The Elusive Path to an Award of Attorney Fees Under 42 U.S.C. § 1988

by Elizabeth Renuart

Several land mines have been judicially placed in the path of attorneys who seek fees under 42 U.S.C. § 1988[1] after a judgment on the merits has been entered or the case is settled or dismissed.[2] This article will address (1) the standard to apply in deciding what constitutes a "prevailing" party for purposes of an award of fees; (2) whether a plaintiff can "lose" on the merits and still be entitled to an award of fees; and (3) whether compensation is available for time spent in certain administrative proceedings through an award of fees in the judicial action. This article will also review the relevant court decisions affecting these issues and discuss pitfalls that the practitioner should avoid when seeking an award of attorney fees.

I. How to Determine Whether a Plaintiff Is a "Prevailing" Party

A. The Standard to Apply

The leading appellate court decision setting forth the "prevailing party" standard is the First Circuit's opinion in *Nadeau v. Helgemoe*,[3] in which the court established a two-pronged test for determining whether or not an award of fees is appropriate. The first prong is whether, as a matter of fact, the suit was a necessary and important factor in achieving the improvements sought. The second prong is whether, as a matter of law, the suit was frivolous, unreasonable, or groundless. This test is often called the "catalyst" theory, and is used to determine when a plaintiff is a "prevailing" party in cases in which the court did not enter a final judgment in favor of the plaintiff. It applies when the case was settled, when the case was dismissed as moot,[4] or when a judgment was entered in favor of the defendant. The *Nadeau* decision has influenced every other circuit court decision regarding this issue.

B. Significant Issue Test v. Central Issue Test

The majority of the circuits have approved the first prong of the *Nadeau* test without change.[5] However, practitioners should be cautioned that the Fifth, Sixth, and Eleventh Circuits have adopted the "central issue test." This variation of the first prong of the *Nadeau* standard requires that the suit must have been a necessary and important factor in achieving results connected with the central issue of the case.[6] Practitioners in these circuits should argue that the plaintiff need only prevail on any "significant" issue, rather than on precisely the "central" issue, since the Supreme Court has approved the significant issue test in *Hensley v. Eckerhart*.[7] An excellent discussion of this conflict can be found in the Fifth Circuit's dissent from the denial of rehearing en banc in *Uviedo v.*

1. The exact language of 42 U.S.C. § 1988, in relevant part, is as follows:

   > In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. If judgment is entered in favor of the plaintiff, Sections I and II of this article are not applicable.
3. Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978). This standard was discussed and refined on another occasion by the First Circuit in Coalition for Basic Human Needs v. King, 691 F.2d 597, 598-599 (1st Cir. 1982). It was also quoted with approval by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).
4. The fact that a case is dismissed as moot when the defendant changes its behavior to conform to the relief sought by the plaintiff has become more problematic in light of the Supreme Court's holding in Hewitt v. Helms, 107 S. Ct. 2672 (1987). This case will be discussed in more detail in part II, *infra*.
5. Gerena-Valentin v. Koch, 739 F.2d 755, 758-59 (2d Cir. 1984); Gingras v. Lloyd, 740 F.2d 210 (2d Cir. 1984); NAACP v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1167 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983); Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 911-12 (3d Cir. 1985); Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), *cert. denied*, 455 U.S. 961 (1982); Smith v. University of N.C., 632 F.2d 316, 346-47 (4th Cir. 1980); Reigh v. Schleigh, 829 F.2d 1334, 1335-36 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1242 (1988); Gekas v. Attorney Registration & Disciplinary Comm'n, 793 F.2d 846, 849 (7th Cir. 1986); United Handicapped Fed'n v. Andre, 622 F.2d 342, 346 (8th Cir. 1980); Lear Sigler, Inc. v. Lehman, 842 F.2d 1102, 1116 (9th Cir. 1988); California Ass'n of Physically Handicapped, Inc. v. FCC, 721 F.2d 667, 672 (9th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984); Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986); Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc); Miller v. Staats, 706 F.2d 336, 341 (D.C. Cir. 1983); *see also*, Devine v. Sutermeister, 733 F.2d 892, 897-98 (Fed. Cir. 1984).
6. Uviedo v. Steve's Sash & Door Co., 760 F.2d 87, 88 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) (six judges dissented from the denial of rehearing en banc and argued that the "central issue test" conflicts with the Supreme Court's decision in *Hensley*); Kentucky Ass'n for Retarded Citizens, Inc. v. Conn, 718 F.2d 182 (6th Cir. 1983); Taylor v. City of Fort Lauderdale, 810 F.2d 1551 (11th Cir. 1987).
7. *Hensley*, 461 U.S. at 433.

