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John L. Fowler
University of Kentucky

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ATTORNEY FEE AWARDS AND THE PUBLIC-INTEREST LITIGANT

INTRODUCTION

Every day thousands of instances of pollution, discrimination, consumer fraud, and other similar abuses of existing laws intended to protect the public occur which threaten the lives and well-being of millions of individuals. Most of these individuals can do nothing to protect themselves and the rest of the public. The individual—unless he is one of the wealthy few—cannot sue in most cases because he simply cannot afford to pay a lawyer to represent him. This is so because lawsuits on environmental, civil rights, and other "public" issues are expensive and because only injunctive or declaratory relief or nominal damages—rather than substantial damages (which could be used to help defray the cost of an attorney's fee)—are usually available. Faced with these economic factors, the individual has no hope against a large, well-financed corporation or governmental entity. Moreover, the individual cannot always expect help from the governmental agencies charged with enforcing the laws designed to protect the public. Frequently

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2 The lawyers for the plaintiffs in Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (environmental protection case) expended 4,500 hours in preparation of their case. Goldfarb, In the Public Interest, Washington Post, June 11, 1975, § A, at 18, col. 5. If their work had been billed at the common rate of $50 per hour, the cost to plaintiffs would have been $225,000.


4 See Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess., pt. 3, at 799 (1973) [hereinafter cited as Hearings]; Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hast. L.J. 733, (1973) [hereinafter cited as Green Light].
such agencies either cannot or will not help the individual. Many are dominated by those entities they are supposed to be regulating. Some agencies are understaffed, underfinanced, or lacking sufficient authority to act effectively. Others are too apathetic or too immobilized by the weight of their own bureaucracy. Additionally, the sheer number of environmental abuses is such that probably no agency could adequately control all of them.

In view of all this, it would seem that the best and perhaps the only system for dealing adequately with the countless abuses of law which threaten the public would be to provide each individual affected with some way to protect himself from the specific abuse which threatens him. Prior to May 12, 1975, just such a system was developing in the federal courts. Individual citizens had been encouraged to bring public-interest lawsuits by recent court decisions which held that an individ-

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Parents seeking the aid of school boards in ending school segregation have frequently encountered great reluctance to act on the part of the boards. "At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order." Bradley v. School Bd., 53 F.R.D. 28, 39 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), rev'd on other grounds, 417 U.S. 696 (1973).

In Thill Securities Corp. v. N.Y. Stock Exchange, 433 F.2d 264, 273 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971), the court noted that the history of federal regulatory agencies teaches that shortly after their creation they tend to become dominated by the industries they were created to regulate.

E.g., H.R. Rep. No. 1146, 91st Cong., 2d Sess. 5 (1970) (slow progress in controlling air pollution attributed to lack of enough skilled enforcement personnel and lack of aggressiveness on part of EPA's predecessor agency in enforcing the law).

See La Raza Unida v. Volpe, 57 F.R.D. 94, 100 (N.D. Cal. 1972), aff'd, 488 F.2d 559 (9th Cir. 1973); Green Light at 733.

"[B]ecause of the limited resources and potentially conflicting interests within and among governmental entities, effectuation of the public policies toward environmental protection and housing relocation frequently depends on private . . . enforcement." La Raza Unida v. Volpe, 57 F.R.D. 94, 100 (N.D. Cal. 1972).

E.g., note 7 supra.

See Green Light at 733.

See Hearings at 799.

ual who had acted as a "private attorney general" (by bringing a lawsuit which succeeded in vindicating an important public right or policy whose effectuation of necessity depended both upon private enforcement and an award of fees to make such private enforcement economically feasible) would be entitled to have his attorneys' fees paid by his opponent.\textsuperscript{14}

These cases represented the culmination of a long evolution of American judicial attitudes toward fee-shifting. In England at the time of the American Revolution, attorneys' fees were routinely awarded to the prevailing party in litigation.\textsuperscript{15} Initially, American courts followed this English rule. But then, for some reason which has remained the subject of debate,\textsuperscript{16} American courts departed from the English practice and with near unanimity\textsuperscript{17} came to adopt the so-called American Rule under which each litigant pays his own attorneys' fees.\textsuperscript{18}

Over the years a number of exceptions to the American Rule developed at the federal level. These can be classified into two groups, statutory exceptions and equitable exceptions.\textsuperscript{19}

\textsuperscript{14} For an excellent discussion of the historical background and development of the equitable private attorney general exception, see Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 655-70 (1974) [hereinafter cited as Comment].

\textsuperscript{15} See Nussbaum, Attorneys' Fees in Public Interest Litigation, 48 N.Y.U.L. Rev. 301, 312 (1973) [hereinafter cited as Nussbaum].

\textsuperscript{16} Many theories have been advanced to explain the early break with the English practice. E.g., Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792, 798-99 (1966) (legislative error in setting fixed fees which were "forgotten" as living costs increased); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75, 81 (1963) (desire to encourage participation in legal system by average man); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216, 1220-21 (1967) (early American individualism); Comment at 640-41 (distrust of lawyers).

\textsuperscript{17} Today, only a few states have meaningful fee-shifting statutes. E.g., ALAS. R. Civ. P. 82(a) (1963) and ALAS. STAT. § 09.60.010 (1973); Nev. Rev. Stat. §18.010(3) (1973).

\textsuperscript{18} For a more complete discussion of the historical background of the American Rule, see Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216, 1217-21 (1967); see Comment at 640-44. The American Rule has been criticized by many commentators over the years. E.g., Ehrenzweig, supra note 16; Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 Fordham L. Rev. 761 (1972) [hereinafter cited as McLaughlin]; Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Comment at 648-55. For discussions of some of the arguments raised in defense of the American Rule, see McLaughlin at 780-82; Comment at 642-44.

\textsuperscript{19} Green Light at 734-35.
Congress has enacted a variety of statutes explicitly authorizing the federal courts to award fees in a wide range of situations. The federal courts, invoking their inherent equity power to prevent injustice, have also developed "equitable" exceptions to the American Rule. For example, where a party has acted in bad faith in litigating a suit or his "obdurate behavior" necessitated the suit, federal courts have awarded attorney fees to his opponent under the "bad faith-obdurate behavior" exception. Under the "common fund-substantial benefit" equitable exception, federal courts have awarded fees to a party when his prosecution of a suit resulted in a substantial benefit to an identifiable class of persons and the court's jurisdiction of the case enabled it to spread the cost of attorneys' fees among the class benefited.

