NCHRP
National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

September 1990 Number 16

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 15 socioeconomics, 17 energy and environment, 70 transportation law (01 highway transportation, 02 public transit)

Supplement to

Payment of Attorney Fees in Eminent Domain and Environmental Litigation

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by Geoffrey B. Dobson. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highay law. This report supplements and updates a paper in Volume 2, Selected Studies in Highway Law, entitled "Payment of Attorney Fees in Eminent Domain and Environmental Litigation," pp. 936-N59 to 936-N101.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportration Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an

expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued in a year or so. The text now totals some 4400 pages, comprising, in addition to the original chapters, 79 papers of which 38 are published as supplements and 29 as new papers in SSHL. Additionally, 8 supplements and 6 new papers appear in the Legal Digest series and will be published in the SSHL in the near future.

Copies of SSHL have been sent free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

CONTENTS

Supplement To
Payment of Attorney Fees
In Eminent Domain and Environmental Litigation

	Page
Introduction	3
Attorney Fees in Eminent Domain Proceedings	3
Attorney Fees in Environmental Cases	9
Appendix: Table 1 States' Positions on Assessment of Attorney Fees in Eminent Domain Cases	14

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper entitled "Payment of Attorney Fees in Eminent Domain and Environmental Litigation" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION

This paper supplements "Payment of Attorney Fees in Eminent Domain and Environmental Litigation." (Published in *Selected Studies in Highway Law,* Vol. 2, p. 936-N59, and a part of which has also been published as 8A *Nichols on Eminent Domain* § 15. 02[1]). Since publication of the original article and its supplement, a number of cases have been decided pertaining to payment of attorney fees in eminent domain proceedings. Additionally, a number of different statutes have been adopted by state and federal government which impact on the award of attorney fees in both eminent domain and environmental proceedings. Foremost among these statutes is the "Equal Access to Justice Act." This Act authorizes the award of fees to a prevailing party in a civil action brought by or against the United States, a U.S. agency, or a U.S. official unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Similar statutes have been adopted by several state legislatures.

The body of this document will examine cases and statutes relating to the award of attorney fees in eminent domain and environmental proceedings which have been decided or enacted after publication of the original article.

ATTORNEY FEES IN EMINENT DOMAIN PROCEEDINGS (p. 936-N60)

The original article noted that the General American Rule in eminent domain proceedings prohibited a prevailing land-owner from recovering attorney fees, absent a recognized exception. Therefore, there will first be examined various exceptions which have been used to establish a requirement that fees be awarded, and secondly, the factors that the courts consider in establishing the amount of such fees where awardable.

Constitutional Basis (p. 936-N60)

It was concluded in the original article that the just compensation clause of a state constitution generally would not, by itself, require the payment of attorney fees. The only exception then noted was the Georgia decision in *White v. Georgia Power,* 237 Georgia 341, 227 S.E. 2d. 385 (1976). That case has now been overruled by *DeKalb County v. Trustees, Decatur Lodge #1602,* 242 Georgia 707, 251 S.E. 2d. 243 (1978), where the Court held "that a proper construction of our Constitution does not require such an award, and we further hold that this is a matter for legislative determination by the General Assembly." See also *Department of Transportation v. Worley,* 244 Georgia 783, 263 S.E. 2d. 436 (1979).

A number of other courts have now also held, relying primarily on *Dohany v. Rogers,* 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930), that attorney fees and expenses are not a part of compensation for land taken by eminent domain. See *9.88 Acres of Land v. State Highway Department,* 274 A 2d 139 (Del. 1971); *State of Hawaii v. Davis,* 53 Hawaii 582, 499 P.2d 663 (1972); *Ada County Highway District v. Acarrequi,* 105 Idaho 873, 673 p.2d 1067 (1983); *State of Indiana v. Hicks,* 465 N.E. 2d 1146 (Ind. App. 1984); *Jackson Redevelopment Authority v. King,* 364 So.2d 1104 (Miss. 1978); *Gaylord v. State Department of Highways,* 540 p. 2d 558 (Okla. 1975); *City of Everett v. Weborg,* 39 Wash. App. 10, 691 p.2d 242 (1984); *Sierra Club v. Ruckelshaus,* 716 F.2d 915, 230 App. D.C. 264 (D.C. Cir. 1983).

Statutory Basis (p. 936-N63)

In the original article it was noted that a number of states have adopted statutes authorizing the award of attorney fees in eminent domain proceedings. Most states have adopted statutes which authorize attorney fees in limited instances, primarily dealing with inverse condemnation or abandonment of the proceedings themselves. As noted in the original paper, payment of attorney fees in inverse condemnation or upon abandonment of eminent domain proceedings is required by the Uniform Relocation Assistance and Land Acquisitions Policies Act of 1970, 42 U.S.C., § 4621, *et seq.,* as a condition for the receipt of federal financial assistance. Indeed, several states have statutorily required compliance with the Act by reference (see Appendix, Table 1). In some limited instances attorney fees have been authorized in eminent domain proceedings on other bases.

Alyeska v. Wilderness Soc'y, 421 U.S. 240, 44 L.Ed. 2d 141, 95 S.Ct. 1612 (1975), cited in the original article, articulates a "bad faith" exception to the General American Rule that counsel fees are generally awardable only pursuant to statute or enforceable contract. Thus, in some instances there has been an effort to obtain attorney fees by claiming bad faith on the part of the condemning authority. See *State of Indiana v. Hicks,* 465 N.E. 2d 1146 (Ind. App. 1984). In *Hicks* the condemnees advanced two theories to justify an award of attorney fee expenses by the trial court: (1) the obdurate behavior, or bad faith exception to the general rule of nonrecovery of attorney fees; and (2) a constitutional mandate entitling condemnees to just compensation for property taken for public use. As noted above, the court rejected the argument for just compensation including an award of attorney fees noting:

> Just compensation is for the property, and not to the owner. United States v. Bodcaw, (1979) 440 U.S. 202, 203. Therefore, any incidental award of the owner resulting from the taking of his land is not a part of the constitutional entitlement to just compensation, but rather a matter of legislative grace.

Nevertheless the Court in *Hicks,* after first quoting with approval *In Re: Wardship of Turrin,* 436 N.E. 2d 130 (Ind. App. 1982), stated that:

> [I]t is readily apparent the obdurate behavior exception to the general rule on attorney fees espoused in Cox v. Ubik, supra, is punitive in nature. Therefore, because Welfare [Department of Welfare] is a governmental entity, punitive damages cannot be assessed against it under the reasoning of the recent decision in State v. Denny, (1980) Ind., 406 N.E. 2d 240. 436 N.E. 2d at 133.

and stated that it would follow the reasoning and apply it to the instant case:

> In ruling the bad faith exception to the general rule in non-recovery and counsel fees, being 'punitive in nature,' is inapplicable when the nature is sought to be applied against the state.

Nonetheless, the Court then held that an award under the bad faith exception "is also designed to reimburse a prevailing party who has been unduly subjected to great expense" and

> Consequently, because the trial court's award of extraordinary litigation expenses, based on the State's bad faith misconduct, was designed to compensate the Hicks for an injury inflicted upon them by the State, the State is not immune from such an award.

See also the discussion of *Sierra Club v. United States Army Corps of Engineers,* 776 F.2d 383, 15 E.L.R. 21039 (2nd Cir. 1985), contained in the discussion of attorney fees in environmental cases, below.

Additionally, it should be noted that the Idaho Court in *Ada County Highway District, supra,* determined that attorney fees and costs are allowable in the discretion of the court as "costs" pursuant to Idaho Rules of Civil Procedure 54(d)(1) Chapter 7-718. This civil procedure rule provides that in eminent domain cases "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse side in the discretion of the court."

As noted in the Introduction section of this paper, the primary change in the allowance of attorney fees in eminent domain proceedings has been the adoption of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. EAJA was reauthorized on August 5, 1985 (Pub. L. No. 99-89, 99 Stat. 184). Prior to reauthorization there was disagreement between the courts as to whether the EAJA was applicable to eminent domain proceedings and whether the land owner could ever be a "prevailing party." See *United States v. 329.73 Acres of Land,* 704 F.2d 800 (5th Cir. 1983); *United States v. 1, 378.65 Acres of Land,* 794 F.2d 1313 (8th Cir. 1986). The 1985 legislation resolves this conflict by amending the definition of "prevailing party" as to eminent domain proceedings and, thus, makes clear that the act is applicable to such proceedings. 28 U.S.C. § 2412 (d)(2)(H) defines "prevailing party:"

> in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to a trial on behalf of the government.

In the event that the property owner is the "prevailing party," fees will be awarded under 28 U.S.C. § 2412 (d)(1)(A);

> unless the court finds that the position of the United States was substantially justified, or that special circumstances make an award unjust.

With regard to what is meant by the term "substantially justified" the United Supreme Court in *Pierce v. Underwood,* 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed. 2d 490, 56 U.S.L.W. 4806 (1988), held:

> We are of the view, therefore, that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or the main that is, justified to a degree that could satisfy a reasonable person.' That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. See United States v. Yoffe, 775 F.2d 447, 449-450 (Ca 1 1985); Dubose v. Pierce, 761 F.2d, at 917-918; Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 593 (CA3 1984); Anderson v. Heckler, 756 F.2d 1011, 1013 (CA4 1985); Hanover Building Materials, Inc. v. Guiffrida, 748 F.2d 1011, 1015 (CA5 1984); Trident Marine Construction, Inc., v. District Engineer, 766 F.2d 974, 980 (CA6 1985); Ramos v. Haig, 716 F.2d 471, 473 (CA7 1983); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (CA9 1983) (per curiam); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1486-1487 (CA10), cert. denied sub nom. Jaboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 825 (1984); Ashburn v. United States, 740 F.2d 843, 850 (CA11 1984). To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation. . . .