Steve's Sash & Door Co.[8] This conflict may soon be resolved by the Supreme Court, which has granted certiorari in a Fifth Circuit case that was decided after *Uviedo.*[9]

C. Proof of Causation

Because the causation element of the first prong of the prevailing party standard is a question of fact, the proof presented in support of causation must be carefully considered and thoroughly presented. The proof may be a simple matter if a settlement was reached between the parties.[10] The more difficult situation arises when the defendant changes its behavior—for example, by amending or withdrawing the challenged statute, regulation, or rule.[11] The evidence that is most effective in this instance consists of admissions by the defendants, agents for the defendants, or other state actors that the lawsuit caused a change in their behavior. This evidence can sometimes be found in legislative history and minutes of meetings or may be obtained through affidavits.[12] In addition, the chronology of events from which reasonable inferences can be drawn is often helpful.[13]

The presentation of such evidence can be accomplished in various ways. Copies of legislative history or minutes of committee meetings can be attached to a motion for award of attorney fees. Affidavits from appropriate individuals, such as members of the body proposing and passing any changes to rules or statutes at issue, can also be provided directly to the court. If a witness is not cooperative, getting an agreement with opposing counsel to take the witness's deposition or, in the absence of agreement, filing a motion with the court is an appropriate course of action. Finally, a request for a hearing on the motions for attorney fees can be made and witnesses can be called to testify at that time.

It is also important to note that the lawsuit need not be the *sole* cause of the change in the defendant's behavior.[14] Moreover, because causation is a factual matter, an appellate court will not reverse the trial court's findings unless clearly erroneous.[15]

8. *See* note 6, *supra.*
9. Texas State Teachers Ass'n v. Garland Indep. School Dist., 837 F.2d 190, 195 (5th Cir. 1988), *cert. granted,* 57 U.S.L.W. 3198 (U.S. Oct. 3, 1988) (No. 3198).
10. *See, e.g., United Handicapped Fed'n,* 622 F.2d at 345-46.
11. The most extreme example of this situation occurs when the challenged statute, regulation, or rule is changed by a nonparty to the case. In *Reigh,* 829 F.2d 1334, *cert. denied,* 108 S. Ct. 1242, the plaintiffs sued the clerks of the courts who enforced rules and procedures with respect to the attachment of bank accounts. The clerks, however, did not have any power to change the rules of procedure. The rules were changed during the course of the litigation by a Rules Committee appointed by the Maryland Court of Appeals. The defendants contended that, although the changes in the rules of procedure occurred on a parallel track with plaintiff's lawsuit, the lawsuit did not "cause" the changes. The district court, however, awarded fees to a limited extent, and the award was upheld on appeal. *Id.* at 829 F.2d 1335-36.
12. *See, e.g., Institutionalized Juveniles,* 758 F.2d at 917; *but see,* American Constitutional Party v. Munro, 650 F.2d 184, 188 (9th Cir. 1981) (an affidavit from one legislator made one year after the amendment to the challenged statute had been passed was inadequate).
13. Posada v. Lamb County, Tex., 716 F.2d 1066, 1072-73 (5th Cir. 1983); *Gekas,* 793 F.2d at 850-51.
14. *Wilmington Medical Center,* 689 F.2d at 1169; *United Handicapped Fed'n,* 662 F.2d at 346-47.
15. *See, e.g., Gekas,* 793 F.2d at 850; *Posada,* 716 F.2d at 1072-73.