Recently, a number of the lower federal courts began applying a new equitable exception which seemed to be a logical and valid extension of the "common fund-substantial benefit" exception—the "private attorney general" exception. The

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20 E.g., statutes cited in notes 37 & 57 infra. For a discussion of such statutes and their application in different areas of the law, see Falcon, Award of Attorneys' Fees in Civil Rights and Constitutional Litigation, 33 Md. L. Rev. 379, 392-99 (1973); Macey, Award of Attorney Fees as a Stimulant to Private Litigation under the Truth in Lending Act, 27 Bus. Lawyer 583 (1972) (consumer protection); Note, Allowance of Attorney Fees in Civil Rights Actions, 7 Colum. J.L. & Soc. Prob. 381, 390-400 (1971); Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 Cornell L. Rev. 1222, 1228-29 (1973) (environmental protection); Comment, Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 Cal. L. Rev. 1656 (1973) (antitrust); 7 Ga. L. Rev. 578 (1973) (civil rights).

21 For a general discussion of these and other exceptions to the American Rule, see King & Plater at 39-50; McLaughlin at 765-70; Comment at 645-48.

22 E.g., Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963). For a general discussion of the bad faith-obdurate behavior exception, see Green Light at 735, 737-38.

23 The "common fund" equitable exception began as a limited exception and was later greatly expanded by the federal courts. Compare Trustees v. Greenough, 105 U.S. 527, 532 (1881) with Sprague v. Ticonic National Bank, 307 U.S. 161, 166-67 (1939) and Hall v. Cole, 412 U.S. 1, 8-9 (1973). For a general discussion of the common fund - substantial benefit exception, see Green Light at 736, 739-41.

career of the exception was brief. On May 12, 1975, the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* ruled that although the federal courts possessed the equitable power to award fees in "common fund-substantial benefit" cases, they did not have such power in the closely related "private attorney general" cases. The Court held that express Congressional authorization would have to be provided before the federal courts could exercise such a power.

Reaction to the decision from public interest lawyers, Congressmen, and others was swift. The decision was criticized both in the House and in the Senate and remedial legislation was introduced. Now, over a year later, no further action has been taken by Congress to provide the statutory

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27 Public interest lawyers were distressed because court-awarded attorneys' fees had appeared to be a promising source of funds for them as foundation giving decreased. 33 Cong. Q. Weekly Rep. 1603 (1975). Ralph Nader noted that the ruling was "going to have a very depressive impact on the ability of public interest lawyers to litigate." 105 Time, May 26, 1975, at 42. Charles Halpern, staff director, Council for Public Interest Law, termed the decision a "disaster." Weaver, *Public Interest Lawyers Shocked by Supreme Court's Denial of Attorneys' Fees to the Winners of Lawsuits*, N.Y. Times, May 18, 1975, § 1, at 29, col. 1. For more on the public interest law movement, see Halpern, *Public Interest Law: Its Past and Future*, 58 Judicature 118 (1974).

28 An editorial in the Washington Post described the decision as a "critical blow to a faltering [public interest law] movement" and called on Congress to act. Goldberg, *In the Public Interest*, Wash. Post, June 11, 1975, § A, at 18, col. 3. A New York Times editorial remarked that in the environmental, consumer, and civil rights areas, "[w]ithout remedial legislation . . . it is going to be extraordinarily difficult to translate many glittering legislative promises into daily realities." N.Y. Times, June 2, 1975, at 24, col. 1. Reaction from legal commentators was generally critical. See, e.g., sources cited note 25 supra.


31 No action has been taken on H.R. 7826, 94th Cong., 1st Sess. (1975) which would provide the statutory authorization required by the Supreme Court. 2 CCH 1975-76 Cong. Index 5010.
authorization required by the Supreme Court before fees can again be awarded on a private attorney general basis—legislation which could be the most far-reaching in its beneficial effect of any considered in this century.

One gets the impression that the political influence of large corporations is being strongly pressed in the halls of Congress concerning this legislation. One also gets the impression that part of the Congressional inaction may be due to great uncertainty as to how a statute with such far-reaching possibilities should be specifically formulated in order to attain its goals without overloading the court system or without opening the door to frivolous or harassing suits.

In an attempt to relieve some of this uncertainty, each major issue (with one exception) which would probably be raised in debates over the exact language of such a statute will be discussed and the most relevant considerations applicable to each will be explored. Primary attention in most instances will be given to the experience of the federal courts in awarding fees under the equitable private attorney general exception, but, when appropriate, material will also be drawn from the experience of the English judicial system with fee-shifting and that of the Congress in providing for statutory fee-shifting. At the conclusion of this discussion a statute will be proposed which, hopefully, if enacted, would achieve the goals of the private attorney general fee-shifting concept without imposing any adverse effects upon the federal court system.

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32 For a revealing expression of industry attitudes toward fee-shifting in general, see Hearings at 1115-28 (testimony of Godown, general counsel, National Association of Manufacturers).

33 See generally Hearings at 791 (testimony of Kline, attorney, Public Advocates, Inc.).

34 The question of whether to allow an award of fees to a private attorney general who sues the United States will not be discussed. This issue involves so many ramifications that it is properly in itself the topic of an entire Comment. At present such awards are barred by 28 U.S.C. § 2412 (1970) unless specifically authorized by statute. For a brief discussion of some of the strong arguments in favor of allowing such an award, see Hearings at 791-92 (testimony of Kline, attorney, Public Advocates, Inc.).

35 For the purposes of this discussion, the great value of allowing the award of attorney fees on a private attorney general basis is presupposed. For some of the arguments which have been raised in favor of this concept, see Hearings at 799-804 (testimony of Kline, attorney, Public Advocates, Inc.); Nussbaum at 331-37; Green Light at 733-34. For some of the relatively few criticisms which have been expressly or
I. TO WHOM SHOULD FEE AWARDS BE AVAILABLE?

A. Should Awards Be Limited to Plaintiffs?

All cases in which the federal courts utilized the equitable private attorney general exception to authorize an award of fees involved an award to a plaintiff who had acted as a private attorney general rather than to a defendant. However, as Congress has recognized in considering fee-shifting legislation, it is conceivable in the procedural posture of some cases (e.g., certain declaratory judgment suits) that a defendant could act as a private attorney general as well. Thus, to provide for that eventuality either party, rather than a plaintiff only, should be eligible for an award of fees in a statute whose purpose is to encourage private attorney generals to vindicate important public rights and policies.

impliedly leveled at the concept, see Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 263-69; Hearings at 1118-27 (testimony of Godown, general counsel, National Association of Manufacturers).


B. Should Awards Be Limited to the Prevailing Party?

Most federal statutes limit the award of fees either to prevailing plaintiffs or to prevailing parties. Similarly, most of the federal courts which applied the private attorney general exception authorized awards of fees only to private attorney generals who had prevailed on at least one of their original claims. This practice should be continued. The award of fees should be limited to the prevailing party. By so doing, flooding the federal courts with frivolous or merely harassing suits can be discouraged.

