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Payment of Attorney Fees in Eminent Domain and Environmental Litigation*

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and 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 for John C. Vance, TRB Counsel for Legal Research, principal investigator, serving under the Special Technical Activities Division of the Board.

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 special problems involving right-of-way acquisition and control, as well as highway law in general. This report deals with the legal questions surrounding payment of attorney fees in eminent domain and environmental litigation.

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RESEARCH FINDINGS

Payment of Attorney Fees in Eminent Domain and Environmental Litigation

By Geoffrey B. Dobson *

Meredith & Dobson
St. Augustine, Florida

INTRODUCTION

In recent years there has been an apparent statutory trend in the United States for payment of landowner's attorney fees by condemning authorities in eminent domain proceedings. For example, in 1971 at least seven states had adopted provisions for payment of landowner's attorney fees as a part of normal condemnation proceedings, and by the end of 1976 at least twelve states had adopted such provisions. In addition, provisions requiring payment of attorney fees in condemnation proceedings for special condemnors or special instances have found their way into laws in a number of other states. Courts have suggested that provisions precluding payment of such attorney fees are unfair and that the law should be changed. Indeed, in at least one example the court has taken upon itself to find that the constitutional requirements of "just compensation" require payment of a landowner's attorney fees in eminent domain proceedings.[1]

So, too, with adoption of the National Environmental Protection Act and the coincident increase in the number of cases directed toward environmental issues there has been a growing awareness and growing litigation concerning payment of attorneys' fees in such proceedings. *Alyeska v. Wilderness Soc'y,* 421 U.S. 240, 44 L.Ed.2d 141, 95 S.Ct. 1612 (1975), addresses itself to the question, concluding that under the "American rule" counsel fees are generally awardable only pursuant to statute or to an enforceable contract absent narrow exceptions which constitute "assertions of inherent power in the courts to allow attorneys' fees in particular situations." However, the *Alyeska* decision does not end the question; other theories, permitting fees, are still being debated.

Thus, the purposes of this paper are to explore the background of the present trend toward payment of attorneys' fees in eminent domain proceedings and to determine those situations in which attorneys' fees should be paid and should not be paid, the manner of determination of the fees, and the factors considered by the courts in determining the

* Mr. Dobson was formerly Chief Counsel of the Florida Department of Transportation.

[1] White v. Georgia Power, 237 Ga. 341, 227 S.E.2d 385 (1976).

amount thereof. In addition, the paper discusses those situations in which attorneys' fees may still be awarded in environmental actions in spite of the decision in *Alyeska.*

An attempt is made, however, to limit the discussion of the subject to those cases arising in environmental or eminent domain proceedings, and consideration will be given to attorneys' fees cases arising in other areas only to the extent that they reflect on or contrast with attorneys' fees in the areas being considered. So, too, the question of attorneys' fees in the area of "inverse condemnation" is considered only narrowly and primarily as it relates to environmental law, it appearing that inverse condemnation is, in reality, a different field of law from eminent domain itself and is treated differently under the various state statutes. So, too, consideration of the award of attorneys' fees upon the abandonment of eminent domain proceedings is considered only to the extent that it reflects on the amount of fees paid, inasmuch as the majority of the states at present pay landowners' attorneys' fees upon the abandonment of eminent domain cases.

ATTORNEY FEES IN EMINENT DOMAIN PROCEEDINGS

The question of whether the landowners' attorneys' fees should be paid in eminent domain proceedings has been debated and considered at least since 1878 when a statute providing for such fees in North Carolina was repealed. As noted in *Alyeska v. Wilderness Soc'y, supra,* the general American rule as to attorneys' fees is that the prevailing litigant is ordinarily not entitled to collect an attorney's fee from the loser. This rule, with few exceptions, has been applied in eminent domain cases. Thus, the courts have generally held that in eminent domain cases the allowance of costs and disbursements is purely statutory. See *State v. Carter,* 300 Minn. 495, 221 N.W.2d 106 (1974); *United States v. 40 Acres of Land, etc.,* 162 F.Supp. 939 (D. Alaska 1958); *Fellers v. State Highway Comm'n,* 214 Kan. 630, 522 P.2d 341 (1974); *County of Los Angeles v. Ortiz,* 6 Cal. 3d 141, 98 Cal. Reptr. 454, 490 P.2d 1142 (1971).

Nevertheless, over the years the courts of some of the states have recognized some exceptions that will authorize payment of attorneys' fees absent a specific state statute so authorizing. In addition, the courts have considered the question of interpretation of existing statutes relating to costs, or other matters, as authorizing the payment of such fees. The question of applicability of various state statutes to particular factual situations has also been considered along this line.

