Wednesday, January 13, 2010

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Ensure equal justice

Our potential clients, call them Chris and Rita, are honest people of modest means who live in a small rented house with their children and grandchildren.

Their goal is reasonable: Keep uninvited people, including the government, out of their home absent a warrant issued upon probable cause.

By MICHAEL A. BURGER
Daily Record Columnist

Although one ordinarily would not need a lawyer for that purpose — the Fourth Amendment ensures a person's home is his or her castle — it seemed a certain local government actually passed its own law allowing its employees to enter rented homes to search for "possible code violations" without cause, much less probable cause, to believe such violations exist. The law does not apply to homeowners — only to renters. That is, it discriminated against poorer people, like Chris and Rita, who are least able to afford a lawyer to fight back. Fortunately, a special federal law may force the government to effectively hire a lawyer for them.

Under 42 USC §1983, when the government violates a citizen's civil rights, it must rectify its behavior and compensate the citizen: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 USC §1983

If the governmental entity lacks the moral rectitude to meaningfully apologize for its transgression, acknowledge its error and make restitution, it also will be required to pay the reasonable attorney's fees incurred by the citizen if he or she sues and prevails. See 42 USC § 1988, which states: "In any action or proceeding to enforce a provision of section [1983], ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 USC §1988(b)

The civil rights laws were written to ensure that if Goliath the Government bullies David the Citizen, David is not without his sling. Under this wonderful law we, the people, have a fighting chance when we are justified in standing up to our well-funded elected government in a court of law.

No matter how meritorious a case, a private law firm also must evaluate whether it can afford to accept it financially. In contemplating and selecting such cases, an understanding of the substantive law at issue as well as the law governing attorney fee applications is essential to good fiscal health.

When do plaintiffs prevail?

Attorney's fees are awarded only to prevailing plaintiffs, so the first question is whether we believe Chris and Rita, putative plaintiffs, will prevail in their bid to preserve their civil rights.

"'A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *McGrath v. Toys "R" Us Inc.*, 3 NY3d 421, 431 (2004) (quoting *Farrar v. Hobby*, 506 U.S. 103, 114 [1992]) (citation omitted).

In an action or proceeding brought pursuant to 42 USC §1983 the prevailing party "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Giarrusso v. Albany*, 174 AD2d 840, (Third Dept. 1991) (citing *Newman v. Piggie Park Ent.*, 390 U.S. 400, 402 [1968]).

In *McGrath, supra*, the New York State Court of Appeals described the standard for lodestar fee awards in state and federal courts: "[C]ourts employ a two-step process for determining whether a discretionary attorney's fee award is appropriate. First, in order to be eligible to apply for an award, plaintiff must be a 'prevailing party' in the litigation. ... The determination is relatively straightforward when a plaintiff obtains what amounts to complete relief — [the] plaintiff is usually entitled to an award that compensates counsel for the time reasonably expended in the lawsuit." *McGrath,* 3 NY3d at 429-30 (citing see *Hensley v. Eckerhart*, 461 U.S. 424, 433-436 [1983]) (citations omitted); accord *Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F3d 132, 152 (Second Cir. 2008); *Kassim v. City of Schenectady*, 415 F3d 246, 254 (Second Cir. 2005); *Pino v. Locascio*, 101 F3d 235, 237-38 (Second Cir. 1996). Also see *Rhodes v. Stewart*, 488 U.S. 1 (1988), which states the plaintiff actually must enjoy the relief granted to be deemed a prevailing party.

"A plaintiff's lack of success on some of his claims does not require the court to reduce the lodestar amount where the successful and the unsuccessful claims were interrelated and required essentially the same proof." *Murphy v. Lynn*, 118 F3d 938 (Second Cir. 1997); *Deep v. Clinton Central School Dist.*, 57 AD3d 828 (Fourth Dept. 2008); *Trustees of the Buffalo Laborers' Pension Fund v. Accent Stripe Inc.*, No. 01-CV-76C (WDNY 2007). The Second Circuit has held that "a §1983 plaintiff's eligibility for an award of fees under §1988 does not depend on her success at interim stages of the litigation, but rather depends on the ultimate outcome of the litigation." *Gierlinger v. Gleason*, 160

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F3d 858, 880 (Second Cir. 1998) (internal citations omitted); *Rahmey v. Blum,* 95 AD2d 294, 304 (Second Dept. 1983)

By logical extension, a partial victory only warrants a partial fee award.

Calculating a reasonable fee

Assuming Chris and Rita won the relief they sought — thus meaningfully altering the legal relationship between them and their government — what sort of attorney fee award could they reasonably anticipate?

McGrath held that "[i]f this threshold requirement [of plaintiff being a prevailing party] is met, the court must then determine what constitutes a reasonable award, a discretionary inquiry that takes into account a multitude of factors, although 'the most critical factor is the degree of success obtained.'" *McGrath,* 3 NY3d at 429-30; *Farrar v. Hobby,* 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992); accord *Barfield v. N.Y. City Health & Hosps. Corp.,* 537 F.3d 132, 152 (Second Cir. 2008); *Kassim v. City of Schenectady,* 415 F3d 246, 254 (Second Cir. 2005); *Pino v. Locascio,* 101 F3d 235, 237-38 (Second Cir. 1996).