If awards are thus limited to prevailing parties, however, it should be understood that the term prevailing means “success” in the lawsuit in a “realistic” sense and not necessarily in a “technical” sense. Federal courts have authorized the award of attorneys’ fees to a party when his opponent entered into a consent decree without stipulation of liability, when a party’s opponent modified a challenged practice after being sued, when a party obtained some but not all of the original relief sought, and when a party technically prevailed on some but not all of the issues he raised. A party should be considered to have “prevailed” if he has forced his opponent to settle a lawsuit on terms favorable to himself. It is submitted that

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38 See, e.g., statutes cited note 37 supra.
39 See, e.g., cases cited note 36 supra.
40 Since in most private attorney general cases, the private attorney general is not well funded, substantial damages are rarely recoverable, and cases are time consuming; an attorney is not likely to take on a frivolous or “nuisance” suit when his only likely source of remuneration will be an award of attorney fees to his client if he prevails. Nussbaum at 333. See generally Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUDIES 399, 437-38 (1973). See also Comment, The Allocation of Attorney’s Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 334-35 (1971).
41 Congress has recognized in considering fee-shifting legislation that fee awards should be made to private citizens who, in attempting litigation to enforce public policies, achieve their objectives despite not having prevailed in a strictly “legal” sense. S. REP. No. 414, 92nd Cong., 1st Sess. 81 (1971); S. REP. No. 1196, 91st Cong., 2d Sess. 38 (1970).
42 Incarcerated Men of Allen County v. Fair, 507 F.2d 281, 288 (6th Cir. 1974).
46 Settlement due to pressure of the private attorney general’s lawsuit should be
a federal court should consider a private attorney general to have "prevailed" if he has substantially vindicated an important public right or policy as a result of his carrying on the lawsuit.\textsuperscript{47} Substantial vindication could be achieved by a number of methods which stop short of complete technical victory, including but not limited to those mentioned above.\textsuperscript{48}

C. Limitations on Eligibility

It would be a mistake to enact a statute in which fees would be awarded in private attorney general litigation to the prevailing party without further limitation on eligibility. Such a rule would discourage private attorneys general from bringing (or defending) suits except in the rare case in which their probability of victory was almost certain, because the typically underfinanced private attorney general would have to pay both his own enormous legal expenses and his opponent's attorneys fees as well if he lost.\textsuperscript{49} For the same reason, this rule would greatly discourage private attorneys general from bringing suits in new or developing areas of the law where the outcome of a suit is often highly unpredictable, thus depriving the law of much of its vitality and ability to adapt to new and changing circumstances.\textsuperscript{50}

Instead, the statute should award fees only to a prevailing

\textsuperscript{a} See generally Exception at 216-19.

\textsuperscript{47} The requirement of "substantial vindication" should be considered satisfied in cases in which the only result of the private attorney general's lawsuit is that the defendants are forced to comply with statutes requiring certain reports to be filed concerning a project's impact on the environment. See King & Plater at 81. However, this requirement should not be considered to have been met if the only result of the private attorney general's lawsuit is that the public is made more "aware" of a problem or that an uncertain area of the law is more clearly defined. In Sierra Club v. Lynn, 384 F. Supp. 834 (W.D. Tex. 1973), modified, 502 F.2d 43 (5th Cir. 1974), the court awarded attorney fees to a plaintiff who did not technically prevail on any of the issues he had raised. The award seems to have been made on the theory that, although the plaintiff did not technically prevail, his lawsuit forced the defendant to complete and file certain studies required by federal law which would probably not have been completed and filed without the impetus of plaintiff's suit. Id. at 849-50.

\textsuperscript{48} Cf. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Exception at 205.

party who has acted as a private attorney general by (1) substantially vindicating an important public right or policy and (2) by conferring a substantial benefit upon the public or a significant class thereof (3) in an area of the law in which such private vindication is necessary if important rights and policies are to be fully meaningful and (4) in which an award of attorney fees is essential if such private enforcement is to be economically feasible. If this is done, no private attorney general will be discouraged from bringing (or defending) a suit through fear of having to pay his opponent's attorney fees, because only a valid private attorney general—and not his non-private attorney general opponent—will be eligible for an award of fees (unless, of course, the private attorney general acts in bad faith in litigating the suit). If the court found that both parties had acted as private attorneys general—a most unlikely possibility—it could exercise its discretion and refuse to tax attorney fees against either party.

II. WHAT STANDARDS SHOULD BE APPLIED TO DETERMINE WHEN A PREVAILING PARTY SHOULD BE CONSIDERED A PRIVATE ATTORNEY GENERAL?

A. Judicial Guidance

The successful experience of the federal courts in applying the private attorney general exception provides some guidelines in exploring this question. Also helpful, although to a lesser extent, is a consideration of some of the fee-shifting statutes which Congress has enacted and the legislative history of those statutes. More emphasis will be placed on the experience of the federal courts in applying the court-created equitable private attorney general exception, however, since the goal is to develop a private attorney general statute which is adapted to the needs and capacities of the federal court system.

When the cases are examined in which fee awards were authorized on either an express or implied private attorney general basis, four distinct criteria emerge as those favored by

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51 These criteria are discussed in Part II infra. See note 54 infra.
52 See generally Part III infra.
53 Some of these statutes are listed at note 3 supra.
the federal courts. In most of these cases the court authorized an award of fees to a prevailing party when his lawsuit involved the substantial vindication of an important public right or policy, by prevailing in the lawsuit he conferred a substantial benefit on the public or a significant class thereof, necessity existed for private vindication if the right or policy involved was to be fully meaningful, and an award of fees was necessary if such private vindication was to be economically feasible.  

It is submitted that these four criteria should be included in any private attorney general statute. They were designed and utilized by the very federal courts which would be authorized to make awards under such a statute, and it is reasonable to expect that courts selected these specific criteria with both a desire to encourage the basic purposes behind the private attorney general fee-shifting doctrine and a desire to select criteria whose use would not inundate or otherwise prove harmful to the federal court system. Furthermore, a substantial amount of case law concerning the application of each criterion was amassed during the life of the equitable private attorney general exception which would prove useful to the courts in deciding close questions under the new statute.