Note

At press time, the Supreme Court decided *Texas State Teachers Association v. Garland Independent School District,* 57 U.S.L.W. 4383 (Mar. 28, 1989). *See* footnote 9. The Supreme Court rejected the "central issue test" adopted by the Fifth, Sixth, and Eleventh Circuits in favor of the "significant issue test." This resolved the conflict discussed in paragraph I.B. of the article. In embracing this test, the Court reaffirmed the *Nadeau v. Helgemoe* standard, that a plaintiff who " . . . has succeded on 'any significant issue in litigation which acheived[d] some of the benefit the parties sought in bringing the suit' . . . has crossed the threshold to a fee award of some kind." *Texas State Teachers Association,* 57 U.S.L.W. at 4386. This is a "generous formulation" that should ease the plaintiff's burden in seeking an award of attorney fees under 42 U.S.C. 1988.

D. The Legal Question

The second prong of the *Nadeau* test involves a question of law. A majority of the circuits have held that with respect to the second prong, the plaintiff need only show that the lawsuit was not "frivolous, unreasonable or groundless."[16] The Seventh, Tenth, and Eleventh Circuits, however, appear to use a stricter standard by requiring the plaintiff to show that the changes caused by the lawsuit were "required by law."[17]

The response to this claim is that 42 U.S.C. § 1988 allows an award of attorney fees in any action or proceeding to *enforce* section 1983 or various other sections if the plaintiff "prevails."[18] Thus, if a plaintiff files an action to enforce section 1983 and states a cognizable claim, the plaintiff need only show that he or she has "prevailed," whatever the final disposition of the case.[19] A showing that the plaintiff *secured* relief pursuant to section 1983 is unnecessary.

16. *Nadeau,* 581 F.2d at 281; *Coalition for Basic Human Needs,* 691 F.2d at 600-602; Disabled in Action v. Mayor, 685 F.2d 881, 885, n.3 (4th Cir. 1982); Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982); Johnston v. Jago, 691 F.2d 283, 286 (6th Cir. 1982); *United Handicapped Fed'n,* 622 F.2d at 347; Greater Los Angeles Council on Deafness v. Community Television of S. Cal., 813 F.2d 217, 220 (9th Cir. 1987); *Miller,* 706 F.2d at 341-342.
17. Palmer v. City of Chicago, 806 F.2d 1316, 1323 (7th Cir. 1986), *cert. denied,* 107 S. Ct. 2180 (1987); *Supre,* 792 F.2d at 963; Maloney v. City of Marietta, 822 F.2d 1023, 1026 (11th Cir. 1987).
18. The legislative history of the enactment of 42 U.S.C. § 1988 states that a person may in some circumstances be a "prevailing party" without having obtained a favorable "final judgment following a full trial on the merits." H.R. REP. No. 1558, 94th Cong., 2d Sess. 7 (1976); *see also,* S. REP. No. 1011, 94th Cong., 2d Sess. 5 (1976); Hanrahan v. Hampton, 446 U.S. 754, 756-57 (1980).
19. Beware of those cases dealing with the issue of whether a plaintiff can be awarded attorney fees for obtaining only preliminary relief but losing on the merits. *See, e.g., Hanrahan,* 446 U.S. 754; *Palmer,* 806 F.2d at 1320, 1324; Doe v. Busbee, 684 F.2d 1375, 1381-83 (11th Cir. 1982); *University of N.C.,* 632 F.2d at 351. None of the plaintiffs in these cases alleged or showed any lasting change in the defendant's behavior. These cases are distinguished for this reason.

Because this second prong of the test is a question of law, the appellate court will review such findings under the abuse of discretion standard.[20]

II. Defendant's Changed Behavior

Attorney fees may be awarded if the lawsuit caused the defendant to change its behavior even if judgment is ultimately entered against the plaintiff. This situation presents the outer limits of what constitutes a "prevailing" party. The somewhat complex situation usually occurs when a plaintiff has challenged the constitutionality of a statute, regulation, or rule. During the course of the litigation, the defendant amends the law in question in ways that improve it but that do not completely address the plaintiff's concerns. The plaintiff pursues these additional concerns, but the court finds that these changes render the amended law constitutional.[21] Judgment is then entered in favor of the defendant, even though, as a practical matter, the plaintiff obtained some of the changes that were sought.

At least in theory, every circuit court of appeals dealing with this issue has recognized that attorney fees are awardable if the "catalyst" standard is met.[22] The appellate courts have actually faced this situation in only a few reported decisions.

