent her time. *See Berry v. Stevinson Chevrolet*, 74 F.3d 980, 989 (10th Cir. 1996).

(2) The time entries should be as detailed as possible. For example:

(a) "deposition of Basil Rathbone" – not "deposition";

(b) "telephone call with Don Barzini about settlement proposal" – not "telephone call" or "call with Don Barzini";

(c) "research re motion to strike jury demand" – not "research."

(d) "review mental health records of Quincy R." – not "work on case."

(3) Make sure your affidavit confirms that the time records were maintained contemporaneously. To the extent any time records were re-constructed, explain why, when, and how.

(4) To assure the court that proper billing judgment was exercised, the lead counsel's affidavit should affirm that all of the attorneys' and paralegals' time was reviewed and should provide a general explanation as to what, if any, cuts were made (e.g., reductions for partial success).

(5) When the amount of fees in a case are unusually large and/or a multitude of attorneys worked on a case, it might be useful to the court to have a generalized breakdown in the fee petition or affidavit of the hours spent on various types of work

(e.g., pre-complaint investigation; discovery; trial preparation; trial; settlement negotiations).

2. What Time Is Compensable?

a) Administrative Proceedings

(1) When the attorneys' fee provision allows fees for "actions and proceedings" and mandates exhaustion of administrative remedies prior to filing a lawsuit (e.g., under Title I of the ADA), the reasonable time expended on administrative proceedings is compensable. *Webb v. Bd. of Educ.*, 471 U.S. 234, 240-41 (1988); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980).

(2) In contrast, time spent on non-mandatory pre-litigation administrative proceedings may be compensated within the discretion of the court only if it was "work that was both useful and of a type ordinarily necessary" to secure the final result obtained by the

litigation. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-61 (1986); *Webb v. Bd. of Educ.*, 471 U.S. at 243-44.

(3) Do federal courts have jurisdiction to hear lawsuits that seek solely attorneys' fees after success at the administrative level?

(a) The Supreme Court in *North Carolina Dep't. of Transp. v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986), held that federal courts do not have jurisdiction to hear cases that seek solely attorneys' fees under 42 U.S.C. § 1988 when the plaintiff has succeeded on his claim under Title VI of the Civil Rights Act in a state administrative proceeding. *Id.* at 12-15. The reasoning of that decision, though, appears to emphasize the statutory language of § 1988, which

allows suits only to enforce specific federal laws (e.g., 42 U.S.C. §§ 1981 and 1983). Since those underlying laws do not themselves allow recovery of fees, the Court concluded that a party could not file suit under § 1988 solely to seek attorneys' fees for successful work in an administrative action.

(b) The Court's decision in *Crest Street*, however, does not mean that suits solely for attorneys' fees cannot be maintained under other civil rights statutes. Many civil rights attorneys' fees statutes are worded in significantly different ways than § 1988 and allow for the recovery of fees for actions and/or proceedings brought under "this chapter" or "this section" or "this subchapter." *See,*

e.g., 20 U.S.C. § 1415(i)(3)(B) (IDEA); 29 U.S.C. § 794a(b) (Rehabilitation Act); 42 U.S.C. § 3613(c)(2) (FHA); 42 U.S.C. § 12205 (ADA). Such language differences have led courts to conclude that plaintiffs who succeed at the administrative level under the IDEA and Title VII, where exhaustion of administrative remedies is mandatory, may maintain federal suits solely for attorneys fees. *See Slade v. U.S. Postal Service*, 952 F.2d 357, 360-61 (10th Cir. 1991) (indicating that suits solely for fees are available under Title VII); *Moore v. Dist. of Columbia*, 907 F.2d 165, 166 (D.C. Cir.) (en banc) (collecting cases under IDEA), *cert. denied*, 498 U.S. 998 (1990).

(c) To the extent, however, that a statute might allow a suit solely for attorneys' fees for administrative work, *Buckhannon* could limit the right to recover fees, at least to the extent that the administrative work did not result in any judgment or relief with a sufficient "judicial" *imprimatur*. The IDEA cases, though, discussed below, provide guidance as to how the courts have applied *Buckhannon* in cases that result in pre-judicial relief or settlements.

(4) Fees For Pre-Litigation Work Under The IDEA

(a) Pre-litigation procedures under the IDEA can take an array of forms, including IEP meetings, mediation, and formal administrative hearings. The IDEA however, does not allow

compensation for all types of pre-litigation process.

(b) Work during the IDEA administrative hearing and appeal process is compensable. *See Moore v. District of Columbia*, 907 F.2d at 176-77; *McSomebodies v. Burlingame Elementary School*, 897 F.2d 974, 975 (9th Cir. 1989); *Mitten v. Muscogee County School Dist.*, 877 F.2d 932, 935 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990); *Duane M. v. Orleans Parish School Bd.*, 861 F.2d 115, 120 (5th Cir. 1988).