B. Relevant Considerations

1. Vindication of an Important Public Right or Policy

If these four criteria are adopted, what considerations are most relevant to each? The first criterion—that the suit must involve the substantial vindication of an important public right or policy—has often been cited as a difficult subject for judicial determination. How can a court determine that one right

44 See, e.g., Gilpin v. Kan. State High School Activities Ass'n, 377 F. Supp. 1233, 1250-52 (D. Kan. 1973); Ross v. Goshi, 351 F. Supp. 949, 955-56 (D. Hawaii 1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 98-101 (N.D. Cal. 1972). In La Raza Unida the court stated: "[A] 'private attorney general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." Id. at 98 (emphasis added).

or policy is important and another is not important and thus not deserving of protection through encouraging its vindication by the award of attorney fees? Admittedly, such a determination is not easy, but courts routinely must make similar determinations in other areas of the law. 56

Several guides as to the importance of various rights and policies are available. Rights or policies very similar in nature to those already protected by Congress through expressly authorized fee awards should certainly be considered sufficiently important. 57 The quantity or wording of legislation which Congress has produced to further a particular right or policy may also provide some indication of the importance which Congress attaches to it. 58 Legislative history can also indicate such importance. 59 Almost any federal constitutional right should be considered an important right, and particularly those that have

54 E.g., the Supreme Court has determined on a case-by-case basis that certain rights contained in the Bill of Rights are so fundamental that they are applicable to the states through the fourteenth amendment while certain other of those rights are not.


58 E.g., S. REP. No. 295, 94th Cong., 1st Sess. 40 (1975) (civil rights described as “fundamental rights”).
been considered so fundamental that they are applied to the states through the fourteenth amendment.\textsuperscript{60} Also, a right upon which a high social value is placed should be considered important.\textsuperscript{61} Of course, many rights and policies have already been identified as being sufficiently important to warrant fee-shifting by virtue of the federal courts' application of the equitable private attorney general exception.\textsuperscript{62} One further test of importance is whether substantial injury to the public or a class thereof would occur if the rights or policies were not enforced.\textsuperscript{63} The courts can give more definition to what is important as they proceed on a case-by-case basis.

The possibility of over-inclusiveness in this first criterion (or the second) resulting in a flood of litigation should not be feared, because the third and fourth factors discussed below are strong limiting factors on the exercise of the award of fees. Thus, no right or policy should be "disqualified" unless it is


clearly of a non-essential nature, if the purposes of the private attorney general doctrine are to be served.

2. Substantial Public Benefit

The second factor, the conferring of a substantial public benefit, is also difficult to determine precisely. In this area, the experience of the federal courts in applying the private attorney general equitable exception is the best guide. The vindication of an important right or policy was often considered to qualify as the required substantial public benefit the private attorney general had conferred, and in fact there is a good deal of interaction between the first two criteria. Concerning the number of people who must be benefited for the benefit to be sufficiently "public," it is interesting to note that fee awards were often court-authorized when only one or a few persons were directly benefited, although many more might have been indirectly benefited (or would be directly benefited in the future by changes in the law, governmental practices, etc. occasioned by the private attorney general's lawsuit). "Benefits" for which fee awards were authorized have been many and varied, ranging from forcing the state to provide adequate

"Congressional fee-shifting statutes and their legislative history provide little overt data on what a "substantial public benefit" is. But a quick perusal of some of the statutes authorizing fee awards (listed at note 37 supra) and some of the rights and policies intended to be furthered by fee awards (listed at note 57 supra) would seem to indicate that Congress has limited fee-shifting to those areas in which its use would benefit at least indirectly either the entire public or large classes thereof.

E.g., Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974) (right of interstate travel free from forfeiture of welfare benefits); Gilpin v. Kan. State High School Activities Ass'n, 377 F. Supp. 1233, 1252 (D. Kan. 1973) (right of women to equal participation in school athletic competition); Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala. 1972) (right to "free and equal suffrage"). In Gilpin the court noted, "By vindicating her own rights, a successful litigant accordingly dispels the 'chill' cast upon the rights of others." Gilpin v. Kan. State High School Activities Ass'n supra at 1252.

It has been suggested that to require the vindication of an important right and the conferral of a public benefit is redundant, because in most cases the vindication of an important right or policy will ipso facto confer a public benefit. See Green Light at 749.

treatment at a mental hospital to forcing reapportionment of the Alabama state legislature. 68

Again, there should be little danger of "opening the floodgates" through the liberal definition of a "substantial public benefit," because the two criteria below will serve to limit the scope of the private attorney general exception without defeating its purpose in any way.

3. The Necessity of Private Enforcement

The third standard involves the necessity of private legal action if public rights and policies are to be vindicated fully. Congress, in providing for fee-shifting in various statutes, recognized that "private enforcement" is necessary if certain federally created rights and policies are to be meaningful. 69 Private enforcement is necessary when public enforcement entities either do not exist or do not fully protect public rights and policies. Lack of public enforcement may exist for a variety of reasons. The effectiveness of public agencies and officials is often restricted by inadequate funding, 70 poor organization, 71 conflicts of interest, 72 domination by the very industries being "regulated," 73 official apathy or refusal to enforce the law unless forced, 74 and myriad other reasons. The sheer size and


69 "Such a provision [authorizing award of attorney fees] is appropriate in voting rights cases, because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved." S. REP. No. 295, 94th Cong., 1st Sess. 40 (1975) (emphasis added). See, e.g., S. REP. No. 1196, 91st Cong., 2d Sess. 36-39 (1970); S. REP. No. 414, 92d Cong., 1st Sess. 79-82 (1971); H.R. REP. No. 911, 92d Cong., 2d Sess. 132 (1972) (Congressional recognition of necessity of private enforcement of certain environmental policies).

70 See sources cited note 8 supra.

71 See, e.g., Green Light at 733.

72 See, e.g., Green Light at 733; La Raza Unida v. Volpe, 57 F.R.D. 94, 100 (N.D. Cal. 1972).

73 See note 6 supra.

74 See, e.g., note 5 supra.
complexity of the task make public enforcement of certain rights and policies virtually impossible. The federal courts in authorizing fee awards under the private attorney general exception recognized that private enforcement is sometimes necessary in several areas of the law. The courts also recognized that private enforcement is often necessary when the “public” attorney general is representing defendants sued for violating public rights and policies in an action brought by a “private” attorney general, or when such defendants are the very public officials charged with the enforcement of the rights or policies violated.

Based on their experience, it would seem proper to award fees whenever, from the facts of a particular case, it is apparent that full vindication of a right or policy is not being or cannot be accomplished by public enforcement mechanisms. But, if such mechanisms are available and are being used effectively by public officials to vindicate the right or policy involved fully, no fee should be awarded.

75 In a nation that now exceeds one trillion, forty six billion dollars in gross national product, government cannot possibly be relied upon to provide vindication of every person or entity aggrieved by a violation of the antitrust laws. It must be left to private litigants to guarantee to themselves the assurance that the future will not repeat the past... Calnetics Corp. v. Volkswagen of America, Inc. 353 F. Supp. 1219, 1225 (C.D. Cal 1973).