Constitutional Basis

Early in this century the argument began to be advanced that the cost of an eminent domain proceeding, including counsel fees and other disbursements, were a part of the "just compensation" guaranteed by the various constitutional provisions of the various states. Although no

cases so held specifically, suggestions appear in a number of cases primarily relating to costs or relating to attorneys' fees where allowed by statutes. As an example, as early as 1905, *In Re Water Supply in City of New York,* 125 App. Div. 219, 109 NYS 652 (1908), the New York Appellate Division noted:

> The city of New York is authorized to take real estate for the purposes of its water supply under the power of eminent domain. By the provisions of Section 507 it is authorized to agree upon the price to be paid; but it does not appear to be obliged to attempt such an agreement as a condition of exercising the power to take by condemnation. It desires a man's property. The individual knows that he must agree upon the price or submit to the award of commissioners, and with this advantage on the part of the City of New York it compels the owners of real estate to take its figures or to litigate the value of the property to be taken. The Constitution requires that private property shall not be taken for public purposes except upon the payment of "just compensation"; and a man who is forced into court, where he owes no obligation to the party moving against him, cannot be said to have received "just compensation" for his property if he is put to an expense appreciably important to establish the value of his property. He does not want to sell. The property is taken from him through the exertion of the high powers of the State, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing of that value.

The statements are, however, merely dicta in that the Court held the payment of attorneys' fees was required by statutory provisions.

Subsequently, there have appeared other cases relying primarily on *Lewis on Eminent Domain,* Third Edition, § 812, which make a similar argument. In this regard see *Grand River Dam Authority v. Jarvis,* 124 F.2d 914 (10th Cir. 1942), construing Oklahoma law:

> It seems to us that courts should be guided by the following principles and considerations in the matter of costs: By the Constitution the owner is entitled to "just compensation" for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all of the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional.
>
> See also *State Highway Comm'n v. Mason,* 192 Miss. 577, 6 So.2d 468 (1942).

In recent years, the courts have seen a revival of the argument, the three most notable examples being *County of Los Angeles v. Ortiz,* 6 Cal. 3d 141, 98 Cal. Rptr. 434, 490 P.2d 1142 (1971); *State v. Carter,*

300 Minn. 495, 221 N.W.2d 106 (1974); and *White v. Georgia Power,* 237 Ga. 341, 227 S.E.2d 385 (1976). In *Ortiz,* landowners, in arguing that litigation expenses are necessarily included in the concept of "just compensation," relied extensively on decisions containing broad language such as quoted previously. The California Court, however, pointed out that such cases, in reality, deal with "ordinary costs such as statutory witness fees and jury fees." This distinction has also been noted by the courts of other states. In *State v. Barineau,* 225 La. 341, 72 So. 2d 869 (1954), the Court noted:

> To hold that the owner must pay his own costs in resisting attempts to take his land without his consent would nullify to a certain extent the Constitutional guarantee of just and adequate compensation, Art. 1, Section 2, La. Const. of 1921, which "clearly contemplates that the class of expenses usually taxed as costs should be included as an element of the owner's damage. . . ." (Citations omitted.)
>
> The judgment of the District Court is not limited; it decrees that the State shall pay all costs—meaning, of course, legal costs in proceedings of this type.

In recent years, however, cases have arisen in states which, by statute, permit or authorize attorney fees. These cases suggest, as did the New York Court in *In Re Water Works, supra,* that attorney fees and other litigation expenses are a part of the concept of just compensation. Both the California Court in *Ortiz, supra,* and the Minnesota Court in *Carter, supra,* referred to *Dade County v. Brigham,* 40 So.2d 602 (Fla. 1950), as holding that the constitutional concept of just compensation includes certain litigation expenses. Indeed, in regard to attorney fees, Florida decisions, as well as cases from other states authorizing such fees by statute, have suggested that such fees are a part of the "just compensation" to which the owner is entitled. [*Division of Administration v. Condominium International,* 317 So.2d 811 (3 Fla. App. 1975)].

With the exception of the Georgia decision in *White v. Georgia Power,* 237 Ga. 341, 227 S.E.2d 385 (1976), however, statements by the courts that just compensation requires the payment of attorneys' fees are dicta. In each case a statute specifically authorized the payment of the fees. As pointed out in *Division of Admin. v. Grant Motor Co.,* 345 So.2d 843 (2 Fla. App. 1977):

> Defendant contends that the constitutional guarantee to full compensation for property taken by eminent domain includes all expenses incurred in any forum while in pursuit of full compensation. Article X, Section 6(a), Florida Constitution, provides that:
>
> > "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."
>
> Although statutory authorization for payment of costs incurred in an eminent domain action pertains only to proceedings in the circuit court, Section 6 of Article X of the Florida Constitution is self-executing and,

therefore, does not require enabling legislation to justify award of items contemplated by full compensation. *Jacksonville Expressway Auth. v. DuPree Co.*, 108 So.2d 289 (Fla. 1958).

Full compensation consists of two elements, the value of the property taken and severance damages to any remainder. Compare *Daniels v. State Road Department*, 170 So.2d 846 (Fla. 1964) with *DuPree Co., supra.* Defendant's reliance on cases which by way of dicta have said that full compensation includes the expenses of establishing the amount of full compensation is misplaced. See *State v. Florida State Improvement Commission*, 47 So.2d 601 (Fla. 1950); *DuPree, supra.* In *Florida State Improvement Commission* and in *DuPree* the court found statutory authority to justify the cost award.

Thus, it must be concluded that the just compensation clause of a State constitution generally will not be held by itself to require the payment of attorneys' fees.