It should be noted that a number of states have adopted similar statutes to the EAJA. See HAW. REV. STAT. § 661-12; IDAHO CODE § 12-117; BURNS IND. STAT. ANN. § 34-2-36-5; IOWA CODE ANN. § 625.29; FLA. STAT. ANN. § 57.111. While no cases have been found holding such statutes to be applicable to eminent domain proceedings, it may be anticipated that at some time arguments such as those originally made under the EAJA before reauthorization will be raised. It should be noted, however, that any similar state statute to EAJA will have to be read in context with state legislation directly related to eminent domain and, under such circumstances, state courts may very well conclude that state EAJA statutes are inapplicable to eminent domain proceedings.

In summary, statutes continue to be adopted gradually extending attorney fees in eminent domain proceedings to prevailing landowners. Generally speaking, only Florida provides for attorney fees in all instances even when the property owner does not prevail. See discussion in the original article.

Before examining the manner by which attorney fees are assessed, it is necessary to discuss a party's statutory entitlement to such fees. As noted, in some instances in order to be entitled to attorney fees, the party must be a "prevailing party." In addition and in other instances, the party must be a property owner. As an example, Florida mandates that

a lien or mortgage owner/holder is not a property holder to whom attorney fees are awardable in eminent domain proceedings. See *Grieser v. Division of Administration*, 371 So.2d 164 (Fla. 2nd D.C.A. 1979); *Major Realty Corporation v. Florida State Turnpike Authority*, 160 So.2d 125 (Fla. 2nd D.C.A. 1964); *Shavers v. Duval County*, 73 So.2d 684 (Fla. 1954). On the other hand, in determining who is a property owner, *In Re: Condemnation Proceedings for the Wilmarth Line*, 380 N.W. 2d 127 (Minn. App. 1986), holds that "a court should look beyond an organization to its membership to determine who is represented."

Factors to be Considered in Assessing Fees (p. 936-N66)

In the original article, it was suggested that when an applicable statute was silent or did not elaborate the factors or method by which attorney fees were determined, the starting point for fee assessment would be determined by the applicable ethics code. A number of cases have now set forth general factors which guide attorney fee assessments. Thus, as noted in *Mulhern v. Roach*, 398 Mass. 18 (1986), 494 N.E. 2d 1327 (1986):

> In determining what is a fair and reasonable charge to be made by an attorney for his or her services, 'many considerations are pertinent, including the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, and the results secured.' Cummings v. National Shawmut Bank, 284 Mass. 563, 569, 188 N.E. 489 (1933). See S.J.C. Rule 3:07, DR 2-106 (B), as amended, 382 Mass. 772 (1981). See also First Nat'l Bank v. Brink, supra, 372 Mass. at 265, 361 N.E. 2d 406 (factors listed in rule are 'substantially identical' to those contained in Cummings, supra). Not one of the factors is necessarily decisive. 'The weight to be given to each of them will vary according to the nature of the services rendered in the particular instance under examination.' McLaughlin v. Old Colony Trust Co., 313 Mass. 329, 335, 47 N.E. 2d 276 (1943). See Cummings, supra.

Difficulty arises as to which of many factors should take precedence. Federal Courts have adopted the lodestar test indicated in *Lindy Brothers Builders, Inc., v. American R & San. Corp.*, 487 F.2d 161 (3rd Cir. 1973), cited in the original article. A number of states, by statute, have specifically made time and normal hourly rate the first factor to be considered. See, as an example, WASH. REV. CODE, § 8.25.070, providing that attorney fees "shall not exceed the general trial rate per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation." See also MONT. CODE §§ 70-30-305 and 306 providing for the fees on the basis of "customary hourly rates" for the county in which the trial is held. In contrast, the Florida Legislature in 1990 adopted bills amending FLA. STAT. 73.092 so as to require the court to "give greatest weight to the benefits resulting to the client from the services rendered."

Additionally, the courts of some states have specifically made time the predominate factor or, at least, the first factor to be considered. Thus, in *Salton Bay Marina, Inc. v. Imperial Irrigation District*, 165 Cal. App. 3rd 952, 212 Cal. Rptr. 701 (4th Dist. 1985), the court noted:

> [T]he court should begin its analysis with a calculation of the attorney services in terms of time the attorneys actually expended on the case. (Serrano v. Priest, supra, 20 Cal.3d 25, 48, fn. 23.) The court should then examine such factors as: nature of litigation, contingent nature of award, difficulty, amount involved, skill required in its handling, skill employed, attention given, success or failure of attorneys' efforts, attorneys' skills and learning, including experience in the particular type of work demanded, and novelty of the theories presented.

Conversely, *Mulhern v. Roach, supra*, specifically rejected the lodestar test. As stated there:

> Contrary to the defendant's assertions, this court has never deemed time spent by an attorney to be the 'lodestar' in determining a fair and reasonable fee. 494 N.E. 2d at 1327. (Mass. 1986).

In summary, it may generally be said that the courts of various states are in agreement that all factors must be considered. However, these same courts are not in agreement as to the importance of time as the critical element in fee determination.

Time and Labor Required (p. 936-N68)

In the original article it was suggested that it is necessary to examine the time expended by counsel to determine whether it is fully compensable under the applicable statutes or court interpretations. The original article noted that there are cases which determine that time expended prior to the commencement of the eminent domain proceedings should be excluded. Furthermore, some of these cases deem duplication of time expended on unsuccessful efforts to be noncompensable.

It now appears to be the general rule that if the time expended was reasonably related to the eminent domain proceeding and necessary for the defense thereof, it will be compensable depending on the specific provisions of the applicable statute. See *In Re: Condemnation Proceedings for the Wilmarth Line*, 380 N.W. 2d 127 (Minn. App. 1986), allowing attorney fees for participation in administrative proceedings determining the location of a power line. *Wilmarth* distinguished *United Power Association v. Moxness*, 267 N.W. 2d 814 (N.D. 1978), which did not allow attorney fees in a similar administrative proceeding on the basis that in North Dakota as opposed to Minnesota "the judicial determination of use and necessity had not been supplanted or supplemented by the administrative determination." Conversely, in Minnesota, a decision in the administrative proceedings was "conclusive as to the public necessity for the project in general." Likewise, in *Prucka v. Papio National Resources District*, 206 Neb. 234, 292 N.W. 2d 293 (1980), the Court allowed fees for services and work done prior to perfection of the District Court of Appeal decision noting:

> We see little purpose to be served in requiring that the results of work done for the county court proceeding which remain material and relevant in the District Court, should be disregarded and abandoned and the work duplicated and repeated solely so that it may be shown that the work was done in connection with the Appeal in the District Court. We hold that the results of any work done in connection with a condemnation proceeding which are relevant and material and properly introduced in evidence on appeal in the District Court, whenever prepared, may be considered by the later court in awarding a reasonable fee. The District Court is not required to allow a fee for such services. On the other hand, the court should not be precluded from taking such factors into account in determining a reasonable fee.

In *Sipe v. Kalitowski*, 390 N.W. 2d 910 (Minn. App. 1986), the Court considered the relationship between an environmental proceeding under the Minnesota Environmental Rights Act and the eminent domain proceeding and held that where the cases were consolidated early into a single case, attorney fees were awardable for the entire action, but withheld any determination of whether, absent such a consolidation, authority for awarding fees would lie under the applicable statute.

Additionally, *Maxey v. The Redevelopment Authority of the City of Racine*, 120 Wis. 2d 13, 353 N.W. 2d 812 (1984), held that attorney fees were not awardable in apportionment or allocation proceedings. The court made a distinction between compensable actions which were necessary to prepare or participate in actual or anticipated proceedings, and incompensable time expenditures in allocation proceedings. The Court noted: "The matter of such apportionment is of no concern to the condemnor and is a problem in which only the condemnees are involved."

Thus, it appears that a court will generally look to the necessity or reasonableness of actions taken in separate proceedings and its relationship to the primary eminent domain proceeding. If reasonably necessary for the defense or prosecution of the eminent domain proceeding, the actions may be considered by the court in its determination of reasonable attorney fees, but such actions are not required to be considered. On the other hand, if such actions are separate and distinct and there is little or no relationship to the eminent domain proceeding, attorney fees will probably not be allowed.

With regard to duplicate time devoted to unsuccessful eminent domain proceedings, the Court in *United Power Association v. Faber*, 277 N.W. 2d 287 (N.D. 1979), upheld a trial court denial of fees for time which was duplicative and unsuccessful. The state Supreme Court in *United Power Association* noted the holding of the District Court:

> that many of the hours they list were utilized in attempting to abort the trial itself and that they were consistently unsuccessful in those efforts; that many hours listed involved seemingly over extended conferences with their clients and witnesses before and during the trial. . . .