Recently, the Supreme Court in *Hewitt v. Helms* discussed what the majority called a "peculiar-sounding question":

> whether a party who litigates to judgment and loses on all of his claims can nonetheless be a "prevailing party" for purposes of an award of attorney's fees.[23]

The merits of *Hewitt* involved substantive and procedural due process claims. Plaintiff, a prisoner, was sentenced to disciplinary restrictive confinement when a prison hearing committee relied solely on an officer's report of the testimony of an undisclosed informant.[24] In 1983, the Supreme Court decided the issue of the prison's informal, nonadversarial procedures for determining the need for restrictive custody.[25] However, the Court did not decide at that time the question of whether the use of hearsay obtained from an unidentified informant violated plaintiff's constitutional rights, and remanded the case to the Third Circuit with instructions to the district court to enter judgment in favor of the plaintiff on this claim unless the defendant established the defense of official immunity.[26] In the district court, plaintiff only pursued his claim for damages (he had originally sought damages, declaratory judgment, and an injunction to expunge his prison records). The district court granted summary judgment for defendants on the ground of qualified immunity. The court did not enter a declaratory judgment in favor of the plaintiff, although the Third Circuit decision would have supported the entry of such an order. Apparently, plaintiff's attorney did not raise this issue in the district court.

Plaintiff then appealed the finding of immunity on the issue of damages and also requested expungement of his misconduct conviction. Defendants argued that all claims for injunctive and declaratory relief had been waived because of plaintiff's failure to pursue them in the district court and, in any event, these claims were moot because plaintiff was no longer in prison.[27] During the pendency of that appeal, the Pennsylvania Bureau of Corrections revised its regulations to include, for the first time, procedures for the use of confidential-source information in inmate disciplinary proceedings. These procedures would have been favorable to plaintiff had they been in operation at the time of his hearing. The Third Circuit affirmed the lower court's decision without comment.[28]

Following this ruling, plaintiff sought attorney fees, which the district court denied. The Third Circuit reversed on the ground that its prior holding that plaintiff's constitutional rights were violated, while not reduced to declaratory judgment in the district court, was an adequate form of judicial relief to support the award of attorney fees.[29] The Third Circuit also directed the district court to consider whether plaintiff's suit was a "catalyst" for the amendment to the directive that changed prison policy.

The Supreme Court again granted certiorari. Significantly, the Court recognized that

> [i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment *e.g.*, a monetary settlement or a change in conduct that redresses

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20. *See, e.g., In re* Burlington Northern, 832 F.2d 422 (7th Cir. 1987).
21. In *Reigh,* the district court found that the amendments to the postjudgment attachment rules of procedure, although an improvement, were also constitutionally defective. The Fourth Circuit, however, reversed. Reigh v. Schleigh, 784 F.2d 1191 (4th Cir. 1986), *cert. denied,* 107 S. Ct. 167 (1986).
22. Gringras v. Lloyd, 740 F.2d 210, 212 (2d Cir. 1984); Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979), *cert. denied,* 448 U.S. 906 (1980); *Institutionalized Juveniles,* 758 F.2d at 912; Hennigan v. Ouachita Parish School Bd., 749 F.2d 1148, 1152-53 (5th Cir. 1985); Fiarman v. Western Publishing Co., 810 F.2d 85, 86 (6th Cir. 1987); Janowski v. International Bhd. of Teamsters Local No. 710, 812 F.2d 295, 297-98 (7th Cir. 1987); *Greater Los Angeles Council on Deafness,* 813 F.2d 217, 219-20; *see also, United Handicapped Fed'n,* 622 F.2d 342, 345-46 (fees awardable in case in which summary judgment on the merits was entered in favor of defendants but parties later entered into a settlement stipulation). Some courts have stated that a plaintiff cannot win attorney fees while losing on the merits. Turner v. McMahon, 830 F.2d 1003 (9th Cir. 1987); Merkil v. Scovill, 787 F.2d 174 (6th Cir. 1986), *cert. denied.* 107 S. Ct. 585 (1986); Harris v. Pirch, 677 F.2d 354 (3d Cir. 1982); Ryan v. Mansfield State College, 677 F.2d 354 (3d Cir. 1982). None of the plaintiffs in these cases ever alleged that the lawsuit caused changes in the behavior of the defendant. Other courts have held that if the change in the defendant's behavior only resulted because of an interim procedural order entered during the pendency of the lawsuit or that any change did not endure judgment, attorney fees are not awardable. *University of N.C.,* 632 F.2d at 346-47; *Palmer,* 806 F.2d at 1323, *cert. denied,* 107 S. Ct. 2180; Jensen v. City of San Jose, 806 F.2d 899 (9th Cir. 1986) (en banc); *Busbee,* 684 F.2d 1375, 1381-83 (11th Cir. 1982).
23. *Hewitt,* 107 S. Ct. at 2674.
24. *Id.* at 2674.
25. Hewitt v. Helms, 459 U.S. 460 (1983).
26. Helms v. Hewitt, 712 F.2d 48 (3d Cir. 1983).
27. *Hewitt,* 107 S. Ct. at 2675.
28. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984).
29. Helms v. Hewitt, 780 F.2d 367, 370 (3d Cir. 1986).