Statutory Basis

Except as noted in the foregoing, the courts have uniformly held that payment of such fees is not a part of "just compensation" and, thus, must necessarily be authorized by statute before the condemning authorities will be required to pay them as a part of the landowner's damages. As pointed out in *County of Los Angeles v. Ortiz, supra:*

> In resolving the dilemma, as we must, we are impressed with the authorities which are almost unanimously in agreement that there is no constitutional compulsion toward litigation costs to a landowner and a condemnation proceeding, defendants have not offered any persuasive justification for overruling this virtually unbroken line of interpretive decisions. It follows that since allowable costs are of policy, as distinguished from constitutional dimension, determination of costs which are permissively recoverable remains with the legislature rather than the Courts. There being no statutory authority for awarding litigation costs, as that term has been used herein, we conclude the trial court properly upheld the county's objection to the costs bills.

In this regard see also *State v. Carter*, 300 Minn. 495, 221 N.W.2d 106 (1974); *In Re Clark's Estate*, 187 F.2d 1003 (5th Cir. 1951); *City of Ottumwa v. Taylor*, 251 Iowa 618, 102 N.W.2d 376 (1960); *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); *Comm'n of Conservation v. Connor*, 316 Mich. 565, 25 N.W.2d 619 (1947), citing to *Dohany v. Rogers; Bowers v. Fulton County*, 227 Ga. 814, 183 S.E.2d 347 (1971) overruled by *White v. Georgia Power*, 237 Ga. 341, 227 S.E.2d 385 (1976).

Although in the middle and latter part of the 19th Century a number of states adopted statutes requiring payment of landowner's attorneys' fees in eminent domain proceedings, most of these statutes were subsequently repealed so that by the 1950's the general American rule was that in condemnation proceedings brought by a public body, attorney's fees were not paid to a landowner's attorney. In recent years, however, there has again been a trend toward adoption of statutes authorizing payment of such litigation expenses either in all, or at least in some, instances. In 1971, for example, only seven states had statutes authorizing payment of attorneys' fees in eminent domain proceedings. By the end of 1976, at least 12 states had such a provision. This trend received impetus from two sources: First, the passage in 1970 of the Uniform Relocation Assistance and Land Acquisitions Policies Act of 1970, 42 U.S.C. § 4621, *et seq.* Section 4654 of Title 42, requires, in general terms, payment of certain litigation expenses in the event (a) of a final judgment that the federal agency could not acquire the property by condemnation, (b) of abandonment of the proceeding by the agency, or (c) of a successful action in inverse condemnation by a plaintiff against the agency.

Section 1655 of Title 42, prohibits the head of a federal agency from approving:

> . . . any program or project or any grant to, or contract or agreement with, a State agency under which federal financial assistance will be available to pay all or part of the costs of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he received satisfactory assurance from such State agency that . . . (2) property owners will be paid or reimbursed for necessary expenses as specified in Sections 4653, and 4654 of this Title.

Accordingly, most of the states have adopted statutes authorizing payment of attorneys' fees, but only to the extent required by the Act.[2]

Second, the Uniform Eminent Domain Code has been recommended to the various states for adoption. Section 1205 provides in part:

> (b) If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the defendant under Section 708, the court shall allow the defendant his costs under subsection (a) and in addition his litigation expenses in an amount not exceeding the greater of [ ] dollars or [25] percent of the amount by which the compensation awarded exceeds the amount of the plaintiff's last offer of settlement made under Section 203 or 708.
>
> [(c) If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or less than the amount specified in the last offer of settlement made by the plaintiff under Section 708, the defendant shall not be entitled to his costs incurred after the date of service of the offer.]

Under § 103(14) the term "litigation expenses" is defined to mean:

> The sum of costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual court proceedings.

[2] See Table 1 (Appendix).

In addition, even though a state may not have adopted a general statute authorizing payment of litigation expenses or attorneys' fees, statutes may have been enacted which deal with particular condemning authorities. See for example, N.C. GEN. STAT., § 160-456(10)(h)(3). The constitutionality of such provisions has been upheld. See *Mobile Housing Board v. Cross,* 285 Ala. 94, 229 So.2d 485 (1969), holding that the legislature may make attorneys' fee provisions for just some condemnors and that such provisions are not unconstitutional as being discriminatory.

On occasion, efforts have been made to claim attorneys' fees on the basis of statutes not directly relating to eminent domain. In *Virgin Islands Housing & U.R.A. v. 19.0976 Acres of Land,* 172 F.Supp. 333 (D.V.I. 1959), the Court allowed the recovery of attorneys' fees under a statute authorizing the same to the prevailing party. However, it should be noted that statutes or rules authorizing attorneys' fees to a "prevailing party" will not authorize attorneys' fees to be paid to the condemnor. See *City of Anchorage v. Scavenius,* 539 P.2d 1169 (Alaska 1975), denying attorneys' fees to the condemnor under Rule 82, ALASKA RULES OF CIV. PROC. Similarly, courts have held that costs should not be taxed against the landowner under a statute authorizing such costs to be taxed in the case of a tender, this constituting a reduction in "just compensation" required by the State constitution. In *Keller v. Miller,* 63 Colo. 304, 165 P. 774 (1917), the Court held that the landowner "should not be prejudiced by having refused a tender made prior to the beginning of the proceeding." But see *Bruno v. State Highway Comm'n,* 146 Kan. 375, 69 P.2d 743 (1937), which taxed costs against the condemnee where the verdict was less than the amount of the tender. The Court did not, however, discuss the constitutional question of whether such reduction caused the amount paid to be less than "just compensation."