By the same token, *Alaska Department of Highways v. Salzwedel*, 596 P.2d 17 (Alaska 1979), noted that the requirement of attorney fees based on time expended "does not mean that the state must become the guarantor of costs incurred in advancing every possible legal theory an owner may have in an eminent domain proceeding." However, the court continued, stating:

> Of course, an owner is not barred from advancing unprecedented claims. When the owner is represented under a contingent fee arrangement, whether such claims are advanced will depend primarily on whether counsel is willing to invest the time and effort in pursuing the claim. Otherwise, the owner must decide whether to incur the expense required to prosecute the claim. In either event, we do not believe that the state should bear the costs of the owner's unsuccessful speculative efforts.

In contrast, however, the Supreme Court of Montana in *Blasdel v. Montana Power Company* rejected the contention that the condemning authority should not have been charged for the landowner's "faulty work" relating to the preparation of the first three dismissed complaints.

Additionally, the question of travel time has arisen, that is, whether travel time is compensable where an attorney comes from a distant point rather than being locally employed. In *Standard Theatres v. Wisconsin Department of Transportation*, 118 Wis. 2d 730, 349 N.W. 2d 661 (1984), the condemning authority contended that it was unreasonable to employ an attorney from outside the local county. The Court, while agreeing with the lower court that the state should not pay for the condemnee's decision to seek more expensive representation, held:

> However, Standard did not 'seek' more expensive representation. Because of the facts of this case, we find Standard's choice of counsel to be reasonable. Standard is an out-of-state theatre owner with a summer residence located in Vilas County. When Standard learned that the property was to be taken by the state, it retained its counsel of thirty years to represent it in the condemnation proceeding. An attorney-client relationship of this duration involves mutual feelings of confidence and trust, and it is only natural that when a case such as this arises, the client first consults its counsel. Because Standard's attorney had experience in eminent domain proceedings in excess of twenty years, it is only natural that he chose to handle Standard's case himself. We find it to be an unjust burden to force Standard to abandon its counsel of thirty years, in whom the client obviously has faith because of their long-standing relationship, in order to retain counsel in the area where the condemned property is located. We must also keep in mind that Standard voluntarily assumed the fees of Attorney Daly should it have been unsuccessful in its appeal to the commission. Therefore, we reject the court of appeals' interpretation that Standard must retain counsel from the area where the condemned land is located in order to be reimbursed for its attorney fees.

In contrast, however, *In Re: Condemnation Proceedings for the Wilmarth Line, supra*, upheld a reduced hourly rate for travel time of less than half the normal hourly rate.

Finally, the original article raised the question of what happens where a landowner's attorney fails to keep time records so that accurate fee assessments can be made by the court. This has been addressed in one instance by statute. Florida requires that the condemnee's attorneys, at least 30 days prior to a hearing to assess fees:

> [S]ubmit to the condemning authority and to the court complete time

> records and a detailed statements of services rendered by date, nature of service performed, time spent performing such services, ... (See Section 73.092, Florida Statutes [1988])

Additionally, the courts have suggested the importance of keeping time records in several eminent domain cases.

For example, the Minnesota Supreme Court in *City of Minnetonka v. Carlson*, 298 N.W. 2d 763 (1980), warned:

> In the future, we strongly recommend that any attorney seeking attorneys fees pursuant to case law or statute maintain adequate written time records in all instances. The absence of written time records may require this court to reverse any award of attorney fees absent compelling circumstances.

On the other hand, it appears that courts are inclined, in spite of such warnings, to accept "reconstructed records." The Minnesota Court of Appeals in *In Re: Condemnation Proceedings for the Wilmarth Line of CU Project*, 380 N.W. 2d 127 (Minn. App. 1986), accepted the use of a "reconstructed time record" without comment. The North Dakota Court in *United Power Association v. Faber*, 277 N.W. 2d 287 (N.D. 1979), in discussing the lodestar approach in eminent domain proceedings, noted that the court's findings "should be made upon contemporaneous records. If such records are not available, the findings should be made upon reasonable reconstruction, estimates, or time amounts."

In summary, time factors are regarded by all courts as being significant. The federal courts use the lodestar approach in time computation. State courts are divided as to whether time is merely one of many factors that must be considered or whether a lodestar approach will be taken in computation of fees.

Two cases illustrate this dilemma. *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal. App. 3rd 465, 202 Cal. Rptr. 389 (1984), upheld a fee award of $656,028.50 ($3,664.00 per hour) based upon consideration of all factors; primarily the contingency factor. Conversely, *Salton Bay Marina v. Imperial Irrigation District*, 165 Cal. App. 3rd 952, 212 Cal. Rptr. 701 (1985), strongly criticized the result reached in *Glendora Community Redevelopment Agency v. Demeter, supra*, and, instead, determined time to be the primary consideration.

Novelty and Difficulty of the Questions (p. 936-N73)

Few additional cases, beyond those noted in the original article in the eminent domain area, have been found which specifically address the question of the novelty and difficulty of questions. Those that have been found generally recognize that the field of eminent domain is a specialized matter not frequently handled by the average practitioner and, thus, warrants a higher than average fee. Therefore, in *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal. App. 3rd 465, 202 Cal. Rptr. 389 (2 D.C.A. 1984), it was noted:

> [T]he practice of condemnation law is not certified for specialization by the California Bar Association, . . . and is not a field in which the average legal practitioner comes in regular contact. The court indicated that redevelopment law and powers of condemnation present novel and difficult questions and that the knowledge and skill necessary to protect a property owner's interest require extraordinary abilities not possessed by most practicing attorneys without considerable research and preparation.

Again, however, it is necessary to examine the particular enabling statute of the state. This factor has been narrowed in importance by statute in several states by making fees awardable on the basis of hourly rates. See MONT. CODE §§ 70-30-305 and 70-30-306 requiring fees to be on the basis of "customarily hourly rates" in the county in which the trial is held. See also § 8.25.070 of the Revised Code of Washington, which provides that the fees "shall not exceed the general trial rate, per day, customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation," or through the setting of a cap on the total fees to be awarded. See LA. REV. STAT. § 48:453[E] limiting the fee to 25 percent of the difference between the award and the amount deposited into the registry of the court.

Customary Fee (p. 936-N7)

As was noted in the original article, discussion of the "customary fee" usually evolves into a question of the impact of the contingent fee agreement and the weight to be given to the agreement in the assessment of court-awarded fees.

Once again, the courts are divided on the weight to be given to the fee agreement. All courts concur that it is improper to assess a fee *solely* on the basis of a contingent fee agreement. On the other hand, fees which have been awarded that are equal to or are close to the contingent amount have been upheld. See *State of Montana v. Rogers*, 184 Mont. 181, 602 P.2d 560 (1979) (note: the factor of contingent fees has subsequently been eliminated by statute in Montana. See MONT. CODE ANN. § 70-30-306), and *Urban Redevelopment Authority of Pittsburgh v. Kristoff*, 69 Pa. Commw. 621, 451 A.2d 1071 (1982), where the court noted:

> Even had the trial court's award equaled the amount called for by the agreement, there is nothing that automatically precludes a contingent-fee percentage from producing a circumstantially reasonable amount. The important consideration in this appeal is the trial court's statement that its award was based on 'all the circumstances' of the case below.

According to some courts, as long as the remaining factors are considered, the contingent fee agreement may be the principal factor. In *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal. App. 3rd 465, 202 Cal. Rptr. 389 (2 D.C.A. 1984), discussed above, the court noted:

> [W]hile a trial court, in the exercise of its discretion, is not bound by the terms of an attorney fee contract, it should, nevertheless, consider those terms and even award attorney fees in the same amount as would be called for by the terms thereof so long as other factors also bearing on reasonableness are considered as well.

In contrast, however, other courts have held that the existence of the contingent fee agreement is irrelevant or to be given little weight. Thus, in *Salton Bay Marina v. Imperial Irrigation District,* 165 Cal. App. 3rd 952, 212 Cal. Rptr. 701 (4 D.C.A. 1985) the Court in rejecting the *Glendora* approach noted:

> The trend of courts in California and around the country is to regard the existence of a contingent fee contract as either irrelevant [footnote omitted] or as but one factor to be considered by the court when it determines what is a reasonable attorney fee (see City of Detroit v. Grinell Corporation (2d Cir. 1974) 495 F.2d 448, 468; Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974); 488 F.2d 714, 719; Clark v. American Marine Corporation (E.D. La. 1970) 320 F. Supp. 709, 711 [16 A.L.R. Fed. 637], aff. (5th Cir. 1971) 437 F. 2d 959; Vella v. Hudgins, supra, 151 Cal. App. 3d 515, 519; Jutkowitz v. Bourns, Inc. (1981) 118 Cal. App. 3d 102, 111 [173 Cal. Rptr. 248]; County of Madera v. Forrester, supra, 115 Cal. App. 3d 57, 65; Manatee County v. Harbor Ventures, Inc. (Fla. App. 1974) 305 So.2d 299, 301; City of Minnetonka v. Carlson (Minn. 1980) 298 N.W. 2d 763, 766-767; Prucka v. Papio Natural Resources Dist. (1980) 206 Neb. 234 [292 N.W. 2d 293, 296]; In Re Maratto's Will (1955 Sur.) 145 N.Y.S. 2d 621, 623; Redev. Com'n. of Winston-Salem v. Weatherman (1974) 23 N.C.App. 136 [208 S.E.2d 412, 415-416]; Redevelopment Comm'n of Hendersonville v. Hyder (1973) 20 N.C.App. 241 [201 S.E. 2d 236, 239]; Arneson v. City of Fargo (N.D. 1983) 331 N.W. 2d 30, 39-40; 8A Nichols on Eminent Domain (3d Ed. 1984) @ 15.02 [2], p. 15-8.20; Annot. (1974) 58 A.L.R. 3d 201, 216-223; but see Parker v. City of Los Angeles, Supra, 44 Cal.App. 3D 556, 567 (inverse condemnation); Lake County Sanitation Dist. v. Schultz, supra, 85 Cal.App. 3d 658, 663, 674 (eminent domain proceeding); see also Glendora Community Redevelopment Agency v. Demeter, supra, 155 Cal. App. 3d 465 discussed infra.)