77 See, e.g., Brandenburger v. Thompson, 494 F.2d 885, 889 n.5 (9th Cir. 1974).

76 “Because the public authorities normally charged with the enforcement of the law are defendants in this action, the only practicable means of enforcing section 1983 is by private parties...” Ross v. Goshi, 351 F. Supp. 949, 955 (D. Hawaii 1972). “The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs’ contentions. Only a private party could have been expected to bring this litigation...” La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972). Public officials were defendants in a great many of the cases involving an equitable award of fees to a private attorney general. See, e.g., Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Stanford Daily v. Zurcher, 366 F. Supp. 18, 24 (N.D. Cal. 1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972).
4. **Necessity of Award in Order to Make Private Enforcement Economically Feasible**

The fourth and final criterion, necessity of award in order for private enforcement of the right or policy to be economically feasible, is possibly the least difficult to utilize. In determining if such a necessity exists, four factors are particularly important: (1) the financial resources of the party seeking to vindicate a certain right or policy; (2) the financial resources available to his opponent; (3) the amount of damages, if any, potentially recoverable (which could be used to defray the private attorney general's legal expenses); and (4) the cost of litigation to vindicate the right or policy.

The use of these factors can be illustrated by utilizing them to determine if fee awards are necessary to enable private vindication of statutorily created civil rights, a determination which Congress has already made. In the typical civil rights case, the plaintiff seeking to vindicate his rights is poor. His opponent is usually either a corporation or governmental entity with imposing financial resources. In the typical civil rights case damages either are not recoverable or are recoverable only in nominal amounts, and the cost of litigation is usually awesome. These factors combine to produce a situation in which hard economic reality dictates that the typical would-be private attorney general is forced to forego any attempt to vindicate his rights.

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79 See, e.g., S. Rep. No. 295, 94th Cong., 1st Sess. 40-42 (1975). "All of these acts [federal civil rights acts passed since 1866] depend heavily upon private enforcement, and fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies." Id. at 42 (emphasis added).

80 See Exception at 207.

81 See Comment at 660. See also Hearings at 835, 841-43 (discussion concerning great advantages which corporations hold over private attorneys general in public interest litigation).

82 This is true not only in civil rights cases but also in environmental protection cases. See Exception at 207. In most equitable private attorney general cases in the federal courts, only injunctive or declaratory relief or insubstantial damages were recovered. E.g., Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Gilpin v. Kan. State High School Activities Ass'n, 377 F. Supp. 1233, 1244 (D. Kan. 1973); Stanford Daily v. Zurcher, 366 F. Supp. 18, 19 (N.D. Cal. 1973); La Raza Unida v. Volpe, 57 F.R.D. 94, 95 (N.D. Cal. 1972).

83 See note 2 supra. See also Hearings at 799-800 (enormous expense involved in public interest litigation against a governmental agency or large corporation).
cate his rights. Fee awards are necessary in such cases if private vindication of rights is to be possible.

The federal courts which authorized awards of fees under the private attorney general equitable exception had little difficulty in considering such factors to determine if awards were necessary. Those courts found that such necessity existed not only in many civil rights cases but also in certain environmental protection, civil liberties, reapportionment, and other cases as well. Fees were not awarded to those rare private attorneys general who were financially able to act as private attorneys general without an award of fees.

In considering this last criterion, the situation of the public interest law firm deserves special mention. When a private attorney general is represented without charge by a public interest law firm, the public interest law firm, rather than the private attorney general, should be awarded fees if an award is necessary for it to be able to represent those who seek private enforcement of the right or policy involved. The court should remember that public interest law firms are becoming increasingly dependant on fee awards for their continued ability to aid such clients as foundation "seed money" is exhausted.

III. DISCRETION IN THE AWARD OF FEES

Should the courts be given total discretion to award or not

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84 The test for this final criterion used in the federal courts can be expressed as follows: Is the financial burden of private enforcement of the particular right or policy such that an award of fees is essential if such private enforcement is not to be discouraged by economic realities? See, e.g., Gilpin v. Kan. State High School Activities Ass'n, 377 F. Supp. 1233, 1250-52 (D. Kan. 1973); Ross v. Goshi, 351 F. Supp. 949, 955 (D. Hawaii 1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 98, 101 (N.D. Cal. 1972).


86 Thus, in Ross v. Goshi, 351 F. Supp. 949 (D. Hawaii 1972) fees were awarded to plaintiffs-intervenors but not to plaintiffs, who were represented by Legal Services' attorneys. The court reasoned that, "Legal Services' attorneys can function as private attorneys-general irrespective of whether this court awards them counsel fees." Id. at 955-56.

to award fees to the prevailing private attorney general, or should the award be mandatory once the prevailing party's private attorney general status is established? In England, courts routinely award fees to the prevailing party unless considerations of equity demand otherwise. In America, fee-shifting statutes expressly authorizing federal courts to award fees are largely divided into a group of statutes in which the award is mandatory to a prevailing plaintiff, a group in which the court may award attorney fees to the prevailing party, and a group in which the court may award fees to either party. The best course for a private attorney general statute to take would seem to be one that would allow a court enough discretion to deny or even reverse fees when a would-be private attorney general’s suit was frivolous or brought to harass, but not enough discretion to deny fees to a private attorney general who had acted in good faith in bringing a suit and had prevailed. Thus, frivolous and bad faith litigation would be discouraged, while at the same time good faith vindication of important rights and policies would be encouraged by the enhanced certainty of being awarded attorney fees if the suit were successful. Also, some provision should be made so that those statutes in which fee awards are presently totally mandatory or totally discretionary would not be changed by the private attorney general statute.

All of these objectives would be accomplished by a statute reading in part, "Unless contrary to existing statutory provisions or considerations of justice demand otherwise," the court

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8 See Mayer & Stix, The Prevailing Party Should Recover Counsel Fees, 8 Akron L. Rev. 426, 430-31 (1975) [hereinafter cited as Mayer & Stix]. English courts have discretion to not only deny fees to a prevailing party but to award attorney fees to an unsuccessful party when a plaintiff refuses a fair settlement offer and recovers less after trial as well. Id.

9 See, e.g., statutes cited note 37 supra.

10 The criteria used to determine whether or not a party is a valid private attorney general are discussed in Part II supra.

11 See 121 Cong. Rec. 5419 (daily ed. June 12, 1975) (remarks of Representative Seiberling). Those fee-shifting statutes which Congress has already enacted have been fashioned in a precise manner designed to best accomplish the specific purpose of each. Thus, no need exists for their repeal or modification.

12 Thus, the courts clearly could still invoke their "bad faith" equitable exception and tax attorney fees against the would-be private attorney general who brought a frivolous or merely harassing suit. The primary purpose of the words "unless considera-
shall award fees to a prevailing party whose status as ‘private attorney general’ under this statute has been established.”