Additionally, efforts made to collect attorneys' fees in state courts pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, have been unsuccessful. See *City of Buffalo v. J. W. Clement, Co., Inc.,* 360 N.Y.S.2d 362, 45 A.D.2d 620 (1974), holding that the act did not apply to actions brought in the State court.[3]

With the growing trend toward adoption of statutes authorizing the payment of litigation expenses, the question arises as to whether such fees and expenses should be paid in cases pending at the time of the effective date of such enactment. The courts are divided on this issue.[4] The Pennsylvania courts have held that their particular statute is prospective and does not authorize the payment of fees in on-going cases. See *Commonwealth, Dep't of Transp. v. Gehris,* 339 A.2d 639 (Pa. Comwlth. 1975). See also *Patterson v. County of Allegheny,* 325 A.2d 484 (Pa. Comwlth. 1974). Other courts have held, however, that the attorneys' fees statute is remedial and may be applied to actions pending at the time of the effective date of the statute. *Fellers v. State Highway Comm'n,* 214 Kan. 630, 522 P.2d 341 (1974). See also *City of Wichita v. Chapman,* 214 Kan. 575, 521 P.2d 589 (1974); *City of Bellingham v. Eiford Constr. Co.,* 10 Wash. App. 606, 519 P.2d 1330 (1974) and *Wallace v. House,* 538 F.2d 1138 (5th Cir. 1976), a non-eminent domain case.

[3] For similar rationale see Sibley v. Volusia County, 2 So.2d 578 (Fla. 1941).

[4] In Louisiana the question was solved legislatively. Acts 1974, Ex. Sess., No. 30, amending and reenacting. LA. REV. STAT. 48.460 provided that the provisions of the Act would not affect any action, suit, or proceeding filed prior to the effective date.

The rationale as to why such statutes can be applied to pending cases was explained in an early case from Illinois, *Chicago & W.I.R. Co. v. Guthrie,* 192 Ill. 579, 61 N.E. 658 (1901).

> Such amendment merely affects the method of procedure, the remedy, and the law is well settled that there can be no vested right in any particular remedy or method of procedure, in that while the general rule is that statutes will not be so considered as to give them a retrospective operation unless it clearly appears that such was a legislative intention, still when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether suit had been instituted or not, unless there is a savings clause as to existing litigation.

Factors to Be Considered in Assessing Fees

The starting point in determination of fees in eminent domain proceedings is the statute under which the fees are authorized. The statutes of the various states differ. Some merely provide for assessment of a "reasonable fee." Others set forth the method or factors that should be utilized by the Court. In the State of Washington, for example, § 8.25.070(4) of WASH. REV. CODE ANN. provides:

> (4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day for actual trial time and the general hourly rate for preparation as provided in the minimum bar fee schedule of the county or judicial district in which the proceeding was instituted, or if no minimum bar fee schedule has been adopted in the county, then the trial and hourly rates as provided in the minimum bar fee schedule customarily used in such county. Not later than July 1, 1971, the administrator for the courts shall adopt a rule establishing standards for verifying fees authorized by this section. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

In contrast, however, Florida Statutes § 73.092 provides:

> 73.092 Attorney's fees.—In assessing attorney's fees in eminent domain proceedings, the court shall consider:
>
> (1) Benefits resulting to the client from the services rendered.
>
> (2) The novelty, difficulty, and importance of the questions involved.
>
> (3) The skill employed by the attorney in conducting the case.

(4) The amount of money involved.
(5) The responsibility incurred and fulfilled by the attorney.
(6) The attorney's time and labor reasonably required adequately to represent the client.

However, under no circumstances shall the attorney's fees be based solely on a percentage of the award.

Where the statute is silent, or at least does not enumerate the factors or the method by which the fee is determined, the starting point in the assessment of fees is, generally, the factors set forth in the applicable canons of ethics. See *Redevelopment Comm'n of Hendersonville v. Hyder,* 20 N.C. App. 241, 201 S.E.2d 236 (1973); *Manatee County v. Harbor Ventures, Inc.,* 305 So.2d 299 (2 Fla. App. 1974). See also *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1974), which, although not an eminent domain case, contains an interesting discussion of the procedures to be followed and the factors to be considered in assessing attorneys' fees.

Section D.R. 2–106(B) of the Code of Professional Responsibility of the American Bar Association provides:

> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

The difficulty in assessment of fees is the question of what weight is to be given to each of the factors enumerated in the Code. As indicated in a non-eminent domain context in *Lindy Bros. Bldrs., Inc. v. American R&S San. Corp.* (Lindy I), 487 F.2d 161 (3d Cir. 1973), [See *Lindy Bros. Builders, Inc. v. Am. Radiator, etc.,* 540 F.2d 102 (3rd Cir. 1973) (Lindy II)], "the mere listing" of the factors considered by the court "makes meaningful review difficult and gives little guidance to attorneys and claimants." Much the same point was made in *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714, 7 F.E.P. Cases 1 (5th Cir. 1974),

in which the warrant of attorneys' fees by the District Court was reversed for failure to "elucidate the factors which contributed to the decision and upon which it was based."