Finally, emphasizing the need to examine the provisions of the enabling statute in a particular state, some states have made it statutorily improper to consider any contingent fee agreement in the fee assessments for an eminent domain proceeding. *Wilson v. Key Tronic Corporation,* 40 Wash. App. 802, 701 P.2d 518 (1985), noted that the intent of the legislature in the adoption of R.C.W. 8.25.070 "was to disallow contingent fees in condemnation cases."

In several cases involving the award of attorney fees arising because of the abandonment of eminent domain proceedings, the impact of a contingent fee agreement has been considered. Thus, the question has arisen as to whether it would be appropriate to consider the amount that would have been recovered had the case not been abandoned. The assertion has also been made that because the contingency did not arise, no fee at all was to be awarded. With regard to the later assertion, no cases have been found that deny fees. The purpose of the award of attorney fees on abandonment was explained in *City of Wharton v. Stavena,* 771 S.W. 2d 594 (Tex. App. 1989), where the Court held that the purpose of the statute allowing for the attorney fee assessment upon the abandonment of proceeding was twofold:

> 1) to compensate the landowner for expenses incurred during an abandoned condemnation proceeding, City of Houston v. Blackbird, 658 S.W.2d 269, 291 (Tex. App.—Houston [1st Dist] 1983, writ dism'd); and 2) to discourage the commencement and subsequent abandonment of condemnation proceedings. Thus, when a condemnor initiates and then voluntarily dismisses a condemnation suit, section 21.019(b) imposes a penalty or duty on the condemning authority to pay reasonable and necessary fees charged by the property owner's appraisers and attorneys for services rendered in preparation for the proceedings. The recovery of these fees should not depend on the vagaries of any particular attorney-client agreement since such recovery is statutorily mandated. See Blackbird, 658 S.W.2d at 271.

See also *County of Madera v. Forrester,* 115 Cal. App. 3d 57, 170 Cal. Rptr. 896 (1981).

In conclusion, it appears to be the general rule that, except in those states in which consideration of a contingent fee agreement has been restricted by legislation, the agreement between the landowner and his attorney may be considered by the court. However, the contingent fee agreement is not the "most controlling factor." See *In Re: Condemnation Proceedings for Wilmarth Line,* 380 N.W. 2d 127 (Minn. App. 1986). It "serves as only a guide, but not a control on the question of a reasonable fee." See *Standard Theatres v. Wisconsin Department of Transportation,* 118 Wis. 2d 730, 349 N.W. 2d 661 (1984).

Amount Involved and Results Obtained (p. 936-N77)

The impact or effect of a contingent fee agreement upon the assessment of fees was considered in the previous section. The possible impact on the attorney of nonpayment, as opposed to the effect of the contractual agreement between the parties, is considered in this section. In other words, in the prior section, the courts considered the question of whether the agreement between the parties serves as a guide to the determination of the reasonable fee. In the present section we consider the question of whether fees should be enhanced because of "nonpayment risk." The distinction is pointed out in the environmental context, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed. 2d 585, 55 U.S.L.W. 5113, 45 F.E.P.C. 1750, 17 E.L.R. 20929 (1987). In *Pennsylvania* the Court noted that *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), cited in the original article, enumerated contingency as a factor to be considered in fee assessments. However, the Court, further noted:

> [A] careful reading of Johnson shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney. 'The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case.' 488 F.2d, at 718. See Leubsdorf 479, n. 38. At most, therefore, Johnson suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award, but there is nothing in Johnson to show

that this factor was meant to reflect the contingent nature of prevailing in the lawsuit as a whole.

JUSTICE BRENNAN also noted that Congress cited Stanford Daily v. Zurcher, 64 F.R.D. 680 (ND Cal. 1974) (subsequently aff'd, 550 F.2d 464 (CA9 1977), rev'd on other grounds, 436 U.S. 547 (1978)), as one of several cases which 'correctly applied' the Johnson factors. Blum, supra, at 903. The court there increased the lodestar based, in part, on contingency-of-success consideration.... In Davis v. County of Los Angeles, 8 EPD P 9444, p. 5047 (CD Cal. 1974), the District Court added a 'Result Charge' to the basic fee award. This award was not intended to compensate the lawyers for assuming the risk of not prevailing on the merits; instead, as the label suggests, the court increased the award because 'counsel [had] achieved excellent results,' and '[t]he nature of the case made it difficult to litigate.... ' Id., at 5048

The "risk of success factor" is also related to a new factor, a "delay in payment." The relationship, in fact, is noted in *Pennsylvania v. Delaware Citizens' Council, supra,* where the Court observed:

> When plaintiffs' entitlement to attorney's fees depend on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later, as in this case. Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. See, e.g., Sierra Club v. EPA, 248 U.S. App. D.C. 107, 120-121, 769 F.2d 796, 809-810 (1985); Louisville Black Police Officers Organization, Inc. v. Louisville, 700 F.2d 268, 276, 281 (CA6 1983). Although delay and the risk of nonpayment are often mentioned in the same breath, adjusting for the former is a distinct issue that is not involved in this case. We do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute.

This delay factor has been noted in the eminent domain context. In *City of Oakland v. Oakland Raiders,* 203 Cal. App. 3d 78, 249 Cal. Rptr. 606 (1st Dist. 1988), the Court sustained an award of $2,000,000 in attorney fees after the City had taken the Raiders to the Appellate Courts "more often than the Raiders took the City of Oakland to the superbowl." The Court observed:

> The City also argues the court erred in citing the deferral of fee payment as a basis for the increase because the award of interest accounted for the delay. However, interest on the $2 million award began to accrue only after the date of the 1984 judgment. Except for the $100,000 retainer, the Raiders' counsel received no payments since the beginning of the litigation 1980. Thus the delay in payment from 1980 to 1984 was a proper basis for the increase.

Summary

In summary, the focus on the assessment of attorney fees in eminent domain proceedings should be on the authorizing statute. As observed in the original article, the applicable statute may merely provide for a "reasonable fee," in which case, all of the different factors used in the assessment of fees will be used by the courts. On the other hand, the statute may provide for an assessment of fees based on a "customary rate" or may be subjected to a cap. Distinctions should also be observed between statutes which mandatorily require the assessment of attorney fees and statutes which authorize fees to be assessed in the discretion of the court.

Finally, it should be observed that in the assessment of fees, the court itself, is regarded as an expert and is not necessarily bound by evidence or testimony before it as to what constitutes a reasonable fee. See *Community Redevelopment Agency v. Krause,* 162 Cal. App. 3rd 860, 209 Cal. Rptr. 1 (1984).

ATTORNEY FEES IN ENVIRONMENTAL CASES (p. 936-N87)

The original article observed that prior to the decision in *Alyeska v. Wilderness Soc'y,* 421 U.S. 240, 44 L.Ed. 2d 141, 95 S.Ct. 1612 (1975), there had been a "trend toward extending an award of attorney's fees and expenses in public interest litigation...." *Alyeska* recognized the American Rule that, absent a few exceptions, attorney fees were not awardable in the absence of statute or contract.

Statutory Basis, Federal

Since the original article, a number of statutes have been adopted which provide for "fee shifting" or the award of attorney fees in environmental matters. At the present time within the United States Code, there are more than 100 statutory provisions for the award of attorney fees, many of which provide a basis for the shifting of fees in environmental litigation. For a list of 119 statutes, see Appendix to Dissent of Justice Brennan in *Marek v. Chesney,* 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). Some of the environmentally related statutes include the Toxic Substance Control Act, 15 U.S.C. § 2619(c)(2); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); the Water Pollution Prevention Control Act, 30 U.S.C. § 1365(d); the Noise Control Act of 1972, 42 U.S.C. § 4911(d); the Resource Conservation Recovery Act of 1976, 42 U.S.C. § 6972(e); the Clean Air Act, 42 U.S.C. § 7604(d); the Marine Protection, Research, Sanctuaries Act, 33 U.S.C. § 1415(g)(9); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1970, 42 U.S.C. § 9659(f).

Most of these statutes have been interpreted to provide for litigation costs, including the payment of reasonable attorney fees to the prevailing or substantially prevailing party whenever the court determines that an award is appropriate. In other words, the award of attorney fees based on different factors under the federal statutes is discretionary.

As in the case of eminent domain, there has been a substantial impact upon public interest litigation as a result of the enactment of the EAJA, 28 U.S.C. § 2412. As noted above, absent falling within a recognized exception, *Alyeska v. Wilderness Soc'y, supra,* precludes the award of attorney fees in many environmental actions such as those brought under the National Environmental Policy Act (NEPA), U.S.C. § 4321, *et seq.,*

or other statutes not containing an attorney fee provision. See *Trinity Episcopal Schools Corporation v. Hills*, 422 F.Supp. 179, 7 E.R.R. 20189, 9 E.R.C. 2037 (S.D. N.Y 1976) (brought under NEPA), and *Tenants and Owners in Opposition to Redevelopment v. Department of Housing and Urban Development*, 406 F.Supp. 960 (N.D. Cal. 1975) (brought under the National Housing Act, 42 U.S.C., § 1441, *et seq.*). The EAJA may now permit the award of fees in such actions if the federal government cannot show its position was "substantially justified" or that "special circumstances" make an award unjust. 28 U.S.C., § 2412 (d)(1)(A).