> the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.[30]

The Court held that because a statement in an appellate decision does not equate with a declaratory judgment and because plaintiff had not sought the entry of the declaratory judgment in the district court, plaintiff had not prevailed for purposes of an award of fees.[31] In so ruling, the Court declined to reach the question of what circumstances would give rise to the "catalyst" theory (*i.e.*, the *Nadeau* theory) so as to justify an award under section 1988, finding that plaintiff had been released from prison at the time that the directive was amended and at the time that final judgment was entered in his case.[32]

This case teaches that if there is *any* basis for obtaining a partial judgment in favor of the plaintiff on any issue, it should be sought in the district court. If judgment is entered in favor of the plaintiff on *any* significant issue in the case, *some* fee award is appropriate, although the amount may be small. It is also important for plaintiff's counsel to prepare a full record on the catalyst theory issue and to be prepared for a mootness argument should the plaintiff become free from the harm caused by the defendant's behavior.

The ruling in *Hewitt* also demonstrates that the catalyst theory will not support an award of fees when a case becomes moot *before* the defendant makes changes in the challenged behavior. A number of circuits have applied the catalyst theory and awarded attorney fees even though the case has been dismissed as moot, if the changes in the defendant's behavior *creates* the mootness.[33] These decisions are not affected by the holding in *Hewitt*, since the defendant there did not change its behavior until after the plaintiff was paroled.[34] Attorney fees have also been denied in cases in which the trial court determined that the changes in the defendant's behavior occurred *before* the lawsuit was filed.[35] Even if equitable relief becomes moot, damage claims can, of course, be pursued and attorney fees awarded as to those claims.[36]

Another significant case dealing with the issue of whether a plaintiff who loses on the merits can win attorney fees also arose in the Third Circuit. In *Institutionalized Juveniles v. Secretary of Public Welfare*,[37] plaintiffs challenged Pennsylvania's laws and regulations relating to voluntary admissions and commitments of juveniles to mental health and mental retardation facilities.[38] During the pendency of the case, Pennsylvania amended its statute and regulations and improved them. Plaintiffs pursued the case, arguing that due process required even more, but the Supreme Court eventually ruled against them on this issue.[39] Nevertheless, the Third Circuit agreed with the district court's factual finding that the litigation was the catalyst for the changes in the law and that an award of attorney fees to some extent was appropriate.[40] This opinion gives extensive and thoughtful consideration to the application of the catalyst theory in these complex circumstances.

If there is *any* basis for obtaining a partial judgment in favor of the plaintiff on any issue, it should be sought in the district court.

The Fourth Circuit also grappled with this issue when it decided *Reigh v. Schleigh*.[41] This case was similar in its procedural history to *Institutionalized Juveniles* in that the plaintiffs challenged the constitutionality of the Maryland postjudgment garnishment rules of procedure and sought declaratory and injunctive relief.[42] During the course of the litigation, the challenged rules of procedure were amended. Plaintiffs contended that the changes were not adequate and that due process required more. The district court agreed.[43] Defendants appealed, and the Fourth Circuit reversed on the merits.[44] Upon request of the plaintiffs, the district court then awarded a limited amount of attorney fees; this award was appealed to the Fourth Circuit by both sides. The Fourth Circuit affirmed but did, significantly, confirm the viability of the "catalyst" theory in light of the Supreme Court's decision in *Hewitt*.[45]