(c) The IDEA imposes certain constraints on the recovery of attorneys' fees, providing, for example, (1) that fees may not be awarded for services subsequent to the time of a written offer of settlement if the offer is made

more than 10 days prior to the proceeding beginning, the offer is not accepted, and the administrative hearing officer finds that the relief obtained is not more favorable than the settlement proposal, unless the parent was substantially justified in rejecting the settlement offer; and (2) that fees may not be awarded for IEP meetings unless it was convened as a result of an administrative proceeding or judicial action or, at the discretion of the state, for a mediation. 20 U.S.C. § 1415(i)(3)(D)-(E). In addition, the IDEA allows for reduction of attorneys' fees in certain situations, including if the court finds that the parent or his attorney unreasonably protracted the final

resolution of the controversy. 20 U.S.C. § 1415(i)(3)(F).

(d) Most courts have applied the principles of *Buckhannon* to IDEA cases filed to secure fees following administrative proceedings by conferring prevailing party status on those who secure relief through final decisions of independent hearing officers (IHOs) and those who secure settlements that have an "administrative *imprimatur*" while denying prevailing party status to those whose relief is achieved only through private settlements.

(i) Parents are not prevailing parties when relief is achieved through private settlements – *Smith v. Fitchburg Public Schools*, 401 F.3d at 26-27;

Doe v. Boston Public Schools, 358 F.3d 20, 30 (1st Cir. 2004); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d at 560-61.

(ii) Parents who receive IHO-ordered relief on the merits are prevailing parties – *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d at 75, 77; *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d at 479-80.

(iii) Parents prevail when claims are settled at the administrative level and the IHO "so ordered" adoption of terms of agreement on record. *A.R. ex rel. R.V. v. New York City Dep't of Educ.* at 76-78; *P.N. ex rel. M.W. v. Clementon Bd. of Educ.*, 2006

WL 861191 at *5. The Second Circuit in *A.R.* reasoned that fees could result from a settlement "so ordered" by an IHO because the IDEA allows recovery of fees in "any action or proceeding" – so that fees must be recoverable to some extent as a result of successful administrative proceedings – and that *Buckhannon*'s requirement of a judicial *imprimatur* could not be literally required. Thus, the *A.R.* Court concluded that it is sufficient if a settlement that results in a change in the parties' legal relationship has an "administrative *imprima-tur*." The Third Circuit in *P.N.*

adopted somewhat different reasoning, holding that "consent orders" that resolved an IDEA case conferred prevailing party status on the parents because the consent orders are enforceable through an action under either 42 U.S.C. § 1983 or under state law.

b) Post-Judgment Enforcement/Monitoring

(1) Prior to *Buckhannon*, it was well-settled that courts have authority to award attorneys' fees for work to monitor, implement, and enforce a consent decree or settlement agreement. *See Joseph A. v. New Mexico Dep't. of Human Services*, 28 F.3d 1056, 1059 (10th Cir. 1994); *Eirhart v. Libbey-Owens-Ford Co.*, 996 F.2d 846, 850 (7th Cir. 1993); *Duran v. Carruthers*, 885 F.2d

1492, 1495 (10th Cir. 1989); *McDonald v. Armontrout*, 860 F.2d 1456, 1461 (8th Cir. 1988); *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988).

(a) The standard to be applied to determine whether work performed for monitoring, implementing, and enforcing a settlement is compensable is "whether the services were reasonably performed during the pendency of the" agreement or consent decree. *Gates v. Gomez*, 60 F.3d 525, 534 (9th Cir. 1995) (citation omitted).

(b) If the post-judgment work was to preserve the fruits of the original judgment or settlement and is "inextricably intermingled with the

original claims in the lawsuit," then there is no need for the court to assess whether the plaintiff prevailed in the later activities. *Plyler v. Evatt*, 902 F.2d 273, 280, 281 (4th Cir. 1990); *Turner v. Orr*, 785 F.2d 1498, 1503-04 (11th Cir. 1986). *Cf. Joseph A. v. New Mexico Dep't. of Human Services*, 28 F.3d at 1058 (degree of success in post-judgment work is consideration, but more important factor is whether work done was necessary to achieve final result). *But see Brewster v. Dukakis*, 3 F.3d 488, 492 (1st Cir. 1993) (upholding ban on fees for "routine monitoring" of a consent decree many years into the litigation).

(2) *Buckhannon* has called into

question whether these standards for post-judgment or post-decree work remain sound law.

(a) In *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004), the court rejected the plaintiffs' request for $1 million for monitoring enforcement of a decades-old consent decree, including compensation for failed contempt motions, failed opposition to the defendants' efforts to modify the decree, and efforts to monitor compliance with the decree "which also bore no fruit." *Id.* at 771-73. The court distinguished cases in which the consent decree itself required the plaintiffs to monitor, so

as to possible create a contractual entitlement to fees. *Id.* at 770, 771, 772. The court questioned whether pre-*Buckhannon* cases that allowed fees for post-decree monitoring that does not result in post-decree orders remained good law. *Id.* at 770-71. "Monitoring may reduce the incidence of violations of a decree, but if it does not produce a judgment or order, then under the rule of *Buckhannon* it is not compensable." *Id.* at 771. Thus, post-judgment litigation must be treated as a discrete phase analogous to a freestanding lawsuit; if there is no judgment or new order, there can be no fees. *Id.* at 773. *But see Gautreaux v. Chicago Housing Auth.*, No. 66 C 1459, 2005 WL 1910849 at *2 (N.D. Ill. Aug. 9,

2005) (distinguishing *Alliance for Repression* and holding that plaintiffs were entitled to post-decree work that was inextricably intertwined with original decree).