Statutory Basis, State

It should be noted that a number of states have adopted legislation which provides for the award of attorney fees in environmental or other public interest litigation, generally using federal acts as a model. Some of these statutes specifically permit the award of attorney fees against state agencies. See, as an example, CAL. CODE CIV. PROC. § 1021.5, which allows the award of fees to a successful party if: there is significant benefit affecting the public interest; there is the necessity of private enforcement; and the fees for the sake of justice should not be paid out of the recovery. This statute specifically permits fee assessments against public entities. See also, N. J. STAT. ANN. 2A:35A-10. Other state statutes permitting the award of attorney fees against state agencies include:

(1) HAW. REV. STAT. § 661-12 permitting award of fees in certain actions by small businesses;
(2) IDAHO CODE § 12-117 permitting the award of attorney fees against state agencies which "acted without a reasonable basis in fact or law";
(3) Burns IND. STAT. ANN. § 34-2-36-5 permitting the award of fees under certain conditions involving small businesses with fewer than 50 employees and § 13-7-11-6 Indiana statute permitting land owners to recover attorney fees on whose land garbage or other solid waste has been illegally dumped without the land owners consent;
(4) IOWA CODE ANN. §625.29 permitting fees against a state agency by a prevailing party where the position of the state is not supported by "substantial evidence";
(5) Vernon's MO. ANN. STAT. § 260.415(3) permitting attorney fees to prevailing parties in certain actions relating to hazardous waste;
(6) N. J. STAT. ANN. § 2A:35A-10 permitting reasonable counsel fees to prevailing parties subject to a cap of $10,000.00;
(7) OR. REV. STAT. § 182.090 authorizing reasonable attorney fees where the state agency "acted without a reasonable basis in fact or in law"; and
(8) Purdon's PENN STAT. ANN. 71, § 2031, *et seq.*, permitting fees against an agency unless the actions of the agency were "substantially justified or special circumstances make an award unjust."

In reviewing state environmental statutes it is necessary to bear in mind that in some instances state statutes will vary from similar federal statutes in that the award of attorney fees may be mandatory as opposed to discretionary. See *Mertzlufft v. Bunker Resources Recycling and Reclamation, Inc.*, 760 S.W. 2d 592 (Mo. App. 1988) where the court noted:

> In support of its argument that the trial court should balance equities on the attorneys' fee question, Bunker cites no Missouri case, but cites federal cases based on federal statutes which hold that the court may award attorneys' fees and, in so doing, may balance the equities as a part of its determination of the question. The federal statutes in those environmental cases provide for a discretionary award of attorneys' fees. See 15 U.S.C.A at 2618(d) (1982); 28 U.S.C.A. at 2412(b) (Supp. 1988); 42 U.S.C.A. at 7604(d) (1983). The state statute we are dealing with does not.

Additionally, state statutes may rely on theories that have now been rejected by the federal courts in determining the basis of attorney fees or the factors to be relied upon. For example, in California the "private Attorney General" theory is alive and well, and the courts may rely on federal decisions predating *Alyeska* awarding attorney fees on such basis. See *Woodland Hills Residents Association, Inc. v. City Council of Los Angeles*, 23 Cal. 3rd 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979).

Prevailing Party, Substantial Justification

Generally, the starting place in environmental litigation is by a determination of whether the applicant for attorney fees is a "prevailing party." Determining whether an applicant is a prevailing party requires, among other things, an evaluation of the pleadings, the actual conduct of the litigation, and the results obtained. A party may be regarded as "prevailing" even though the case was disposed of by settlement rather than judgment, see *Maher v. Gagne*, 448 U.S. 122, 65 L.Ed. 2d 653; *Girandola v. Borough of Allentown*, 208 N.J. Super. 437; 506 A.2d 64 (1986). Whether the litigation was a necessary and an important factor in obtaining the relief, whether the relief obtained by settlement was a substantially significant portion of the goals of the suit, and whether the settlement had a reasonable basis are also important factors which should be considered (see *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Kahan v. Rosenstiel*, 424 F.2d 161 (3rd Cir.), *cert. denied* 398 U.S. 950, 26 L.Ed. 2d 290 (1970); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), *cert. denied* 455 U.S. 961, 71 L.Ed. 2d 681 (1982)).

In addition, for cases in which attorney fee claims are based on the EAJA, there must be a determination of whether the government's position was "substantially justified." As noted in the section on the Eminent Domain Proceedings, the EAJA was reauthorized on August 5, 1985. Previously, there had been disagreement between the courts as to the interpretation of the term "position of the United States" and whether that position was to be based solely on the government's position in the actual litigation or whether there could be consideration of the underlying agency action. See *Wolverton v. Heckler*, 726 F.2d 580 (9th

Cir. 1984). The 1985 amendments clarified the issue by providing for consideration of "the record with respect to the action or failure to act by the agency upon which the civil action is based." See 18 U.S.C. § 2412(d)(1)(B).

In *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed. 2d 490 (1988), the Supreme Court considered the question of the meaning of the term "substantially justified" and stated:

> We are of the view, therefore, that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'—this is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. See United States v. Yoffe, 775 F.2d 447, 449-450 (CA1 1985); Dubose v. Pierce, 761 F.2d, at 917-918; Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 593 (CA3 1984); Anderson v. Heckler, 756 F.2d 1011, 1013 (CA4 1985); Hanover Building Materials, Inc. v. Guiffrida, 748 F.2d 1011, 1015 (CA5 1984); Trident Marine Construction, Inc. v. District Engineer, 766 F.2d 974, 980 (CA6 1985); Ramos v. Haig, 716 F.2d 471, 473 (CA7 1983); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (CA9 1983) (per curiam); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1486-1487 (CA10), cert. denied sub nom. Jaboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 825 (1984); Ashburn v. United States, 740 F.2d 843, 850 (CA11 1984). To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation. . . .

However the Court noted that the unfavorable terms of a settlement agreement cannot, without inquiry into the reasons for settlement, conclusively establish the weakness of the government's position. Additionally, the determination of the action at the pleading stage does not necessarily determine that the government's position was not substantially justified, particularly if the case centers on question of law rather than fact. If the case centers on law, it may merely mean that the District Court was efficient.

Furthermore, it should be noted that in an environmental action brought pursuant to federal statutes against a state agency, there is the question of whether the state enjoys an eleventh amendment immunity. As noted in *Sierra Club v. United States Army Corps of Engineers*, 776 F.2d 383, 15 E.L.R. 21039 (2nd Cir. 1985):

> The State's Eleventh Amendment argument need not detain us long. Although the Supreme Court arguably considers the issue of whether the Eleventh Amendment bars an award of attorneys' fees against a state under the common law an open one, n2[,] and although other circuits are split on the issue, n3[,] we have consistently held that the Eleventh Amendment is not a bar.
>
> n2[,] Compare Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 269 n.44 (1975) (award of fees against a state would raise Eleventh Amendment issues that the Court does not decide) with Hutto v. Finney, 437 U.S. 678, 689-92 (1978) (award of bad faith fees against a state that refused to comply with injunction upheld).
>
> n3[,] Compare Bond v. Stanton, 528 F.2d 688, 690-92 (7th Cir. 1976), remanded, 429 U.S. 973 (1977); Thonen v. Jenkins, 517 F.2d 3, 7-8 (4th Cir. 1975); Souza v. Travisoni, 512 F.2d 1137, 1139-40 (1st Cir.), remanded, 423 U.S. 809 (1975) with Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315, 1317 (4th Cir. 1975); Jordan v. Gilligan, 500 F.2d 701, 705-10 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975).
>
> The first case in which we expressed our view that an award of fees against a state fits within the 'ancillary effect' doctrine of Edelman was Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974). We subsequently affirmed that position in Class v. Norton, 505 F.2d 123, 126-127 (2d Cir. 1974), and Fitzpatrick v. Blitzer, 519 F.2d 559, 571 (2d Cir. 1975), aff'd in part, rev'd in part, 427 U.S. 445 (1976). Most recently, our position on this issue was restated in Gagne, 594 F.2d at 336. The State points to no decision since Gagne that causes us to question our long held position. 'Thus, we adhere to our own precedents, which we believe are consistent with Supreme Court authority, and hold that the award of attorneys' fees in this case was a permitted 'ancillary effect' of a proper prospective decree and therefore not barred by the Eleventh Amendment.' Gagne, 594 F.2d at 342.