Some of the more important of the foregoing factors are considered separately in the following as they relate to eminent domain cases.

Time and Labor Required

As pointed out in *Lindy Bros. Bldrs., Inc. v. American R&S San. Corp.,* 487 F.2d 161 (3d Cir. 1973), in non-eminent domain context, the starting point in the consideration of a fee is the time spent:

> . . . (W)e must start from the purpose of the award: to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant. Before the value of the attorney's services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the hours devoted to various general activities (e.g., pretrial discovery, settlement negotiations) and the hours spent by various classes of attorneys (e.g., senior partners, junior partners, associates), the court cannot know the nature of the services for which compensation is sought.

As stated in *Manatee County v. Harbor Ventures, Inc.,* 305 So.2d 299 (2 Fla. App. 1974):

> While the time a lawyer spends on a given case is only one factor to be considered in setting his fee, it must be given considerable weight because as has often been said in justifying the size of attorneys' fees, "a lawyer's time is his stock in trade."

In considering the factor of time, the Courts have been concerned with whether the time was expended on matters which are compensable under the applicable statute, the reasonableness of the expenditure of the time, the hourly rate, and the failure of the attorney to keep records.

One of the prime considerations is whether the time expended by the landowner's attorney is time for which compensation may be claimed under the applicable statute. Often it will be found that a landowner's attorney has devoted time to other matters only indirectly related to the eminent domain proceeding. Such matters can include questions pertaining to zoning, see *Dade County v. Oolite Rock Co.* (Oolite I), 311 So.2d 699 (3 Fla. App. 1975); services rendered prior to initiation of the appeal for which fees were allowed, *Johnson v. Nebraska Public Power District,* 187 Neb. 421, 191 N.W.2d 594 (1971); matters not directly related to dismissal of action and items incurred in the suit after notice of intention to dismiss, *Cook County v. Chicago Copper and Chemical Co.,* 314 Ill. App. 485, 41 N.E.2d 983 (1942); conferences

related to proposed legislation and conferences with the foreman of a grand jury, *Port Luis Harbor District v. Port San Luis Transp. Co.*, 213 C.A.2d 689, 29 Cal. Rptr. 136 (1963).

As indicated in *Johnson v. Nebraska Public Power District, supra,* some courts have held that no award would be made for time expended prior to the initiation of the case for which fees are to be awarded.

As stated in *In Re Kent County Airport,* 368 Mich. 678, 118 N.W.2d 824 (1962):

> Once the proceeding has been instituted, reasonable attorney fees should be awarded for work done in preparation for trial. However, attorney fees for work done prior to the actual initiation of proceedings should not be included in the award since until the proceedings are underway, it cannot be said that condemnation has been begun under the statute and the Constitution.

But see, on the other hand, *City of Columbus v. Rugg,* 97 Ohio App. 26, 123 N.E.2d 299 (1954), allowing fees for "all legal services rendered incident to the appropriation proceeding, whether such services were rendered before or after the proceeding was instituted." See also *State Dep't of Transp. v. Grice Electronics,* 356 So.2d 7 (1 Fla. App. 1977), allowing "compensation to appellee's attorneys for work performed before suit was filed but after condemnation was imminent."

Examination of the statutes of the different states reflects that in at least some of them the landowner must prevail before he is entitled to attorneys' fees. In some instances it might be possible for the landowner to prevail as to some issues and for the condemnor to prevail as to others. The question then arises as to whether time expended by the landowner's attorney on issues as to which he is unsuccessful are compensable. In at least some non-eminent domain areas, time expended on unsuccessful efforts has been held to be noncompensable. In *Taylor v. Goodyear Tire & Rubber Co.,* 6 F.E.P. Cases 672 (N.D. Ala. 1973), a Fair Employment Practices case, the Court held:

> Plaintiffs seek an award for all efforts, successful and otherwise. The Court has considered the authorities cited in support of this proposition and is not persuaded by them. Obviously there is not necessity for plaintiffs to recover an award of damages in order to be entitled to attorneys' fees if due to plaintiffs' efforts discriminatory practices were stopped. *Clark v. American Marine Corp.,* 320 F.Supp. 709, 12 F.E.P. Cases 670 (E.D. La. 1970). It may be as plaintiffs suggest in their brief that the lawsuit had a certain prophylactic effect but that is not established from the evidence presented to the Court. The Court is of the opinion that plaintiffs and intervenors are entitled to a fee for their successful effort in adjusting seniority rights and in recovering the sick pay differential and that their efforts on job classifications and back pay efforts which were unsuccessful cannot be regarded by the Court. The statute provides for fees to the prevailing party and with respect to these issues plaintiffs did not prevail. It is as if these two issues had been brought in separate suit and defendants had prevailed. Under such circumstances the Court would not be entitled to award fees for that effort. The fact that these contentions were coupled with two other theories on which success was obtained does not change this result. The Court is of the opinion, therefore, that the unsuccessful efforts have to be entirely disregarded. *Union Leader Corporation v. Newspapers of New England, Inc.,* 218 F.Supp. 490 (D.C. Mass. 1963), vacated on other grounds 333 F.2d 798 (1st Cir. 1964); *Gunn v. Layne & Bowler, Inc.,* 1 F.E.P. Cases 383, 69 LRRM 2237–2233, 1 E.P.D. § 9823 (D.C.W.D. Tenn. 1967).