IV. HOW SHOULD THE AMOUNT OF FEES AWARDED BE DETERMINED?

A. “Reasonable” Attorney Fees vs. a Fixed Amount

In England, “reasonable” attorney fees are awarded, and almost all of the Congressional statutes providing for an award of attorney fees in specific areas of the law prescribe “reasonable” attorney fees as the amount of the award. In addition, most federal courts have awarded “reasonable” fees in applying the equitable private attorney general exception. On this question, practicality dictates that no attempt be made to fix the amount of attorneys’ fees which can be recovered. Because of our inflationary and otherwise unpredictable economy, any fixed schedule of recoverable attorneys’ fees would

tions of justice demand otherwise” is to make absolutely clear that the courts are to award attorney fees to the private attorney general unless overriding considerations of justice are present.


13 See, e.g., statutes cited note 37 supra. The Labor-Management Reporting and Disclosure Act tit. V § 501(b), 29 U.S.C. § 501(b) (1970) is exceptional in that it provides for a fee award which constitutes a “reasonable part of the recovery.”


15 But cf., Allowance of Attorney Fees in Civil Rights Actions, 7 COLUM. J.L. & SOCIAL PROB. 381, 410-11 (1971) (legislature should provide that court start with a specified fee base and then consider additional criteria to use in making appropriate increases or reductions according to particularities of the case involved).

16 A provision setting a fixed percentage of total damages recovered as the measure of the attorney fees award would also be unsuitable for a private attorney general fee-shifting statute, since nonmonetary equitable relief is often the only remedy available
have to be constantly revised to keep pace with the changing cost of living. This would have to be done if one of the basic purposes of fee-shifting, i.e., making the injured party realistically "whole,"100 is to be accomplished.

It could be argued that awards should be limited to low fixed amounts so as neither to deter the non-private attorney general from engaging in litigation with the private attorney general nor to "punish" him for doing so. But reasonable attorney fees will not deter the large well-financed corporations101 and government entities, which tend to be the private attorney general's opponents, from participating in litigation. Not only are such fees small in relation to the financial resources usually available to such parties, but the fees are small when compared to the high economic stakes involved in the typical private attorney general suit from the non-private attorney general viewpoint (particularly in environmental litigation).

An award of reasonable fees does not "punish" the non-private attorney general for participating in the suit, but rather serves to make the injured private attorney general really "whole" by reimbursing him the attorneys' fees expended in gaining redress for his injury.102 Moreover, the typical oppo-

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99 Indeed, one legal commentator has advanced the theory that the English rule was replaced by the American rule, not because of any conscious choice, but because a fixed schedule of recoverable attorney fees was "forgotten" by a legislature over a long inflationary period. Amounts which were reasonable when set became so nominal over time that the courts gradually stopped shifting fees at all. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CAL. L. REV. 792, 798-99 (1966).

100 See Mayer & Stix at 429-30.

101 The attorney fees of such corporations in public interest litigation are often subsidized by the government and their cost is spread to the taxpayer by the device of allowing deductions for business-related attorney fees from taxable income as an ordinary and necessary business expense. Tunney, Foreword; Financing the Cost of Enforcing Legal Rights, 122 U. PA. L. REV. 632, 633 (1974). In this way the federal government often contributes almost half of the corporation's expenses in defending itself from the private attorney general's public interest litigation. Hearings at 854. The corporation receives this subsidy regardless of merit, reasonableness, or success of the suit. Hearings at 835. But public interest law firms are also subsidized in part by the federal government, because such firms are funded largely by tax-exempt foundations. Tunney, supra, at 633.

ments of the private attorney general, large corporations and governmental entities, are not greatly damaged by fee awards because they are in a unique position to spread the cost of the fee award among their customers or constituents. The award of reasonable attorney fees makes it more possible that poor private attorneys general will have the same high quality legal talent available to present their viewpoints that has always been available to their corporate and governmental opponents.

Finally, the award of reasonable rather than fixed fees will discourage the use of excessive delaying tactics by a private attorney general's opponent who thereby hopes to "run up" the private attorney general's legal expenses to such a degree that he will eventually be forced to drop his suit even though he may have had a very strong case on the merits. Reasonable rather than fixed attorney fee awards will also encourage settlement when it is clear that the private attorney general will prevail at trial and thus help clear court calendars.

B. Determining a "Reasonable" Fee

Courts in both England and the United States have proven themselves able to determine the amount of a "reasonable" fee without encountering the problems which some predicted would arise. In England at the close of the case, the prevailing party's attorney submits his estimate of his fee to the court. If

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103 See Exception at 207.
104 Cf., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974).
105 On the other hand, fear that a statute allowing the award of non-fixed "reasonable" attorney fees would encourage delay by the private attorney general aimed at running up his own attorney fees in order to "scare" the opponent into settling is totally unjustified. The private attorney general could not recover for legal expenses necessitated by such delaying tactics, because fees so incurred would be considered unreasonable and thus not taxed. Furthermore, the court could always exercise its equitable discretion to deny fees totally or even award fees to the private attorney general's opponent under the "bad faith" equitable exception to the American rule.
106 Cf., Exception at 204.
107 "[T]he time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).
the other party agrees to pay it, no further involvement by the
court is needed. If the parties disagree, the issue is submitted
to a special taxing master who determines what is a reasonable
fee. In making his determination he considers awarding fees
only for legal work that was necessary, reasonable, and proper.
Thus fees incurred through excessive caution or as a result of
mistake are not awarded.108

If the prevailing litigant has abused the system by unneces-
sarily running up his legal expenses by use of delaying tac-
tics, for example, he may be denied all or part of his fees. Abuse
of the system is rare.109 The cost incurred by the court in deter-
mining the proper fee award is assessed in a manner which
encourages litigants to agree to a reasonable fee amount rather
than requiring a taxing master to decide the issue. If less than
one-sixth of the original estimate offered into court is disal-
lowed by the taxing master as unreasonable, the party who
refused to agree to it must pay the costs of the fee determina-
tion. If more than one-sixth of the original estimate is
disallowed, the litigant who offered it must pay the costs.110

In the United States, courts have used different meth-
ods.111 The federal courts are experienced in the determination
of what constitutes reasonable attorney fees because of their
long history of making such determinations under the many
federal fee-shifting statutes which call for the award of reasona-
ble fees.112 Courts tend to consider similar factors in determin-
ing what are reasonable fees under different statutes. For ex-
ample, in ascertaining what constitutes reasonable attorney
fees under the fee-shifting provision of the Federal Copyright
Law,113 courts generally have considered the following to be

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109 Id. at 431.
110 Comment at 638 n.7. Further information concerning the English system is
111 For example, the judge rather than a taxing master normally makes the deter-
Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).
112 E.g., statutes cited note 37 supra.
113 "In all actions, suits, or proceedings under this title, except when brought by
or against the United States or any officer thereof, full costs shall be allowed, and the
court may award to the prevailing party a reasonable attorney's fee as part of the
important elements: result achieved, legal work necessary, legal work actually done, level of skill required, time expended, distance traveled, lawyer's professional standing, and amount of damages involved. The actual fee charged is not considered.\textsuperscript{114}