See also *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 496 F.2d 1017, 4 E.L.R. 20643 (5th Cir. 1974), *cert. denied*, holding that the Texas Highway Department and its individual state officers were immune from attorney fee awards pursuant to eleventh amendment immunity citing to *Edelman v. Jordan* U.S. 94 S.Ct. 1347 39 L.Ed. 2d 662; *Ford Motor Company v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

Bad Faith

As in eminent domain proceedings where a specific statute was perhaps not available, the courts have considered the assessment of the fees under the "bad faith" exception to the American Rule. Thus, in *Sierra Club v. United States Army Corps of Engineers*, 776 F.2d 383, 15 E.L.R. 21039 (2nd Cir. 1985), attorney fees were assessed against the state in a case involving the once-proposed replacement of a portion of the lower Manhattan westside highway. As in the *State of Indiana v. Hicks*, 465 N.E. 2d 1146 (Ind. App. 1984), discussed in the eminent domain section above, the court in *Sierra Club* considered the question of whether the state was immune from an award of attorney fees for bad faith on the basis that bad faith constituted an award of punitive damages. The court held:

> Seizing on the punitive aspect of an award of bad faith attorneys' fees, the State claims that an award of bad faith fees is barred by the holding of City of Newport. We believe that an award of fees under the bad faith exception rests on different principles than does an award of punitive damages. Although the award of fees for bad faith has a punitive and deterrent flavor, the award serves a compensatory purpose. Cf. Stolberg v. Members of the Board of Trustees, 474 F.2d 485, 489-90 (2d Cir. 1973), cert. denied, 429 U.S. 897 (1976). That is why we require that the award be limited to those expenses necessary to counter the losing party's bad

faith. Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977). Thus, we do not find the rationale of City of Newport controlling. [453 U.S. at 466-67]

Our position is supported by relevant Supreme Court precedent. Hutto v. Finney, 437 U.S. 678 (1978). In its reliance on City of Newport, the State ignores Hutto, which is more directly on point. In Hutto, the court sanctioned the use of a fee award to secure a state's compliance with a district court's order. The basis of the award was the state's bad faith. Id. at 689. Nowhere did the Court suggest that such an award was barred as a form of retribution against innocent taxpayers. Thus, Hutto allows a federal court to so 'penalize' a state based on its bad faith conduct before the court and nothing in City of Newport indicates a retreat from that position.

In sum, a federal court has the inherent power to award attorney's fees against a party who litigates in bad faith. Such authority is a necessary incident to the power to regulate the conduct of the parties before the court. In the instant case, neither the Eleventh Amendment as construed in Edelman nor public policy as expressed in City of Newport immunizes the State from the result of the court's exercise of this power. Thus, we hold that the district court had the authority to award fees against the State.

With regard to bad faith there are two types: (1) prelitigation bad faith, when the bringing of unnecessary action is compelled by defendant's "unreasonable, obdurate obstinacy" (see *Stolberg v. Members of the Board of Trustees,* 474 F.2d 485 (2nd Cir. 1973)); and (2) bad faith during trial, when a party presents a colorless claim for improper purpose (see *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2nd Cir. 1977), on remand and superseded by statute stated in *Glaser v. Cincinnati,* 808 F.2d 285).

Sierra Club v. United States Army Corps of Engineers, supra, set forth the basis:

[T]o award fees under the bad faith exception a court must find clear evidence that the losing party's claims were 'entirely without color and made for reasons of harassment or delay or for other improper purposes.' Browning Debenture Holders, 560 F.2d at 1088; Eastway Construction, 762 F.2d at 253. [Footnote omitted.] The test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice. Colombrito v. Kelly, 764 F.2d 122, 133 (2d Cir. 1985); PRC HARRIS, Inc. v. Boeing Co., 700 F.2d 894, 898 (2d Cir.), cert. denied, 464 U.S. 936 (1983). Under this test, a claim is 'entirely without color' when it lacks any legal or factual basis. Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980) (per curiam) (Nemeroff I). While there is no precise definition of 'improper purpose' it may be evidenced by conduct occurring either before or during trial. Cf. Hall v. Cole, 412 U.S. 1, 15 (1973).

The court continued:

An award of fees under the bad faith exception calls for a two-tiered standard of review. A district court's determination that bad faith exists is a factual finding which may only be set aside if it is clearly erroneous. See Perichak v. International Union of Electrical Radio and Machine Workers, 715 F.2d 78, 79 (3rd Cir. 1983); Lipsig v. National Student Marketing Corp., 663 F.2d 178, 181 (D.C. Cir. 1980); Nemeroff I, 620 F.2d at 347. In addition, because that awarding of fees involves an exercise of equitable powers, the decision to award or deny fees lies in the discretion of the district court. Thus, even where the district court's finding of bad faith is not clearly erroneous, we must still review the award to determine if it was a proper exercise of discretion. See Perichak, 715 F.2d at 80; Nemeroff v. Abelson, 704 F.2d 652, 60-61 (2d Cir. 1983) (Nemeroff II); Lipsig, 663 F.2d at 181-82. If the court did not abuse its discretion, the award of fees must be affirmed.

Lodestar Approach

Once the determination has been made that it is appropriate to award attorney fees in environmental proceedings, the federal lodestar approach will generally be used. *Californians for Responsible Toxics Management v. Kizer,* 211 Cal. App. 3rd 961, 259 Cal. Rptr. 599 (1st Dist. 1989) illustrates this:

In federal cases once the court has determined that a plaintiff is the prevailing party and is eligible for a fee award, the inquiry shifts to what a reasonable fee will be. As the United States Supreme Court has noted in the context of fee awards under federal civil rights statutes, 'the range of possible success is vast,' and the achievement of prevailing party status alone 'may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.' (Texas State Teachers Assoc. v. Garland Independent School Dist. (1989) U.S., [103 L.Ed.2d 866, 876, 109 S.Ct. 1486, 1492]; quoting Hensley v. Eckerhart (1983) 461 U.S. 424, 436 [76 L.Ed. 2d 40, 52, 103 S.Ct. 1933].)

Absent the existence of California authority for the proposition that it is improper to consider lack of success as a lodestar adjustment factor, we are not prepared to say that the trial court here erred in doing so. Plaintiff did not succeed on any of its motions. Likewise the court made the factual finding that the result achieved was contributed to by 'many other agencies, political entities and individuals.'

Because plaintiff's claims probably cannot be easily segregated into successful ones and unsuccessful ones to which hours can easily be attributed (see Hensley v. Eckerhart, supra, 461 U.S. at pp. 434–436 [76 L.Ed.2d at pp. 50–52]), the trial court's assessment does not lend itself to a single mathematical calculation. We cannot say that a 35 percent fractional multiplier is arbitrary or bears 'no reasonable connection between the lodestar figure and the fee ultimately awarded.' (Press v. Lucky Stores, Inc., supra, 34 Cal. 3d at p. 324.)

As in eminent domain cases, the court will consider whether the expenditure of counsel's time was reasonable in relation to the success achieved. Furthermore, the court will consider whether plaintiff's claims can be easily segregated into successful and unsuccessful categories to which hours can easily be attributed. See *Californians for Responsible Toxics Management, supra.*

The court should take consensus of the reasonableness of fees as related to the degree of success obtained, and should, if feasible, exclude fees associated with claims upon which the party did not succeed and which are not integrally related to claims of the party prevailed upon. *Grano*

v. Barry, 783 F.2d 1104 (D.C. Cir. 1986). Duplicative time will be disallowed. *Sierra Club v. National Organization for the Reform of Marijuana Laws*, 619 F.Supp. 1244, 16 E.L.R. 20148 (D.C. 1985).

Again, as in the eminent domain area, the court will consider, with regard to time charged, ancillary proceedings and the reasonableness and relationship to the principal proceeding. As explained in *Californians for Responsible Toxics Management, supra,*:

> Relying on United States Supreme Court precedent (Webb v. Dyer County Bd. of Education (1985) 471 U.S. 234 [85 L.Ed.2d 233, 105 S.Ct. 1923]) this district has previously adopted the rule that an award under section 1021.5 for time spent in related administrative proceedings may properly constitute time reasonably expended in the action. (Wallace v. Consumers Cooperative of Berkeley, Inc., supra, 170 Cal.App. 3d at pp. 848–849.)

The court continued:

> The question is not whether the parties to the administrative action are the same parties involved in the lawsuit, but rather has the successful party made the requisite showing that time spent in a related administrative proceeding was reasonably expended on the litigation because it was both useful and necessary and directly contributed to the resolution of the action. (Webb v. Dyer County Bd. of Education, supra, 471 U.S. at pp. 242–243 [85 L.Ed.2d at p. 242]; Wallace v. Consumers Cooperative of Berkeley, Inc., supra, 170 Cal.App.3d at pp. 848–849.)

See in this regard also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439, 54 U.S.L.W. 5017, 16 E.L.R. 20801 (1986), and *North Carolina Department of Transportation v. Crest Street Community Council*, 479 U.S. 6, 107 S.Ct. 336, 936 L.Ed.2d 188, 55 U.S.L.W. 4001 (1986). The former case upheld the award of attorney fees for time expended in administrative matters which were "crucial to the vindication of Delaware Valley's rights . . .," citing to *Webb v. Board of Ed. of Dyer County*, quoted in *Californians for Responsible Toxics Management, supra.* In *North Carolina Department of Transportation, supra,* the Court held that attorney fees in an unrelated administrative proceeding could not be recovered.

Again, as in the eminent domain cases, the courts have noted a concern with the requirement to keep contemporaneous time records. See *Sierra Club v. United States Corps of Engineers, supra.*

Having established entitlement to attorney fees and reasonable hours expended, the court then determines a reasonable hourly rate. As explained in *Sierra Club v. Mullen*, 619 F. Supp. 1244, 16 E.L.R. 20148 (D.C. 1985):

> In establishing the lodestar rate, the Court must first determine a reasonable hourly rate, which this Circuit has defined as 'that prevailing in the community for similar work.' Copeland v. Marshall, 641 F.2d at 892. The fee applicant is charged with providing the Court with 'specific evidence' of the prevailing community rate for similar services which the attorney performed. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1325. Adequate proof includes affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases, fees awarded by courts or through settlements to attorneys of comparable experience rendering comparable services, and the hourly rate customarily charged by the fee applicant. 'What is needed are some pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate.' Id. at 1326.