See also *EEOC v. Western Electric Co.,* 10 F.E.P. Cases 1275 (D.Md. 1975), in which fees were allowed in part and disallowed in part on time expended in the preparation and argument of a motion for summary judgment as to which there were seven grounds. The motion was successful as to four grounds and unsuccessful as to three grounds; therefore, the Court disallowed three-sevenths of the alleged 430 hours of time expended by the defendant's attorneys.

On the other hand, where the statute does not require that the landowner "prevail" in order to be entitled to attorneys' fees it has been held that fees will be permitted even as to time expended on unsuccessful efforts. See *Hodges v. Division of Admin., State Dep't of Transp.,* 323 So.2d 275 (2 Fla. App. 1975 wherein the Court stated:

> Fla. Stat. § 73.091 (1973) requires the condemning authority to pay all reasonable costs and attorneys' fees incurred by the property owner. The purpose of this statute is to permit the owner to contest the value placed on his property by the condemning authority and at the same time come out whole. In *City of Miami Beach v. Liflans Corp.,* Fla. App. 3d 1972, 252 So.2d 515, the court held that the property owner in a condemnation action was entitled to an award of attorneys' fees even though the jury returned a verdict of zero compensation. Here, the question of business damages was close, and the issue was only resolved at the trial of the case. In fact, the Department's motion for summary judgment on this issue had been denied just a few days before the trial. Under the circumstances, it was reasonable for the Hodges' to line up expert witnesses to testify on business damages and to have their attorneys make the preparations necessary to try to recover these damages.
>
> Accordingly, that portion of the judgment pertaining to attorneys' fees and costs is reversed, and the case is hereby remanded to tax the reasonable costs of expert witnesses relating to the attempted proof of business damages and to award reasonable attorneys' fees for the services of the Hodges' attorneys including their services on the issue of business damages.

Disallowance of duplicative time is also authorized by the courts. As pointed out in *Harmony Lanes v. State Dep't of Roads,* 193 Neb. 826, 229 N.W.2d 203 (1975):

> An examination of the record and the affidavits as to services tends to establish some duplication and multiplicity of services and counsel. In Anderson v. State, 184 Neb. 467, 168 N.W.2d 522, we said: "The Statute

contemplates but one fee and the amount allowed should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services of two or more attorneys."

Counsel for a condemnor should consider the possibility that a tender may result in the exclusion of that portion of the attorney's fee accruing subsequent to the making of the tender. Rule 68 of the Federal Rules of Civil Procedure provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Similar rules will be found in the Rules of Procedure for many of the states.[5] While recognizing that the making of an offer of judgment or tender may not have the effect of authorizing costs or fees to be taxed against the condemnee, it should be noted that at least in one case the making of such a tender has cut off costs and fees that would otherwise have been required to be paid by the condemnor. See *State v. Efem Warehouse Co.*, 207 Ore. 237, 295 P.2d 1101, 70 A.L.R.2d 797 (1956). But see, on the other hand, *Colby v. Larson,* 208 Ore. 121, 297 P.2d 1073 (1956), holding that provision of statute authorizing payment of attorney's fee controls over statute authorizing offer of judgment. However, it should be noted that the payment into the court registry pursuant to a quick-take statute does not constitute a tender where the condemnor may contend at trial for a lower amount. *Housing Auth. of City of Bridgeport v. Pezenik,* 137 Conn. 442, 78 A.2d 546 (1951).

Finally, with respect to the element of time, there is the question of

[5] For states adopting all or a substantial part of the FED. R. CIV. P., see AM. JUR.2d *Desk Book,* Doc. 128. See also Notes of Advisory Committee on Rules for rule 68, FED. R. CIV. P.

record keeping. This question relates not only to the amount of time and labor required, which is considered here, but also to the hourly rate, which is determined to a great extent by the remaining seven factors set forth in D.R. 2–106(B). The importance of a breakdown in the services performed is illustrated by *Dade County v. Oolite Rock Co.* (Oolite II), 348 So.2d 902 (3 Fla. App. 1977), filed June 28, 1977, in which the Court stated:

> It is common knowledge that various types of legal work command differing scales of compensation. The work involved here consisted of time spent in conferences, making investigations, and in taking and attending the taking of discovery depositions and the filing of an answer, preliminary to a pre-trial hearing on the question of the necessity of the county for the taking of the party's land for a public park (which hearing was not held by reason of the prior voluntary dismissal of the proceeding by the county, the condemnor). As stated in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717 (5th Cir. 1974); "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." Taking a discovery deposition or attending a discovery deposition being taken by some other party usually is handled by a junior member of a firm. If a senior partner or head of a firm wishes to do such work himself, the fact that he does so does not raise its type level.

Thus, in considering the factors, consideration must also be given to how the time was spent. As the canon points out, other factors to be considered in determining the reasonableness of the fee are the novelty and difficulty of the questions involved, the skill required, and the fee customarily charged in the locality. All these are separately considered in the following. These factors also must necessarily be considered in determining the time expended.