In determining reasonable fees under the Federal Antitrust Law attorney fee provision,\textsuperscript{115} courts use such factors as the nature of the legal question presented, its novelty and complexity, the result achieved, competence, experience, and professional standing of counsel, amount of legal fees commonly incurred in such actions, time and labor expended, and the amount of damages involved.\textsuperscript{116}

The federal courts also gained experience in determining reasonable attorney fees while applying the equitable private attorney general exception. Different methods and combinations of methods were used by different courts. In some cases, both litigants stipulated prior to the court's ruling on the attorneys' fee award question what a reasonable award would be if the court ruled in favor of the private attorney general.\textsuperscript{117} Other courts relied upon or recommended on remand the use of the fee schedule contained in the Criminal Justice Act\textsuperscript{118} as a

\textsuperscript{114} Mayer & Stix at 434-35 and cases cited therein. Judges do not consider each factor mechanically. For example, in Orgel v. Clark Boardman Co., 301 F.2d 119, 122 (2d Cir. 1962), although the attorney had spent a great amount of time in preparing the case, the court considered it to have been largely a result of his unfamiliarity with the field and awarded substantially less than what would have been typically charged for the amount of time expended. Mayer & Stix at 345 n.38, citing Orgel v. Clark Boardman Co., supra. In most cases awards have been generous. Mayer & Stix at 435.

\textsuperscript{115} "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue [implying that only plaintiff may recover attorney fees] . . . and shall recover . . . [damages], and the cost of suit, including a reasonable attorney's fee." Clayton Act § 4, 15 U.S.C. § 15 (1970) (emphasis added). See generally Note, Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 CAL. L. REV. 1656 (1972).

\textsuperscript{116} See, e.g., Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 390 n.15 (8th Cir.), cert. denied, 419 U.S. 836 (1974); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 221 (9th Cir.), cert. denied, 379 U.S. 880 (1964). After considering such factors, courts' fees awards have usually been both realistic and generous. See, e.g., Twentieth Century Fox Film Corp., supra at 222 ($100,000); Wynn Oil Co. v. Purolator Chemical Corp., 391 F. Supp. 522, 528 (M.D. Fla. 1974) ($553,602).

\textsuperscript{117} E.g., NAACP v. Allen, 340 F. Supp. 703, 708 n.4 (M.D. Ala. 1972) ($3,500 stipulated as "reasonable") (employment discrimination case); Sims v. Amos, 340 F. Supp. 691, 693 n.3 (M.D. Ala. 1972) ($14,822.50 stipulated as "reasonable") (reapportionment case).

“reasonable guide” \( ^{119} \) in determining a reasonable fee. \( ^{120} \) Many courts \( ^{121} \) relied upon or recommended the use of guidelines set down in Johnson v. Georgia Highway Express, Inc., \( ^{122} \) a case involving a statutorily authorized award of reasonable fees. Factors to be considered under these guidelines were: (1) time and labor required; (2) novelty and difficulty of the legal questions involved; (3) skill required; (4) preclusion of other employment due to acceptance of the case; (5) usual fee for similar work in the community; (6) whether fee was fixed or contingent; (7) any time limitations involved; (8) amount involved and results obtained; (9) experience, reputation, and ability of counsel; (10) “undesirability” of the case (representation of clients associated with unpopular causes can have an economic impact on an attorney’s practice which should be considered by the court); (11) nature and length of the attorney’s professional relationship with the particular client; and (12) fee awards in similar cases. The guidelines also provided detailed instructions as to how each factor was to be weighed and its underlying considerations analyzed. \( ^{123} \)

award of attorneys’ fees to an attorney appointed by the court to represent an indigent criminal defendant at a rate of $20 per out-of-court hour and $30 per in-court hour.


\( ^{120} \) See, e.g., Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972); Gilpin v. Kan. State High School Activities Ass’n, 377 F. Supp. 1233, 1253 (D. Kan. 1973) ($1,150 awarded in sex discrimination case); Sierra Club v. Lynn, 364 F. Supp. 834, 851 (W.D. Tex. 1973) ($20,000 awarded in environmental law case); Wyatt v. Stickney, 344 F. Supp. 387, 410 (M.D. Ala. 1972) ($36,754 awarded in case involving constitutional right of mental patients to adequate treatment). In Gilpin the court stated:

A member of the legal profession has the obligation to represent clients who are unable to pay for counsel and also to bring suits in the public interest. While embarking upon their duties, they should not be motivated by a desire for profit but by the public spirit and sense of duty. Accordingly, although those who satisfy these responsibilities should be adequately renumerated for their most valuable services, their fees should not be exorbitant.

. . . [T]he role of the attorney involved in public interest litigation [can be likened] to that of the attorney representing an indigent criminal defendant under the Criminal Justice Act.

Gilpin v. Kan. State High School Activities Ass’n, supra at 1253.

\( ^{111} \) See, e.g., Brandenburg v. Thompson, 494 F.2d 885, 890 (9th Cir. 1974); Fairley v. Patterson, 493 F.2d 598, 607 (5th Cir. 1974).

\( ^{122} \) 488 F.2d 714 (5th Cir. 1974).

\( ^{123} \) Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Concerning factor (5), the court in Johnson advised that the fee award for strictly legal work should never be awarded at a rate less than the $20 per hour prescribed by the
Ideally, a private attorney general statute should provide for determination of reasonable fees by a process combining the best of both the English and American systems. Under such a system, the prevailing private attorney general would present a statement of his attorneys' fees into court, and if his opponent agreed to them, no further involvement by the court would be necessary. If, however, the parties disagreed, the judge would hold a very brief evidentiary hearing (on the record) in which he would make a determination based on factors similar to those discussed above.

The courts should guard against placing too much emphasis on the actual number of hours spent by counsel working on the case, so the efficiency of counsel would not be indirectly discouraged. In addition, emphasis should not be placed upon the amount of monetary recovery in determining fee amount, because in a private attorney general case the importance of the issues involved often has little or no relation to the amount of damages potentially recoverable. In many private attorney general cases only equitable, nonmonetary relief is available. In considering each factor, the court should at all times keep in mind that reasonable attorney fees are being determined; legal expenses which were unnecessary, deliber-

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124 For a thorough discussion of several alternative methods of determining fee awards, refer to Comment at 701-12.

125 Whatever process is chosen, the courts should be encouraged to develop consistency in its application. Otherwise, attorneys may be discouraged from taking private attorney general cases because of their inability to predict the amount of a probable fee award should they prevail. Cf., Comment, Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 CAL. L. REV. 1656, 1657 (1972).