See also *Sierra Club v. United States Army Corps of Engineers*, holding:

> First, although the district court indicated that it believed that the hourly rates charged by appellees' attorneys were reasonable, there is no indication that these rates were compared with rates 'charged for similar work by attorneys of like skill in the area.' Cohen, 638 F.2d at 506. Such a comparison 'should have been the starting point for determination of a reasonable award.' Id. In addition, the court did not determine that the hours spent on fisheries issues were reasonable and not redundant. Cf. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); Sealy Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984). Such a determination helps to ensure that the fees awarded only compensate for the expenses necessary to counter the bad faith. Cf. Browning Debenture Holders, 560 F.2d at 1088-89. Finally, the court did not adequately explain its decision to award appellees two-thirds of the cost incurred on the appeal in Sierra Club II. On remand, the court should either explain this decision or reconsider it, keeping in mind the partial success achieved by the State, the Corps and FHWA on appeal.

As noted in *Mertzlufft v. Bunker Resources Recycling and Reclamation*, 760 S.W. 2d 592 (Mo. App. 1988), federal statutes allow a balancing of equity on attorney fee questions. Accordingly, the court in determining the lodestar hourly rate may also determine and take into account, as noted in *Sierra Club*, any partial success achieved by the party against whom attorney fees are sought. Consequently, in the environmental case of *Woodland Hills Residents Association v. City Council of the City of Los Angeles*, 75 Cal. App. 3d 1, 141 Cal. Rptr. 857, 8 E.L.R. 20046 (1977), the court noted:

> [I]t is appropriate that the totality of circumstances be taken into account in each specific case to reach a result that is fair to the public entity and its taxpayers and to the victorious plaintiffs and their counsel. In many situations, such as that presented in the case at bench, the circumstances will indicate that fairness to all parties concerned will require that the city, county or state and its taxpayers not be saddled with the full value of the services of plaintiffs' attorneys since the benefit to plaintiffs is greater than the benefit to the taxpayers in general. In such a case the attorneys for plaintiffs cannot be expected to be reimbursed for the full value of their services unless their clients who have the more substantial interest in the outcome of the lawsuit and who receive the greater benefit are able to pay the greater proportion of the reasonable value of the services rendered by the attorneys.

With regard to the quality of the representations afforded as being a multiplier, the court in *Sierra Club v. Mullen, supra,* noted:

> We have found it all too common for the District Courts to adjust the lodestar upward to reflect what the courts view as a high level of quality representation. This trend should stop. Copeland contemplated such adjustments only for rare cases: A quality adjustment is appropriate only when the representation is unusually good or bad, taking into account the level of skill normally expected to an attorney commanding the hourly rate used to compute the 'lodestar.'

This thought, in the EAJA context has been seconded by the United States Supreme Court in *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed. 2d 490, in considering the special factors which would justify an increase in the hourly rate:

> If 'the limited availability of qualified attorneys for the proceedings involved' meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the $75 cap—since the 'prevailing market rates for the kind and quality of the services furnished' are obviously DETERMINED by the relative supply of that kind and quality of services. 'Limited availability' so interpreted would not be a 'special factor,' but a factor virtually always present when services with a market rate of more than $75 have been provided. We do not think Congress meant that if the rates for all lawyers in the relevant city—or even in the entire country—come to exceed $75 per hour (adjusted for inflation), then that market-minimum rate will govern instead of the statutory cap. To the contrary, the 'special factor' formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees whatever the local or national market might be. If that is to be so, the exception for 'limited availability of qualified attorneys for the proceedings involved' must refer to attorneys 'qualified for the proceedings' in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.

Already discussed with regard to eminent domain has been the contingency factor. Note should be made of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed. 2d 585, 55 U.S.L.W. 5113, 45 F.E.P.C. 1750, 17 E.L.R. 20929, 26 E.R.C. 1091, which is one of the primary cases relating to the contingency factor. The court gives a complete history of the difference in the circuits between allowing the risk of nonpayment to be considered as an enhancing factor on fee shifting statutes and noted: "that the practice of enhancing fees for risk of loss forces the losing defendant to compensate plaintiff's lawyers for not prevailing against defendants in other cases," and "also penalizes the defendants who have the strongest case; and in theory, at least, would authorize the highest fees in cases least likely to be won and hence encourage the bringing of more risky cases, especially by lawyers whose time is not fully occupied with other work."

The court concluded:

> that using a contingency enhancement is superfluous and unnecessary under the lodestar approach to setting a fee. The reasons a particular lawsuit is considered to be 'risky' for an attorney are because of the novelty and difficulty of the issues presented and because of the potential for protracted litigation. Moreover, when 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. These factors, however, are considered by the court in determining the reasonable number of hours expended and the reasonable hourly rate for the lodestar, and any further increase in this sum based on the risk of not prevailing would result not in a 'reasonable' attorney's fee, but in a windfall for an attorney who prevailed in a difficult case.

Summary

In considering attorney fees in environmental proceedings, the place of beginning is the applicable statute. Generally, under federal environmental statutes the award of fees is discretionary with the court and will not permit an award for time expended in unrelated administrative proceedings. State statutes may differ and caution should be exercised in relying on federal cases in an environmental action brought pursuant to a state statute. The court will generally use the lodestar approach using time as the principal factor. Other factors, as in eminent domain proceedings, will be considered by the court.

APPENDIX

TABLE 1

STATES' POSITIONS ON ASSESSMENT OF ATTORNEY FEES IN EMINENT DOMAIN CASES

STATE	POSITION
Alabama	Fees are generally not awarded, but see § 18-1A-290, ALA. CODE, allowing fees if award is not paid within 90 days or 60 days after determination of appeal. Fees are occasionally allowed by special statute with regard to some local condemning authorities. See *Mobile Housing Board v. Cross*, 229 So.2d 485 (Ala. 1969), upholding a population act requiring the payment of attorney fees by the Mobile Housing Board.
Alaska	ALASKA CIV. R. 72(k) prohibits the assessment of attorney fees unless: (1) the taking of property is denied; (2) the award of the court is at least 10 percent larger than the amount deposited by the condemning authority; (3) there is an allowance of the master from which an appeal was taken; (4) the action was dismissed; (5) the allowance of costs and attorney fees "appears necessary to achieve a just and adequate compensation of the owner." Attorneys fees are required to be commensurate with the time committed by the attorney for the case throughout

TABLE 1—Continued

STATE	POSITION
	the entire proceedings. See *State v. Alaska Continental Development Corporation,* 630 P.2d 977 (Alaska 1980).
Arkansas	Generally, attorney fees are not available to the defendant.
Arizona	Fees are awardable if the condemning authority cannot acquire property by condemnation, the proceedings are abandoned or there is a successful inverse condemnation. See ARIZ. REV. STAT. § 11-972. Application: This section is limited, however, by A.R.S. 11-974 requiring utilization of Article by governing body or utilization of Federal aid. See *Salez v. City of Tucson,* 756 p. 2d 348 (Ariz. App. 1988).
California	CAL. CODE CIV. PROC. § 1273.020(a) requires the condemnor in arbitration proceedings to pay all expenses of the arbitration, not including attorney fees, expert witness fees, or other expenses incurred by other parties for their own benefit. Subsection provides that an agreement "may require that the party acquiring the property pay reasonable attorney fees...." Law Revision comment notes that "absent such provision in the agreement, the party from whom the property is being acquired must pay his own attorney's fees...." Under § 1268.610, if the proceeding is wholly or partially dismissed for any reason or a final judgment is made in which the property cannot be acquired, attorney fees are awardable.
Colorado	Attorney fees are awardable to a landowner who prevails in inverse condemnation pursuant to COLO. REV. STAT. § 25-56-116, or if the court finds that the petitioner is not authorized to acquire property. See COLO. REV. STAT. § 38-1-122(1), attorney fees are not a part of just compensation. See *Leadville Water Company v. Parkville Water District,* 164 Colo. 362, 436 P.2d 659 (1967); *Department of Health v. HECLA Mining Company,* 781 P.2d 122 (Colo. App. 1989), *cert. denied* __ P.2d __, docket number 89 SC 400 (1989) (not final and subject to revision).
Connecticut	Under CONN. GEN. STAT. § 48-17(a), attorney fees are awardable if the condemning authority cannot acquire the property or the proceedings are abandoned and under § 48-17(b) in the event of successful inverse condemnation.
Delaware	DEL. CODE 10 § 6111 provides that counsel fees may not be taxed as costs. See *9.88 Acres of Land v. Delaware,* 274 A.2d 139 (Del. 1971), cited in text.
District of Columbia	Under D.C. CODE § 16-1321, attorney fees are awarded if the proceedings are abandoned, but not when abandoned at the request or with the consent of the owner.
Georgia	Attorney fees are not awardable. See *Dekalb County v. Trustees, Decatur Lodge,* 242 Ga. 707, 251 S.E.2d 243 (1978), cited in text.
Florida	"The petitioner shall pay all reasonable costs of the proceedings in the Circuit Court, including a reasonable attorney's fee to be assessed by that court." See FLA. STAT. § 73.091. (Also see, original article.)
Hawaii	HAW. REV. STAT. § 101-27 provides for attorney fees to be awarded upon abandonment, dismissal, or unsuccessful condemnation.
Idaho	IDAHO R. CIV. PROC., Rule 54(d)(1)(D) allows for the award of discretionary "costs." Pursuant to *Ada County Highway Dist. v. Acarrequi,* 105 Idaho 873 673 P.2d 1067, cited in text, this has been interpreted by the Idaho courts to allow, pursuant to Rule 54(e)(5), the award of attorney fees in the discretion of the court.
Illinois	ILL. STAT. ch. 110, para. 7-111, 7-123, and 7-122, authorizes the award of attorney fees on an appeal if there is no authority to maintain the proceeding, if the proceeding is dismissed, if the condemning authority fails to make full payment/compensation, or if there is judgment that