(b) In contrast with the Seventh Circuit, other courts have continued to award attorneys' fees after *Buckhannon* for work to monitor, enforce, or defend consent decrees. *See Cody v. Hillard*, 304 F.3d 767, 772-75 (8th Cir. 2002) (allowing fees for post-decree monitoring, partially successful defense of effort to modify consent decree, and negotiation of new agreement that was inextricably intertwined with original consent decree); *Grier v. Goetz*, ___ F. Supp. 2d ___, 2006 WL 572314 at *8-*17 (M.D. Tenn. Mar. 7, 2006) (allowing

fees for partially successful defense of proposed modification of consent decree and for post-judgment monitoring); *Barcia v. Sitkin*, No. 79 Civ. 5831, 2005 WL 1606038 at *3 (S.D.N.Y. July 7, 2005) (allowing fees for post-judgment monitoring); *Burt v. County of Contra Costa*, No. C-73-0906 MHP, 2001 WL 1135433 at *9 n.11 (N.D. Cal. Aug. 20, 2001) (same).

c) Fee Claim – It is well-established that time spent in preparing and litigating fee claims is compensable under fee-shifting statutes. *See Comm'r., INS v. Jean*, 496 U.S. 154, 162 (1989); *Kinney v. Int'l. Bhd. of Elec. Workers*, 939 F.2d 690, 694-95 (9th Cir. 1991) (collecting cases); *Bagby v. Beal*, 606 F.2d 411, 415-16 (3d Cir. 1979).

d) Appeal – Time spent by a prevailing party on appellate work is compensable. *See Palmer v. City of Monticello*, 31 F.3d 1499, 1508 (10th Cir. 1994); *Larez v. Holcomb*, 16 F.3d 1513, 1523 (9th Cir. 1994); *Norris v. Hartmarx Specialty Stores, Inc.*, 913 F.2d 253, 257 (5th Cir. 1990).

e) Travel

(1) Courts have recognized that time spent on litigation-related travel can be recovered as part of a reasonable attorney's fee when it is the custom in the community for attorneys to bill clients for such time. However, there is no established rule concerning whether travel time can be billed at the full rate, and some courts have reduced the rate for time spent on travel. *See Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993); *McDonald v. Armontrout*, 860 F.2d at 1462-63.

(2) Practice Tip: To avoid and/or minimize potential rate reductions in travel, you

should have little time that involves purely travel. Doing other work while traveling (e.g., preparing for deposition while on plane) can help to avoid the reduction. Additionally, your time sheets should clearly reflect the time that was spent solely on travel. For example, do not say "travel and deposition – 5 hours," but, rather, say "travel – 1 hour and deposition – 4 hours."

f) Paralegal Work – Time for work spent by paralegals can be billed at reasonable hourly rates if that is the practice in the legal community. *Missouri v. Jenkins*, 491 U.S. 274, 285-89 (1989).

g) Rates For Tasks Performed By Over-Qualified Attorneys

(1) Some courts will cut time and/or rates for work undertaken by a highly priced attorney that could have been undertaken by a lower-priced attorney or paralegal. *See Ursic v.*

Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983).

(2) Example: In *Halderman v. Pennhurst State School & Hosp.*, the court disallowed time spent by lead counsel escorting non-testifying experts on site visits, noting that some of the experts had been escorted by paralegals. 49 F.3d at 942.

(3) What happens when, as in many small public interest firms, there is no lower-priced attorney or paralegal available who can handle the work? Some district courts have recognized that it would be unfair to punish small firms for not retaining a large staff to which it could delegate simpler matters and have not reduced the rate for such work. *See Collins v. Southeastern Pennsylvania Transp. Authority*, 69 F. Supp. 2d 701, 705 (E.D. Pa. 1999); *Bailey v.*

District of Columbia, 839 F. Supp. 888, 891 (D.D.C. 1993).

(4) Practice Tip: In your affidavit, you should where appropriate:

(a) state that work was delegated to lower-priced attorneys and paralegals when possible and appropriate; or

(b) state that your office has few attorneys and/or paralegals so that it was not always possible to delegate work to lower-priced personnel.

C. Reasonableness of Hourly Rates

1. Market Rates in Relevant Community

a) Attorneys are entitled to recover fees at the reasonable market rate, which the Supreme Court has defined as the rate "prevailing in the community for similar services by lawyers of reasonable comparable skill, experience, and

reputation." *Blum v. Stenson*, 465 U.S. at 895, 896 n.11. Attorneys who work for non-profit public interest and legal services organizations likewise are entitled to be compensated at prevailing market rates in the community. *Id.* at 895.

b) What is the "relevant community"?

(1) Often there is no dispute since the community in which the attorneys practice is the same as that where the case is heard. When the attorneys are from outside of the forum, however, courts are not necessarily bound by the local community rates. In those circumstances, courts may approve higher rates if attorneys in the judicial district in which the case is heard are unavailable, either because local attorneys are unwilling to handle the matter or because they are unable to provide effective representation due to lack of experience or specialization. *See Barjon v. Dalton*, 132

F.3d 496, 500 (9th Cir. 1997), *cert. denied*, 525 U.S. 827 (1998); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517, 519 (8th Cir. 1995) (per curiam); *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d at 1186 (quoting Third Circuit Task Force Report); *Hendrickson v. Branstad*, 934 F.2d 158, 164 (8th Cir. 1991). It is imperative, however, that attorneys who seek rates higher than those available in the local forum present evidence to support the need for such higher rates. *See Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994).