Fees in civil rights cases are calculated using what is often referred to as the "lodestar" method.

A word to the wise: Maintain contemporaneous time records from the matter's inception. Such records should accurately record the time spent on the matter, the identity of the attorney or staff member rendering the service and the nature of the work. Failure to maintain and submit proper records may well be a bar to recovering a reasonable fee.

"[A] reasonable hourly rate is not itself a matter of binding precedent. Rather, under established caselaw, a reasonable hourly rate is the 'prevailing market rate,' i.e., the rate 'prevailing in the [relevant] community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Farbotko v. Clinton County,* 433 F3d 204, 208 (Second Cir. 2005) (citing *Blum v. Stenson,* 465 U.S. 886, 896 (1984); see also *Cohen v. W. Haven Bd. of Police Comm'rs,* 638 F2d 496, 506 (Second Cir. 1980) ("Fees that would be charged for similar work by attorneys of like skill in the area" are the "starting point for determination of a reasonable award.")

"Generally speaking, the rates an attorney routinely charges are those that the market will bear." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F3d 182, 188, 190 n.4 (Second Cir. 2007) (three-judge panel abandoning the term "lodestar" in favor of "presumptively reasonable fee" but not requiring other Second Circuit panels to do so), *sua sponte* amending prior opinion, 493 F3d 110; accord *Lake v. Schoharie County Comm'r of Soc. Servs.,* 2006 U.S. Dist. LEXIS 49168 (NDNY May 2006) ("[A]n attorney's normal billing rate may provide a suitable starting point, since it is generally indicative of his or her legal reputation and status.")

To be reasonable, an hourly rate must also be consonant with §1988(b)'s "central purpose of attracting competent counsel to public interest litigation." *Farbotko,* 433 F3d at 209. "'[T]he actual rate that applicant's counsel can command on the market is itself highly relevant proof of the prevailing community rate.'" *Bebchick v. Washington Metropolitan Area Transit Com.,* 805 F2d 396, 404 (D.C. Cir. 1986).

In 2007, the three-judge *Arbor Hill* panel sought to transform the process of arriving at a reasonable fee by defining the reasonable hourly rate as "the rate a paying client would be willing to pay." *Arbor Hill,* 522 F3d at 190 (Jacobs, C.C.J., Walker, C.J., O'Connor, A.J. Ret. [sitting by designation]). The panel urged fee-setting courts to "consider, among others, the *Johnson* factors; it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Id.*

Johnson factors to be considered include:

- time and labor required (reflected in contemporaneously generated time records);
- novelty and difficulty of the questions;
- level of skill required to perform the service properly;
- preclusion of employment by the attorney due to acceptance of the case;
- the attorney's customary hourly rate;
- whether the fee is fixed or contingent;
- the time limitations imposed by the client or the circumstances;
- the amount involved in the case and the results obtained;
- the experience, reputation and ability of the attorneys;
- the "undesirability" of the case;
- the nature and length of the professional relationship with the client; and
- awards in similar cases.

(See *Johnson v. Georgia Highway Express Inc.,* 488 F.2d 714, 717 (Fifth Cir. 1974); *Arbor Hill,* 522 F3d at 185; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986); see also *McGrath,* 3 N.Y.3d at 430 (citing *Hensley v Eckerhart,* 461 U.S. at 430 n.3 [1983]).

An enhanced fee also may be awarded in exceptional cases: "Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees ... counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved." *In re Telik Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 590 (SDNY 2008); *Green v. Torres,* 361 F3d 96, 99 (Second Cir. 2004); *Ousmane v. City of New York,* 2009 NY Slip Op 50468U, 13 (N.Y. Sup. Ct. 2009); *Kenny A. ex rel. Winn v. Perdue,* 532 F3d 1209 (11th Cir. 2008) (quality of representa-

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tion and results obtained are permissible basis for fee enhancement), *cert.* granted, 129 S. Ct. 1907 (2009). "[W]hen an attorney ultimately prevails in such a lawsuit, this success will be primarily attributable to his legal skills and experience, and to the hours of hard work he devoted to the case." *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 726 (1987).

Ultimately, in determining a fee, "the result is what matters." *Hensley*, 461 U.S. at 435.

In the absence of a fee-shifting statute, it likely would be impossible for the predominantly poor families targeted by the law to challenge it. The very purpose of the attorney's fee statute is "'to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.'" *Farbotko v. Akey*, 433 F3d 204, 208 (Second Cir. 2005), quoting *Kerr v. Quinn*, 692 F2d 875, 877 (Second Cir. 1982); *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987); *Quarantino v. Tiffany & Co.*, 166 F3d 422, 425-426 (Second Cir. 1999).

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