STATE	POSITION
	the condemning authority cannot condemn. Attorney fees are also awardable under § 7-122 in the event of any successful inverse condemnation.
Indiana	Litigation expenses not exceeding $2,500 are permitted under IND. STAT. § 32-11-1-10 in the event of a trial and the amount of damages, exclusive of interest and costs, is greater than the last offer under § 32-11-1-8.1.
Iowa	Under IOWA CODE § 472.33, attorney fees are awardable if the award exceeds 110 percent the final offer prior to condemnation.
Kansas	KAN. STAT. § 26-507 allows "reasonable expenses upon the abandonment of the proceedings." Fees are allowed under § 26-509 whenever the jury renders a verdict greater than the appraiser's award.
Kentucky	Under KY. REV. STAT. § 416.610(4), if the final judgment determines that the petitioner does not have the right to condemn, the court will enter final judgment directing petitioner to pay "all costs." The term "all costs" has been held not to include attorney fees. See *Kentucky v. Khieriem,* 707 S.W. 2d 340 (Ky. 1986).
Louisiana	Under LA. REV. STAT. § 19:8, "if the highest amount offered is less than the compensation awarded, the court may award reasonable attorney fees." LA. REV. STAT. §48:453[e] limits compensation to 25 percent of the difference between the award and the amount deposited with registry of the court. 19:8 has no ceiling; 48:453[E] does. For the differences, see *Louisiana Resources v. Noel,* 499 SO.2d 1016 (La. App. 1986).
Maine	Under title 23, § 154, if proceedings are instituted, then abandoned owner may be reimbursed for his reasonable attorney fees "actually incurred."
Maryland	MD. CODE §§ 12-106, 108, 109 permit attorney fees to be awarded to the defendant if the condemnation is not successful or is abandoned.
Massachusetts	Attorneys fees are not generally awarded.
Michigan	MICH. COMP. LAWS §§ 273.132, 213.190 provided that attorney fees are awarded to the condemnee if condemnation is abandoned after the jury is impaneled.
Minnesota	Attorney fees are awarded under MINN. STAT. § 117.195 if the condemnors unsuccessfully try or abandon suits or fail to pay the damages awarded by the court within 90 days of final judgment. Attorney fees are awardable if the proceedings are discontinued as if on a challenge under the Minnesota Environmental Rights Act § 116(D).01.
Mississippi	Attorney fees are awarded under MISS. CODE § 11-27-37 if the condemnors are unsuccessful, abandon the suit, or fail to pay damages and the costs awarded to the defendant within 90 days after the final judgment.
Missouri	Fees are not awarded.
Montana	MONT. CODE § 70-30-305 and 306 authorizes fees if property owner prevails by recovering greater award than final offer. Reasonable fees are based on "customary hourly rates" for the county in which the trial is held.
Nebraska	NEB. REV. STAT. § 76-720 authorizes fees if condemnee appeals and receives 15 percent greater than appraiser's award, if condemnor appeals and final judgment is not less than 85 percent of award.
Nevada	In NEV. REV. STAT. § 20:3-26 fees are awarded upon successful inverse condemnation, or if condemnation is abandoned or unsuccessful.
New Hampshire	Fees are not awarded.
New Jersey	Fees are awarded upon successful inverse condemnation, and if condemnation is abandoned or unsuccessful pursuant to N. J. STAT. § 20:3-26.
New Mexico	Fees are awardable pursuant to N. M. 1978 STAT. § 42A-1-25 if proceedings are abandoned, dismissed, or if the condemning authority has no right to take.

TABLE 1—Continued

STATE	POSITION
New York	Under New York statutes E.D.P.L. § 702, fees are awarded if the proceedings are abandoned, not legally authorized, or arise as a result of inverse condemnation after the condemnor denies taking and has made no offer to settle the claim.
North Carolina	N. C. GEN. STAT. § 1-209.1 authorizes fees upon abandonment of the proceedings.
North Dakota	North Dakota provides for a discretionary allowance of fees pursuant to N.D. CENT. CODE § 32-15-32. See *Unified Power v. Faber*, 277 N.W. 2d 287 (N.D. 1979).
Ohio	OHIO REV. CODE ANN. § 163.62 makes attorney fees available if condemnation is unsuccessful or is abandoned.
Oklahoma	Under OKLA. STAT. ANN. 27 §11, attorney fees are awarded if condemnation is unsuccessful, abandoned, or if condemnee/appellee gains award greater than 10 percent of award by commissioners. Under 27 § 12 attorney fees are awarded to plaintiff in successful inverse condemnation.
Oregon	Under ORE. REV. STAT. § 35-275, private condemnor must pay attorney fees. Section 35-335: Attorney fees are awarded for abandonment. Section 35-346: Attorney fees are awarded when there is a trial and the award by trial is greater than highest offer or first written offer by condemnor if made in bad faith. Under § 35.355: If defendant prevails on appeal from trial award, he receives attorney fees.
Pennsylvania	Purdon's PA. STAT. ANN. 26 § 1-610: Attorney fees are awarded generally up to $500. 26 § 1-408, 26 § 1-609: Attorney fees are awarded upon abandoned condemnation and to successful plaintiff in inverse condemnation. 26 § 1-406(e): If condemnee objects within 30 days of notice of taking and if objection is sustained, he may receive attorney fees.
Rhode Island	R.I. GEN. LAWS § 37-6-28 provide that agencies will fully comply with 42 U.S.C. §§ 4601-4655 "by making all of the payments authorized and set forth in said federal act...."
South Carolina	S.C. CODE LAWS 1976, § 28-2-510 authorized "landowner's reasonable costs and litigation expenses" in the event the condemnor has no right to take.
South Dakota	S. D. CODIFIED LAWS § 21-35-22 authorizes fees if proceeding is dismissed. Section 21-35-23 authorizes fees if award is 20 percent greater than final offer filed with the court at time trial commenced and if award exceeds $700.
Tennessee	TENN. CODE § 29-16-119 provides that if the verdict of the jury affirms the finding of the jury of inquest or is more unfavorable to appellant, costs awarded against the appellant. Otherwise costs are awarded as in chancery cases. Under § 29-17-812 reasonable attorney fees are allowed if the judgment is that the condemnor cannot acquire or the proceedings are abandoned.
Texas	Vernon's TEX. CODE ANN. § 21.046 authorizes a relocation assistance program compatible with the Federal Uniform Relocation and Real Properties Acquisition Policies Act of 1970. Section 21.019 provides for fees upon motion by the condemnor to dismiss the proceedings.
Utah	UTAH CODE ANN. § T8-34-16: Attorney fees are awarded upon abandonment.
Vermont	VT. STAT. title 19, § 512 authorizes fees if the landowner prevails in inverse condemnation under title 19 (Highways), as a result of acquisition of real property for a federal program; or federal financial assistance will reimburse reasonable attorney fees.
Virginia	IN VA. CODE §§ 25-16.34, 25-250, 25-251, attorney fees are awarded if condemnation is dismissed, abandoned, or is unsuccessful; attorney fees are also awarded to successful plaintiff in inverse condemnation.
Washington	WASH. REV. CODE § 8.25.070 provides for an award of fees if: (a) condemnor fails to make written offer of settlement at least 30 days prior to commencement of trial; or (b) judgment exceeds highest written offer per above by 10 percent. Fees "shall not exceed the general trial rate per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly Rate for preparation."
West Virginia	W. VA. CODE § 54-3-3 authorizes implementation of Uniform Relocation Assistance Act, 42 U.S.C. § 4601.
Wisconsin	WIS. STAT. § 32.28(3) authorizes fees if (a) the proceedings are abandoned; (b) the court determines that there is no right to condemnor in part or all; (c) judgment is for plaintiff in inverse condemnation proceeding; or (d) the award exceeds jurisdictional offer by at least $700 and at least 15 percent.
Wyoming	WYO. STAT. § 1-26-5161 authorize litigation expenses in the event of a damage award to the owner in inverse condemnation. Under § 1-26-604(b), the court may award condemnee's litigation expenses incurred after a demand is filed, if the condemnor files a demand for retrial and ultimately obtains judgment no more favorable than the previous one.

GEOFFREY B. DOBSON
Attorney at Law
Dobson & Christensen, P.A.
St. Augustine, Florida

APPLICATIONS

The foregoing research should prove helpful to attorneys representing transportation agencies or other governmental bodies responsible for environmental issues in transportation programs, and private sector attorneys practicing eminent domain or environmental law.

[a] Formerly with Texas Office of the Attorney General
[b] Formerly with Federal Highway Administration
[c] Formerly with California Department of Transportation
[d] Formerly with Colorado Department of Highways