(2) The IDEA statutorily mandates that fees must be based on "rates prevailing in the community in which the action or proceeding arose for the kind and quality of services rendered." 20 U.S.C. § 1415(i)(3)(C). This seems to limit the

ability of attorneys to secure non-forum rates in IDEA cases.

2. Recognition of Specialized Skills

a) Rates of sole practitioners or practitioners in small firms or with general practices are not an appropriate comparison for rates charged by public interest lawyers. Given the nature of the work and specialization involved, the appropriate comparison is to boutique law firms involved in complex litigation, such as those that practice antitrust litigation. *See* S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 (legislative history of 42 U.S.C. § 1988); *Doe v. Township of Hampton*, Civil Action No. 94-811, 1996 WL 805073 at *7 (W.D. Pa. Dec. 11, 1996).

b) So, too, courts have refused to reduce hourly rates for civil rights attorneys because the work is not complex. The decision in *Jones v. Philadelphia Housing Authority*, Civil Action No. 99-0067, 1999 WL 972006 (E.D. Pa. Oct. 19, 1999), is

particularly instructive. In that case, the court rejected defendant's arguments that a legal services attorney's rate should be reduced because the housing work was routine. The court wrote that the defendant's position was "insulting to the value of community legal services"; that "public interest attorneys provide a critical and essential public service of high quality, in the face of enormous financial and social constraints"; that "[p]ublic interest law exacts an emotional and financial toll on attorneys that lawyers involved in" more complex litigation "rarely experience"; and that "[t]he poor and ignorant are entitled to – and must receive – the same quality of legal services as those who are more affluent." *Id.* at *2.

3. Current vs. Historical Rates. In *Missouri v. Jenkins*, the Supreme Court recognized that attorneys can be compensated for delay in payment in a case that can take several years either: (1) through use of current, rather than historical, rates, or (2) an upward adjustment to a fee

based on historic hourly rates to reflect its present value. 491 U.S. at 282-84.

4. What evidence should be produced to support the reasonableness of the attorneys' rates?

   a) Because the applicant bears the burden of proof, it is essential that she "produce satisfactory evidence – in addition to the attorney's own affidavits – that the request for rates are" reasonable. *Blum v. Stenson*, 465 U.S. at 896 n.11.

   b) Affidavits of other attorneys in the area, especially those familiar with your work and/or those of experienced and respected members of the private bar, are probably the best evidence to support your rates.

   c) You might also submit evidence of fee awards granted to the attorney in prior cases. *See e.g.*, *Barjon v. Dalton*, 132 F.3d at 502 (noting that an attorney may not rely solely on prior fee awards to justify rates, though allowing that such awards may be relevant); *People Who Care v. Rockford*

Bd. of Educ., 90 F.3d at 1312 (courts may consider evidence of fee awards in other similar cases).

d) Many local community legal services organizations maintain fee charts based on studies of rates in local communities. If available, those charts (and, optimally, an affidavit of a person familiar with how the chart was created) should be submitted with the fee petition. *See Maldonado v. Houstoun*, 256 F.3d at 187-88 (Third Circuit indicated that Community Legal Service's fee schedule was an appropriate barometer of market rates).

e) Altman Weil Pensa, a private company, undertakes surveys of billing rates in a variety of firms in regions throughout the country. Their information is not free. However, they have provided information to local legal services organizations to create fee charts.

f) The National Law Journal publishes a survey of the billing rates for partners and associates in the

nation's largest law firms. *See A Firm-By-Firm Sampling Of Billing Rates Nationwide*, Nat'l L.J., Dec. 12, 2005; *Billing Rates for Junior to Senior Associates*, Nat'l L.J., Dec. 12, 2005.

g) To the extent that you are requesting non-forum rates, you must submit evidence to demonstrate that local attorneys either are unwilling to take the case or lack the requisite expertise.

D. Adjustments to the Lodestar

1. The lodestar is presumed to be the reasonable fee. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 564; *Blum v. Stenson*, 465 U.S. at 897.

2. While upward adjustments or "multipliers" technically are permitted under certain circumstances, the tide has turned against such enhancements. The burden is on the applicant to demonstrate how a multiplier is "necessary" to result in a reasonable fee, *City of Burlington v. Dague*, 505 U.S. at 562, and will be awarded only in "rare" or

"exceptional" cases supported by "specific evidence." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565. *Accord Blum v. Stenson*, 465 U.S. at 898-901. The Supreme Court, though, has rejected most of the potential bases for multipliers.

a) In *City of Burlington v. Dague*, the Court rejected fee enhancements based on "contingency" (i.e., the risk assumed by counsel in the event the plaintiff did not prevail). 505 U.S. at 567.

b) The Supreme Court also has rejected multipliers based on the complexity of the litigation, novelty of the issues, the skill and experience of counsel, the quality of representation, and the results obtained since such factors generally are reflected in the lodestar by the amount of hours and the hourly rates of counsel. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565; *Blum v. Stenson*, 465 U.S. at 898-901.

c) The use of multipliers in IDEA cases is barred by statute. 20 U.S.C. § 1415(i)(3)(C).