These cases indicate that the final judicial result in the litigation is not as important as whether the lawsuit caused some change in the defendant's behavior that survives the end of the case.[46] While simply obtaining some preliminary relief may not be enough to support an award of attorney fees, causing changes in the defendant's behavior in an enduring way

30. *Hewitt*, 107 S. Ct. at 2676.
31. *Id.* at 2677-78.
32. *Id.* at 2677. The four justices who dissented argued that the case should have been remanded to the district court for factual findings with respect to the "catalyst" theory.
33. Conservation Law Found. v. Secretary of Interior, 790 F.2d 965, 968 (1st Cir. 1986); Exeter-West Greenwich Regional School Dist. v. Pontarelli, 788 F.2d 47, 50 (1st Cir. 1986); *Coalition for Basic Human Needs*, 691 F.2d at 598; Durett v. Cohen, 790 F.2d 360, 361 (3d Cir. 1986); Savidge v. Fincannon, 836 F.2d 898 (5th Cir. 1988); Robinson v. Kimbrough, 652 F.2d 458, 462 (5th Cir. 1981); Coen v. Harrison County School Bd., 638 F.2d 24, 26 (5th Cir. 1981); *Gekas*, 793 F.2d 846, 849; Clark v. City of Los Angeles, 863 F.2d 987, 989 (9th Cir. 1986); Fitzharris v. Wolff, 702 F.2d 836, 839 (9th Cir. 1983); *American Constitutional Party*, 650 F.2d 184, 186 (9th Cir. 1981); *Martin*, 773 F.2d 1145, 1148; Fields v. City of Tarpon Springs, Fla., 721 F.2d 318, 319 (11th Cir. 1983); Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1555 (11th Cir. 1987); Commissioners, Court of Medina County, Tex. v. United States, 683 F.2d 435 (D.C. Cir. 1982).
34. *Hewitt*, 107 S. Ct. at 2677.
35. Sorola v. City of Lamesa, 808 F.2d 435, 437 (5th Cir. 1987).
36. LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987).
37. *Institutionalized Juveniles*, 758 F.2d 897.
38. *Id.* at 901-02.
39. Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).
40. *Institutionalized Juveniles*, 758 F.2d at 912. The appellate court, however, disagreed with the district court's assessment of the actual extent of the benefits secured by the plaintiffs.
41. *Reigh*, 829 F.2d 1334, *cert. denied*, 108 S. Ct. 1242.
42. Reigh v. Schleigh, 595 F. Supp. 1535 (D. Md. 1984).
43. *Id.*
44. *Reigh*, 784 F.2d 1191, *cert. denied*, 107 S. Ct. 167.
45. *Reigh*, 829 F.2d at 1335, *cert. denied*, 108 S. Ct. 1242. Copies of the briefs in the appeal, as well as the petition for certiorari, are available from the Clearinghouse, No. 38,543.
46. *See also Greater Los Angeles Council of Deafness*, 813 F.2d 217 (9th Cir. 1987).

can. Making a record of these changes and providing proof of the cause is the key to obtaining a fee award.[47]

III. Compensable Time in Pursuing an Administrative Appeal

In three different cases, the Supreme Court has grappled with the issue of whether a plaintiff who prevails is entitled to attorney fees for time spent pursuing the matter in certain administrative proceedings.[48] The Court has held that time spent in mandatory administrative proceedings or in administrative proceedings that were crucial to enforce the plaintiff's rights under a consent decree, is compensable.[49] The Court also has held that counsel's work in an *optional*[50] administrative proceeding can be compensated if the work is " 'useful and of a type ordinarily necessary' to secure the final result obtained from litigation."[51]

The majority opinion in *Webb v. Board of Education* did not enunciate a standard for determining what is "useful and necessary." In his concurring opinion, however, Justice Brennan discussed three factors that he considered relevant:

> First, a court must conclude that the claimed portions of administrative work were independently reasonable. Second, the court must find that the administrative work, or some "discreet" portion of it, . . . significantly contributed to the success of the federal court outcome and eliminated the need for work that otherwise would have been required in connection with the litigation. Finally, fees should be awarded only to the extent that the administrative work was equally or more cost-effective than the comparable work that would have been required during the course of the litigation.[52]