126 Cf. Mayer & Stix at 441-42.

127 A brief recorded evidentiary hearing would allow the basis of calculation of the fee award to be more readily reviewable by the appellate court. See Allowance of Attorney Fees in Civil Rights Actions, 7 COLUM. J.L. & SOCIAL PROB. 381, 411 (1971); cf. Comment at 706-07. Also, the trial court's judgment itself should elucidate the factors which contributed to the final decision on the amount of the fee award. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974).

128 See Comment at 703.

129 No award should be reduced because the result achieved is an intangible, nonpecuniary benefit such as the vindication of a fundamental right rather than a large damage recovery. Cf. S. Rsp. No. 295, 94th Cong., 1st Sess. 41 (1975).

130 See sources cited note 3 supra.
ately "run up" in an attempt to "scare" the opponent into settling,\textsuperscript{131} or otherwise unreasonably incurred should not be included in the award. Thus, there should be no reason to fear that fee awards will be inflated because they are "reasonable" rather than fixed.\textsuperscript{132}

The court, however, should not hesitate to include in its award the reasonable fees incurred in preparing and presenting specific arguments which were reasonable and advanced in good faith as part of the prevailing private attorney general's case, but which were not accepted by the court.\textsuperscript{133} If the injured private attorney general has substantially prevailed in the case, he should be reimbursed for all the reasonable expenses which his attorneys had to incur in their successful attempt to get relief. If he is to be made truly "whole," this must be done.\textsuperscript{134}

Once the judge has made his determination, the cost of that determination should be assessed against the prevailing private attorney general if more than one-sixth of his statement of fees was disallowed. If less than one-sixth was disallowed, his opponent should have to pay the cost. This method of assessing costs will help insure that lengthy contests as to the "reasonableness" of fee awards will be rare. Review of trial court awards of reasonable attorney fees should be based on the "abuse of discretion" standard.\textsuperscript{135}

\textsuperscript{131} This tactic is discussed at note 105 \textit{supra}.

\textsuperscript{132} See generally Mayer & Stix at 430-31.

\textsuperscript{133} See Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973).

\textsuperscript{134} One commentator has suggested that the court should award somewhat higher than actual "reasonable" fees to a private attorney general's attorney in order to account for the contingency element faced by attorneys who specialize in public interest law. Such attorneys are not fairly compensated for their services to the public by awards of "reasonable" fees in cases in which they prevail, he argues, because they receive no compensation for their good faith efforts on behalf of the public in cases in which they do not prevail. Comment at 708-11. This argument has merit, but it must be remembered that it would be unfair to a losing good-faith non-private attorney general to have to pay a greater amount in attorney fees than was needed to make the party he injured "whole." \textit{But see} City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974) (court ruled it proper to consider contingency factor faced by attorney in antitrust litigation in determining size of statutorily authorized "reasonable" fee award).

\textsuperscript{135} Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974).
C. Awards to Those Not Obligated to Pay Their Attorneys

Most courts have authorized the award of attorneys' fees in private attorney general cases (including cases involving statutorily authorized awards) even when the private attorney general was under no legal obligation to pay his attorneys, as is often the case when public interest law firms are involved in litigation. Only a few judges have opposed the practice. If fees were denied in such cases, the poor who seek to vindicate their rights would be hard put to find attorneys who could afford to represent them, since private attorney general cases are often expensive to litigate. The ability of public interest firms to engage in litigation would also be greatly damaged. If the main purpose behind the private attorney general doctrine—to encourage the vindication of important public rights and policies by private citizens—is to be fulfilled, awards must be allowed when private citizens are represented without charge by public-minded lawyers. In order to get the most public benefit from such an award, it should be paid directly to the attorney who has accepted the pro bono publico case rather than to the nonobligated private attorney general client, since it is the attorney rather than the client who needs recom-

138 See, e.g., Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974) (private attorney general represented by ACLU attorneys); Fairley v. Patterson, 493 F.2d 598, 606-07 (5th Cir. 1974) (private attorneys general represented by Ford Foundation attorneys); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538-39 (5th Cir. 1970) (court awarded statutorily-authorized attorney fees to private attorney general despite lack of showing that she was obligated to pay any attorney fees).

137 E.g., Ross v. Goshi, 351 F. Supp. 949, 955-56 (D. Hawaii 1972) (private attorneys general acting as plaintiffs represented by Legal Services were denied fees; private attorneys general acting as plaintiffs-intervenors represented by private counsel were awarded fees).

138 The Ford Foundation is the source of a large percentage of the operating funds for several public interest law firms. However, the Foundation has made it clear that its contributions are only “seed money” and other sources of financing will have to be found in the future. Adams, Responsible Militancy—The Anatomy of A Public Interest Law Firm, 29 RECORD OF N.Y.C.B.A. 631, 644 (1974).

139 It is true that the prospect of attorneys’ fees does not discourage the litigant from bringing suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged [if fee awards are denied because services are provided without charge], and in award of attorneys’ fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay.

Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).
pense for the work he has done and the expenses he has incurred.\textsuperscript{149}

CONCLUSION

Based on the foregoing research and reasoning, the following statute is suggested:

Unless contrary to existing statutory provision or considerations of justice demand otherwise, the court shall award reasonable attorneys' fees to a prevailing party whose status as a private attorney general under this statute has been established. To be considered a private attorney general, a party by carrying on his lawsuit must have (1) conferred a substantial benefit on the public or a significant class thereof, and (2) substantially vindicated an important public right or policy whose full effectuation of necessity depends both upon private vindication and an award of fees to make such private vindication economically feasible.

Reasonable fees shall be determined in the following manner. At the close of trial, the prevailing party shall submit to the court an estimate of his reasonable attorney fees. If the other party agrees to this estimate, such estimate shall be stipulated as reasonable by the court. Lacking such stipulation the court or a master appointed thereby shall determine the amount of a reasonable fee award in a brief evidentiary hearing. Reasonable fees shall be determined in such case by a balanced consideration of such factors as novelty and complexity of the legal question involved, time and labor required to present the case, usual fee for similar work in the community, results obtained, experience, reputation and ability of counsel. Additional appropriate factors may also be considered. Only reasonable, necessary, and proper fees shall be taxed. Cost of the determination in such manner shall be taxed against the party submitting the estimate if more than one-sixth of his estimate was disallowed, and against the opposing party if less than one-sixth was disallowed.

A common complaint today is that the individual has little power to do anything about the great national problems which affect him. By enacting such a statute, Congress, which too

\textsuperscript{149} See id.
often must capitulate to the demands of special interests rather than to the public interest, and which too often lacks sufficient time and resources to deal adequately with each of the complex problems facing the nation, could in one gesture give power to those who have been powerless, advance the public interest, and provide a mechanism by which each of the numberless problems which affect the public could be dealt with adequately by the very individuals most affected.

*John L. Fowler*