3. Lodestar Reductions for Limited Success

a) Related vs. Unrelated Claims

(1) If a lawsuit consists of distinct, unrelated claims, and the plaintiff is unsuccessful in some of those claims, the court may eliminate specific hours spent on the unrelated claims. *Hensley v. Eckerhart*, 461 U.S. at 434-35; *Thomas v. City of Tacoma*, 410 F.3d at 649..

(2) In contrast, if the lawsuit consists of related legal theories and/or is based on a common core of facts, the "court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. at 435. If the plaintiff has achieved "excellent" results, then he should receive "a fully

compensatory fee" even though he did not prevail on every aspect of the lawsuit. *Id.* If, instead, the plaintiff achieved only partial or limited success, then the lodestar may be reduced even though the claims were inter-related. *Id.* at 436.

(3) Examples:

(a) Residents of a group home were summarily evicted based on a zoning ordinance. The residents assert that the ordinance discriminates against individuals with disabilities in violation of the Fair Housing Act, the Equal Protection Clause, and Due Process Clause. The residents also contend that their summary eviction violated their procedural due process rights. The court finds that the ordinance violates the Fair Housing Act, but rejects all of the

constitutional claims. The court should not eliminate time spent on those constitutional claims that involved the validity of the ordinance, since those claims were intertwined with the statutory claim, and the plaintiffs achieved excellent results. However, the court may decline to compensate the plaintiffs for those hours spent purely on the eviction issue since that claim was distinct from the others.

(b) Plaintiffs file a lawsuit alleging that the state's Medical Assistance program violates Title XIX of the Social Security Act by denying medically necessary home health services and also violates both Title XIX and the Due Process Clause by failing to provide adequate notice when

services are denied. Plaintiffs prevail on the substantive claim, but not their process claims. The court may eliminate time spent solely on the process claim.

(c) An individual files an employment discrimination claim under the ADA and the Rehabilitation Act seeking back pay and damages of $300,000. She prevails only on the ADA claim and the court awards only back pay and no damages. While the claims are closely intertwined, the plaintiff did not obtain excellent results, and, thus, the court may decrease the lodestar.

(d) Five individuals confined in a nursing facility sue the state for violations of PASRR. One of the individuals withdraws two months after the suit

was filed. At trial, the court rules in favor of three of the individuals but against the fourth. The court may reduce time spent on work related solely to the two individuals who did not prevail, including time spent interviewing the clients and reviewing records. The court also may make a percentage reduction of time spent on joint work (e.g., at trial).

(4) Where reductions are made due to the limited "results obtained," the courts may either identify specific hours that should be eliminated or it may simply reduce the award by some amount to account for the limited success. *Hensley v. Eckerhart*, 461 U.S. at 436-37.

b) Unsuccessful motions and arguments. Courts will not exclude time spent on a losing motion or stage of the litigation if such fees were necessarily

incurred in the course of an ultimate victory. *See Jaffee v. Redmond*, 142 F.3d 409, 414 (7th Cir. 1998); *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 378 (3d Cir. 1987).

4. A fee award will not be reduced because the lodestar amount is greater than that to which the attorney is entitled under an existing contingency fee agreement with the plaintiff. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989).

E. Prison Litigation Reform Act (PLRA) and Attorneys' Fees

1. The PLRA limits attorneys' fees in lawsuits brought by individuals confined in jails, prisons, or other correctional facilities in which fees would otherwise be authorized by 42 U.S.C. § 1988. 42 U.S.C. § 1997e(d).

2. In actions in which a monetary judgment is awarded to a prisoner in an action subject to the PLRA, the PLRA provides that "a portion of the judgment (not to exceed 25

percent) shall be applied to satisfy the amount of attorneys' fees awarded against the defendant. If the award of attorneys' fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2).

a) Appellate courts have construed this provision to mean that, when a prisoner secures a monetary judgment, attorneys' fees will be capped at 150 percent of the total judgment. *Robbins v. Chronister*, 435 F.3d 1238, 1240 (10th Cir. 2006) (en banc); *Royal v. Kautzky*, 375 F.3d 720, 725 (8th Cir. 2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 2528 (2005); *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001),

cert. denied, 535 U.S. 1095 (2002); *accord Farella v. Hockaday*, 304 F. Supp. 2d 1076, 1079 (C.D. Ill. 2004). In *Robbins*, the inmate was awarded nominal damages of $1, and the Tenth Circuit – in a unanimous en banc decision – held that the fees for his court-appointed attorney must be capped at $1.50. *Robbins v. Chronister*, 435 F.3d at 1241-44.

b) This cap on the total amount of attorneys' fees should be limited to cases in which an actual monetary judgment is rendered after trial. The cap would not apply in cases in which injunctive relief is awarded. It also has been held to be inapplicable when a case is settled for a monetary award and the case dismissed by a "so ordered"

stipulation of settlement pursuant to Federal Rule of Civil Procedure 41(a) and there is no judgment entered under Federal Rule of Civil Procedure 58. *Torres v. Walker*, 356 F.3d 238, 242-45 (2d Cir. 2004). Although such a settlement typically would not render a plaintiff the prevailing party under *Buckhannon*, the stipulation of dismissal in *Torres* included an agreement by the defendants to pay plaintiff's reasonable attorneys' fees. *Id.* at 244-46.