Few eminent domain cases have been found which consider the question of what happens where the landowner's attorney fails to keep time records so that an accurate assessment of fees can be made by the Court. See *Division of Admin., State Dep't of Transp. v. Condominium Int.,* 317 So.2d 811 (3 Fla. App. 1975). In a non-eminent domain context, the question has been considered. As stated in *In Re Hudson & Manhattan Railroad Co.,* 339 F.2d 114 (2nd Cir. 1964):

> We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required. There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so.

This failure to keep records, however, does not preclude the award of a fee. See *Lindy Bros. Builders, Inc. of Phila. v. American R&S San. Co.*, 382 F.Supp. 999 (E.D. Pa. 1974), affirmed in part and reversed in part, 540 F.2d 102 (3d Cir., 1976) (Lindy II).

Thus, it would appear that the failure to keep records is merely another factor to be considered by the court in determining the amount of time expended and its value.

Accordingly, an attorney faced with the assessment of fees in eminent domain proceedings should use as a starting point the time expended by the attorney claiming the fee and how the time was spent. The determination should be made as to whether some of the time expended is not related to the eminent domain case, expended prior to the commencement of the case, or spent on issues on which he did not prevail, and is, thus, possibly noncompensable. Consideration should then be given as to whether other portions of the time were spent on matters which were comparatively low level and would, thus, command only a lower fee.

However, it should be remembered that fees are not based solely on an hourly rate. A Florida court recently noted "that recent appellate decisions in 'condemnation' cases are leaning towards an hourly rate without actually mandating one," but continued, in upholding an award of $340 an hour, by suggesting that it would be improper to base the fee on just the one factor of time. See *Division of Admin., State Dep't of Transp. v. Denmark*, 354 So.2d 100 (4 Fla. App. 1978).

Prior to trial, consideration might be given by the attorney for the condemning authority to making an offer of judgment, if, in his particular jurisdiction, this might have the effect of eliminating any costs, including fees, incurred after the date of the offer.

Novelty and Difficulty of the Questions

This factor has already been noted in the foregoing, but is one often relied on by the courts in adjusting the hourly rate upward. Various factors may indicate that the case is one which is novel or difficult. The case may be one of first impression, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 7 F.E.P. Cases 1 (5th Cir. 1974). The trial may be one that was difficult to try because of issues such as the probability of rezoning and the effect that such probable rezoning might have on the market value of the property, *City of Miami Beach v. Cummings*, 228 So.2d 109 (3 Fla. App. 1969), or it may be one which is difficult because of the skill and reputation of the attorney representing the condemning authority, *City of Moraine v. Baker*, 34 Ohio Misc. 77, 297 N.E.2d 122 (1971). In the *City of Moraine* case, the Court observed:

> It is said that one of the basic factors to be considered in determining the reasonable value of legal services is the nature, extent and difficulty of the services rendered. Burnett v. Graves, (1956), 5 Cir., 230 F.2d 49, 56 A.L.R.2d 1; Monaghan v. Hill (1944), 9 Cir., 140 F.2d 31. Conversely, the fact that an action involved no novel or difficult questions has been given as a reason for limiting attorneys fees. Twentieth Century-Fox Film Corp. v. Brookside Theater Corp. (1952), 8 Cir., 194 F.2d 846; 56 A.L.R.2d 23, Section 3. There has been no evidence brought to the attention of the court that the novelty of any issues involved in the litigation were deemed to affect the difficulties and, hence, the value of the legal services. Certainly the thrust of the representation by counsel for the defendants had no novel or difficult connotations.
>
> On the other hand, this court is of the opinion that inasmuch as there is now no contract or controlling rule or statute to be considered in determining the reasonable value of the service rendered by the attorneys, the court may consider the skill and eminence of opposing counsel since the character of the opposition to some extent determines the difficulty of the services. 143 A.L.R. 682, 56 A.L.R.2d 23, Section 3, *supra*. Counsel for the appropriating agency has the acknowledged capacity of a formidable adversary with known repute as an aggressive, vigorous and tenacious fighter. Therefore, there may be some credence in the proposition that the handling of this matter by the attorneys for the landowners reflected some skillful ingenuity.

On the other hand, in *Johnson v. Georgia Highway Express, supra,* the Court observed as to the caliber of opposition:

> To put these guidelines into perspective and as a caveat to their application, courts must remember that they do not have a mandate under Section 706(k) to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession.

Customary Fee

Until *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975), abolishing minimum fee schedules, there was an emphasis in attorneys' fee cases on the fees set in such schedules, even to the extent of being statutorily blessed in at least one state. Contrast *City of Billingham v. Eiford Constr. Co.*, 10 Wash. App. 606, 519 P.2d 1330 (1974) and *State v. Lacey*, 84 Wash. 2d 33, 524 P.2d 1351 (1974).