None of the circuit courts has yet explained this "useful and necessary" language in *Webb*.[53]

It is important to note, however, that attorney fees requested under 42 U.S.C. § 1988 will not be awarded for administrative proceedings unless a lawsuit has been filed to secure rights under the appropriate statutes to which section 1988 applies.[54]

Attorneys representing poor people in civil rights cases now find themselves in a dilemma as a result of these Supreme Court decisions. For instance, if an optional administrative proceeding exists that may result in the problem being favorably resolved, should counsel pursue that problem before filing in court?[55] If so, will counsel come away unpaid if the administrative outcome is favorable? Should counsel file in federal court first and then pursue the administrative proceeding because if he or she does not do so, and the administrative outcome is favorable, counsel cannot, under the ruling in *North Carolina Department of Transportation v. Crest Street Community Council,* file in federal court solely to obtain attorney fees? Some of these questions were raised by Justice Brennan in his concurrence in *Webb* and in his dissent in *Crest Street*.[56]

There are no clear answers to these questions. Any reluctance to handle section 1983 cases and other civil rights cases because of the uncertainty of obtaining attorney fee awards may unfortunately reduce the desire and ability of private attorneys to handle these important cases. This will undermine the purpose behind the enactment of section 1988, which is to encourage the enforcement of civil rights.

IV. Conclusion

It is crucial to be aware of these pitfalls placed in the path of counsel who seek to be compensated for handling significant civil rights cases. The course leading to obtaining an award of attorney fees under section 1988 can be treacherous, and counsel must constantly watch for warning signs. This article has described many of the problems. Being aware of them at the time that litigation is *contemplated* will make it easier to create an appropriate record to support an award of fees at the conclusion of the case.

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47. In deciding whether it is worth the time that it will take just to litigate the attorney fee issue, remember that the time spent pursuing or defending any appeal or writ of certiorari is compensable. For a discussion of attorney fee awards for appellate time, see McCarthy v. Bowen, 824 F.2d 182, 183 (2d Cir. 1987) (EAJA); United States v. Estridge, 797 F.2d 1454, 1460 (8th Cir. 1986) (EAJA); Ekanem v. Health & Hosp. Corp., 778 F.2d 1254, 1257 (7th Cir. 1985) (section 1988); United States v. 329.73 Acres, Grenada & Yalobusha Counties, 704 F.2d 800, 811 (5th Cir. 1983) (en banc) (EAJA). For a discussion of attorney fee awards for Supreme Court time, see Barnes v. Bosley, 764 F.2d 490 (8th Cir. 1985); Furtado v. Bishop, 635 F.2d 915, 924 (1st Cir. 1980).
48. Pennsylvania v. Delaware Valley Citizens Council, 106 S. Ct. 3088 (1986); Webb v. Board of Educ., 471 U.S. 234 (1985); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).
49. *New York Gaslight Club,* 447 U.S. at 71; *Delaware Valley Citizens Council,* 106 S. Ct. at 3096.
50. There is no exhaustion requirement prior to filing a section 1983 case. Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982).
51. *Delaware Valley Citizens Council,* 106 S. Ct. at 3096; *Webb,* 471 U.S. at 234.
52. *Webb,* 471 U.S. at 253.
53. For a brief discussion of this standard, see *Exeter-West,* 788 F.2d at 51-52.

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54. North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 107 S. Ct. 336 (1986). In this case, the plaintiff never filed a lawsuit on the merits, but pursued administrative remedies with an appropriate agency. After obtaining a successful settlement, plaintiff filed a suit solely to obtain attorney fees. *But see* Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988), in which the court granted attorney fees in a judicial action filed solely for that reason and distinguished *Crest Street* based on the statutory difference of the Education of All Handicapped Children Act.
55. The First Circuit suggests that if the administrative proceeding is concluded before the filing of the section 1983 lawsuit, it was not "useful and necessary" under the *Webb* standard. *Exeter-West,* 788 F.2d at 52.
56. *Webb,* 471 U.S. at 247-54 (Brennan, concurring and dissenting); *Crest St. Community Council,* 107 S. Ct. at 343-47 (Brennan, J. dissenting).