3. The PLRA also caps – in all cases to which it applies – the hourly rates of counsel, providing that an attorney's hourly rate cannot exceed 150 percent of the hourly rate established by 18 U.S.C. § 3006A for payment of court-appointed counsel. Court appointed counsel are paid $60 for in-court work and $40 for out-of-court work, though the Judicial Conference can approve rates up to $75 per hour in certain jurisdictions.

IV. Litigation Expenses and Costs

A. Most civil rights statutes provide that "costs" are recoverable by a prevailing party. However, in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), the Supreme Court indicated that the term "costs" means only those costs expressly compensable pursuant to 28 U.S.C. §§ 1821 and 1920 (such as filing fees, transcripts, and witness fees). *Id.* at 87 n.3. The court, therefore specifically rejected arguments that expert witness costs were compensable (either as "costs" or part of "attorneys' fees") under 42 U.S.C. § 1988. *Id.* at 87 n.3 & 102.

B. In response to the decision in *West Virginia University Hospitals, Inc.*, Congress in the Civil Rights Act of 1991 amended Title VII of the Civil Rights Act to allow recovery of expert witness costs. 42 U.S.C. § 2000e-5(k). At the same time, Congress also amended 42 U.S.C. § 1988 to allow recovery of expert witness costs but only in those cases filed under 42 U.S.C. § 1981 (racial discrimination in contracting) and 42 U.S.C. § 1981a (remedies for intentional employment discrimination under Title VII, the Rehabilitation Act, and the ADA). 42 U.S.C. § 1988(c). The amendment to 42 U.S.C. §

1988, therefore, would not allow recovery of expert witness costs in cases filed under 42 U.S.C. § 1983 (such as cases to enforce the Medical Assistance statute or the Constitution).

C. Arguably, Congress's failure to amend other disability rights statutes which only allow recovery of "fees" and "costs" (e.g., the FHA, 42 U.S.C. § 3613(c)(2); the Rehabilitation Act, 29 U.S.C. § 794a(b)) would seem to imply that expert witness fees are not compensable under those statutes. However, there is a split in authority in IDEA cases as to whether expert fees are compensable, even though the statute, 20 U.S.C. § 1415(i)(3)(B), only refers to "costs." *Compare Goldring v. Dist. of Columbia*, 416 F.3d 70, 73-74 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3476 (U.S. Feb. 8, 2006) (No. 05-1027) (prevailing party under IDEA is not entitled to recover expert fees as part of costs and collecting cases), *with Murphy v. Arlington Centennial School Dist. Bd. of Educ.*, 402 F.3d 332, 337-39 (2d Cir. 2005), *cert. granted*, 74 U.S.L.W. 3379 (U.S. Jan. 6, 2006) (No. 05-18). The Supreme Court this term agreed to decide the question in the *Murphy* case.

D. Given the Court's indication in *West Virginia University Hospitals, Inc.* that the term "costs" in fee statutes is synonymous with "costs" under 28 U.S.C. § 1920, it might at first appear that other litigation expenses that are not taxable under § 1920 (e.g., travel expenses, messenger services, faxing, and telephone) would not be compensable in statutes that only allow the recovery of "fees" and "costs." However, the courts – even after *West Virginia University Hospitals* – have held that non-taxable litigation expenses may still be recovered as part of the "attorney's fee" if it is the custom of attorneys in the local community to bill their clients separately for such expenses. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998); *Sussman v. Patterson*, 108 F.3d 1206, 1213 (10th Cir. 1997); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1224 (3d Cir. 1995); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Indeed, the court in *Harris* even held that expert fees relating to discovery that plaintiff incurred in deposing the defendant's expert were compensable. 24 F.3d at 19.

E. The fee provision in the Americans with Disabilities Act, 42 U.S.C. § 12205, specifically provides that "litigation expenses"

as well as costs are compensable. The legislative history reflects that this was done specifically to allow prevailing parties to recover costs beyond those available under 28 U.S.C. § 1920, such as expert fees. *See* H. Rep. No. 101-485, pt. 2, at 140 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 423. Courts, too, have acknowledged that "litigation expenses" encompass more than the bare-bones costs available under 28 U.S.C. § 1920. *See Lovell v. Chandler*, 303 F.3d 1039, 1058-59 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *Corbett v. National Products Co.*, 1995 WL 284248 at *4 (E.D. Pa. May 9, 1995).

F. When can the defendant recover costs if he prevails?

1. Federal Rule of Civil Procedure 54(d)(1) provides that “[e]xcept when expression therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs ....” These costs would be those allowed under 28 U.S.C. § 1920.

2. Since civil rights fee-shifting statutes, including the ADA, allow for recovery of costs by the defendant only if he satisfies the stringent *Christiansburg Garment*

standard (described above), Rule 54(d)(1)'s allowance of costs to the prevailing party should not apply in civil rights cases unless the defendant satisfies the *Christiansburg Garment* standard. *See Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1190 (9th Cir. 2001). *But see Miles v. State of California*, 320 F.3d 986, 988-89 (9th Cir. 2003) (holding in ADA case that the defendant was entitled to costs under Rule 54(d)(1) without any assessment or mention of the *Christiansburg Garment* standard or the court's previous ruling in *Brown*).

3. However, at least some courts have held that if the statutory basis for costs is included as part of attorneys' fees (*e.g.*, the ADA statutory provision, 42 U.S.C. § 12205, which allows the recovery of "a reasonable attorneys's fee, including litigation expenses, and costs), then the "costs" recoverable would not include those allowed by 28 U.S.C. § 1920. As such, a defendant who wins is entitled to an award of court costs under 28 U.S.C. § 1920, even if he is not a "prevailing party" under the *Christiansburg Garment* standard. *See Tuggles*

v. Leroy-Somer, Inc., 328 F. Supp. 2d 840, 842-45 (W.D. Tenn. 2004) (discussing cases).

V. Procedural Issues

A. Time for Filing

1. Federal Rule of Civil Procedure 54(d)(2) requires that individuals file any claim for attorneys' fees within 14 days following entry of judgment absent order of the court. This rule applies even if you expect the losing party to appeal.

2. Practitioners should err on the side of caution if they are not certain what constitutes a judgment. For example, settlements or consent decrees – even if they require ongoing monitoring – may be deemed judgments that trigger the 14-day filing period.

3. In practice, many courts will extend the time for filing, particularly if an appeal is likely, and the parties join in a motion for an extension.

4. Some federal appellate courts have their own local rules concerning the filing of post-appeal fee petitions that require fee petitions to be filed with the Court of Appeals

rather than the District Court. *See* Local Rule 108.0 of the United States Court of Appeals for the Third Circuit; Local Rule 39-1.6 of the United States Court of Appeals for the Ninth Circuit.

B. Substance of Motion

1. Rule 54(d)(2) indicates only that the moving party must: (1) specify the judgment; (2) state the statute or other grounds entitling the party to attorneys' fees; and (3) state the amount or provide a fair estimate of the amount sought.

2. The commentary expressly states that the motion need not be supported at the time of filing with evidentiary material, though such evidence must be submitted in due course according to the court's direction. It is sufficient that the motion "alert the adversary and the court that there is a claim for fees and the amount of such fees (or a fair estimate)." Fed. R. Civ. P. 54 (1993 Adv. Comm. Note). However, given that the fee petitioner bears the burden of proof, it is preferable (where feasible) to treat the motion like any other motion and put forward the

arguments and evidence necessary to sustain the fee petition.

VI. Waiver Of Attorneys' Fees

A. Fee Waivers As A Condition Of Settlement

1. The Supreme Court ruled in *Evans v. Jeff D.*, 475 U.S. 717 (1986), that a district court has discretion to approve a class action settlement that is conditioned upon the waiver of class counsel's fees. *Id.* at 737-38. The court rejected the argument of plaintiffs' counsel (who had requested fees despite their waiver) that the defendant's settlement demand created an unacceptable ethical dilemma for them by requiring them to choose between fees and their clients' interests. *Id.* at 727-28. While the Court left open the possibility that fee waivers might be inappropriate in some circumstances (e.g., when the defendant had no realistic defense or when waiver was sought for "vindictive" purposes), it refused to approve a blanket prohibition on settlements conditioned on fee waivers. *Id.* at 737-38, 739-40.

2. One potential means to avoid the possibility of a fee waiver demand by defendants is to include in your client retainer agreement a provision whereby the client assigns to counsel the statutory right to fees. At least one court has indicated that such an assignment would be valid so that the attorney could still proceed for fees against the defendant if the defendant had notice of the assignment. *Zeisler v. Neese*, 24 F.3d 1000, 1002 (2d Cir. 1994).

B. Need For Express Waiver In Settlement. Will fees be deemed to be waived when there is a settlement that does not explicitly resolve attorneys' fees but that has a general release of claims? The answer depends on the Circuit in which you practice.

1. The Fifth Circuit appears to hold that a generalized waiver or release of claims in a settlement will result in a waiver of a fee claim and that the plaintiff cannot conceal an intent to seek fees. *Bell v. Schexnayder*, 36 F.3d 447, 450 (5th Cir. 1994).

2. The Third and Ninth Circuits, on the other hand, have held that only a specific and express waiver of fees in a settlement – not silence or a general waiver – will be

sufficient to waive attorneys' fees. *Torres v. Metropolitan Life Ins. Co.*, 189 F.3d 331, 333-35 (3d Cir. 1999); *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698 (9th Cir. 1989).

3. The Second Circuit appears to have adopted an intermediate approach, holding that an agreement's broad mutual release of claims accompanied by a stipulation to dismiss the case "without cost to any party" could be read as an intent to settle all claims. *Brown v. General Motors Corp.*, 722 F.2d 1009, 1012 (2d Cir. 1983). *See also Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1058 (2d Cir. 1995) (while holding that the settlement language at issue was not sufficient to constitute a fee waiver, the court reaffirmed its decision in *Brown* that a broad, non-specific release could serve as a basis for a fee waiver depending on the intent of the parties).

VII. Impact of Rule 68 Offer on Attorneys' Fees

A. Rule 68

1. Federal Rule of Civil Procedure 68 provides that a defending party may serve an offer to allow judgment to be taken against him "with costs then accrued." If the offeree rejects the proposed judgment and the judgment he obtains is not more favorable than the Rule 68 offer, the offeree must pay the defendant's costs incurred after making the offer.

2. The IDEA contains a similar provision that also allows use of this process in an administrative proceeding. 20 U.S.C. § 1415(i)(3)(D)(i).

B. Need for Formal Offer. There must be a formal offer under Rule 68 for the cost provisions to apply, and courts should not apply those provisions based only on rejection of a non-Rule 68 settlement proposal. *See Ortiz v. Regan*, 980 F.2d 138, 141 (2d Cir. 1992).

C. Attorneys' Fees as "Costs" Under Rule 68

1. In *Marek v. Chesny*, 473 U.S. 1 (1985), the Supreme Court held that the term "costs" in Rule 68 includes statutory attorneys' fees under 42 U.S.C. § 1988. *Id.* at 7-

11. It based its conclusion on the wording of § 1988 which provides that fees are "part of" costs. *Id.*

2. While many other civil rights fee statutes similarly define fees as "part of" costs, *see, e.g.*, 20 U.S.C. § 1415(i)(3)(B) (IDEA), 29 U.S.C. § 794a(b) (Rehabilitation Act), other statutes do not provide that fees are "part of" costs, but, rather, simply allow for the recovery of fees and costs. *See, e.g.*, 42 U.S.C. § 3613(c)(2) (FHA); 42 U.S.C. § 12205 (ADA). Where fees are not "part of" the costs, then the cost provisions of Rule 68 are inapplicable. *See Haworth v. Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995); *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398, 1404-05 (10th Cir. 1993).

D. Capping Plaintiffs' Fees and Costs Under Rule 68

1. A lump sum offer will be a sufficient offer under Rule 68 as long as it clearly states that the sum includes "costs." There is no requirement that the offer break out damages, fees, and costs. *Marek v. Chesny*, 473 U.S. at 6. If the offer does not specifically state that it is to include costs, the court retains discretion to award post-offer costs to

the plaintiff, even if the judgment is less than the Rule 68 offer. *Id.*; *Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998).

2. Where a "cost-included" Rule 68 offer is proffered and declined, and the plaintiff's judgment is not more favorable than the offer, then the defendant will not be liable for any post-offer costs (including attorneys' fees where such fees are "part of" the costs). *See Herrington v. County of Sonoma*, 12 F.3d 901, 907, (9th Cir. 1993).

E. Plaintiffs' Responsibility for Defendants' Fees and Costs Under Rule 68

1. Where a "cost-included" Rule 68 offer is proffered and declined, and the plaintiff's judgment is not more favorable than the offer, then the plaintiff also will be liable to pay the defendant's post-offer costs. *See Haworth v. Nevada*, 56 F.3d at 1052; *Knight v. Snap-On Tools Corp.*, 3 F.3d at 1405; *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987).

2. This, however, does not mean that the plaintiff is responsible to pay the defendant's post-offer attorneys' fees, even when the statute defines fees as part of costs. The Supreme Court was careful in *Marek v. Chesny* to provide that only "properly awardable" costs are to be awarded to defendants. 473 U.S. at 9. The lower courts have interpreted this to mean that civil rights defendants can only recover fees as part of costs under Rule 68 if they meet the *Christiansburg Garment* standard by showing that the lawsuit was frivolous, unreasonable, or without foundation. *See EEOC v. Bailey Ford, Inc.*, 26 F.3d 570, 571 (5th Cir. 1994) (per curiam); *Crossman v. Marcoccio,* 806 F.2d at 334.

VIII. EAJA Fees

A. The Equal Access to Justice Act (EAJA) contains alternative means of securing fees in lawsuits against the federal government.

B. The provision of EAJA that is primarily used to recovery fees provides that courts should award attorneys' fees and expenses when the party prevails against the federal government (in cases

other than tort cases) so long as the government's position was "not substantially justified," and no "special circumstances" exist that would make the award unjust. 28 U.S.C. § 2412(d)(1)(A).

1. This provision of EAJA caps the hourly rates of attorneys at $125 unless the court determines that an increase in the cost of living or a special factor (e.g., limited availability of qualified attorneys) justifies a higher rate. 28 U.S.C. § 2412(d)(2)(A).

2. This provision of EAJA allows recovery of expert costs, but provides that no expert may be compensated at a rate higher than expert witness fees paid by the United States. 28 U.S.C. § 2412(d)(2)(A).

3. An EAJA fee claim under this provision must be submitted within 30 days of final judgment. 28 U.S.C. § 2412(d)(1)(B).

C. Another EAJA provision allows an award of attorneys' fees, expenses, and costs to the prevailing party – without caps on hourly rates and experts – to the same extent as any other party would be liable under common law or statute. 28 U.S.C. §

2412(b). This allows recovery of fees in cases involving, for example, the creation of a common fund or substantial benefit to non-parties. There is no time period for filing a fee claim under this EAJA provision, so, presumably, the 14-day limit under Rule 54(d) (discussed supra) would apply.

As noted above, *Buckhannon*'s "prevailing party" standard is applied in EAJA cases.