Nevertheless, even with the abolishment of minimum fee schedules, the amount customarily charged in the area remains important. *Johnson v. Georgia Highway Express, supra,* suggests that the reasonableness of the fee should be considered in the light of awards "made in similar litigation within and without the court's circuit." A listing of representative cases setting forth the fees awarded is included in the Appendix. In addition, the fees charged for similar services in cases in which there is no assessment against the condemning authority

should be considered. As stated in *Manatee County v. Harbor Ventures, Inc.*, 305 So.2d 299 (2 Fla. App. 1974):

> The fact that the fee is to be paid from a public fund does not warrant a higher fee than what the defendants would ordinarily be expected to pay if the law did not place this responsibility on the condemning authority.

The same thought was expressed in *Dade County v. Oolite Rock Co.* (Oolite II), 348 So.2d 902 (3 Fla. App. 1977) which held:

> Oolite was entitled to award of a fee in an amount which would be reasonable to be paid by such a client to its attorney on a quantum meruit basis for the legal work which was involved, predicated on a rate of charge or fee scale for such work that is customary in the community. In *Oolite One* and in the earlier case of *Manatee County v. Harbor Ventures, Inc.*, 305 So.2d 299, 301 (Fla. 2d DCA, 1975), this court and the Second District Court of Appeal stated that when a party is required and ordered to pay a reasonable sum as fee or compensation for the services of the attorney for an opposing party, the fee awarded should be such amount as could reasonably be expected would properly be charged by the lawyer to the client and paid by the client, if by law the latter rather than his adversary was required to pay the same.
>
> While the reasonableness of a fee should not necessarily be determined by the amount it represents per hour for the work done, it is evident that work of the kind involved here, regardless of who performed it, could not reasonably demand compensation of $439 per hour. The fee allowed by the trial court was substantially greater than it is considered would customarily be charged to a client for the work involved. In this case, incident to the hearing on which the fee was allowed, a lawyer testifying for the fee claimant, of experience and legal standing comparable to the best, although testifying that his rate of charge was $150 per hour, recommended that Oolite's attorney be paid by the county $35,000, which amounted to in excess of $500 per hour, for the work of the kind involved here.
>
> The county, as appellant, argued that this court in *Oolite One* had made it the law of the case that a fee of $200 per hour was appropriate to be allowed. This court did not so rule, as the law of the case, although in *Oolite One*, in commenting on the testimony of a witness for the county who had said that a fee in that amount would be proper, this court stated that a fee in such amount would appear to have been reasonable and even generous for the services in this case (311 So.2d at 707, footnote 10).
>
> Although it is repetitious, we again state and emphasize that in making awards of attorney fees which by contract or by law are required to be paid by one party for the services of the attorneys of an opposing party in a case, the award should not be for more than the rate or amount customarily charged and paid between attorney and client in the community for services of the kind that are involved. Tendency of a court to award substantially more, even when the payment is to be made out of public funds, which is not without example, is to be avoided. For a lawyer to charge a client or seek to obtain a court award of a fee substantially in excess of that which by custom in the community he could reasonably expect his client to pay, while not unethical, is unseemly. *Cf.* Canon 2 DR2-106(A), Code of Professional Responsibility. The same applies to attorneys testifying in aid of the fee applicant. *Brickell v. Di Pietro*, 152 Fla. 429, 12 So.2d 782 (1943).

Although the amount the landowner may have agreed to pay his attorney as a fee handling the condemnation proceedings may be evidence of a reasonable fee, it is not binding on the trial court. In *Redevelopment Comm'n of Hendersonville v. Hyder*, 20 N.C. App. 241, 201 S.E.2d 236 (1973), the Court pointed out that:

> These fee contracts were binding upon the parties who executed them but not upon the court which, under the statute, fixes the fees to be taxed against a third party, the Redevelopment Commission. Whatever liability the property owners may have to their attorneys under their respective fee contracts may be determined in other actions. Here the court is concerned with an allowance of an attorney fee authorized by statute.

But see *Johnson v. Georgia Highway Express, supra,* where the Court stated:

> 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. But as pointed out in Clark v. American Marine, *supra.*
>
> > [T]he statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive. Conceivably a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed but what is reasonable."
>
> 320 F.Supp. at 711. In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount.

On the other hand, where the fee contract negotiated between the party and his attorney appears to be reasonable, the courts seem inclined, as a practical matter, to award a fee coincident to the fee specified in the contract both in eminent domain cases and in other types of cases. See, e.g., *Municipal Airport Auth. of City of Fargo v. Stockman,* 198 N.W.2d 212 (N.D. 1972); *Oliveira v. Besteiro,* 18 W.H. 668 (S.D. Tex. 1968), a wage-hour case. Usually, however, the question arises in the context of contingent fee contracts and the question of contingent fees results obtained, discussed below.

Amount Involved and Results Obtained

This aspect has to do with the question of a contingent fee. As already noted, the courts have been bothered with the question of whether the fee assessed should be a contingent one. Generally speaking, however, the majority of the courts have taken the position that a contingent fee or one based on a percentage of the award or a percentage of the difference without regard to other factors is improper. See *Redevelopment Comm'n of Winston-Salem v. Weatherman,* 23 N.C. App. 136, 208 S.E.2d 412 (1974). As expressed in *Redevelopment Comm'n of Hendersonville v. Hyder,* 20 N.C. App. 241, 201 S.E.2d 236 (1973):

> When a statute provides for attorney fees to be awarded as a part of the costs to be paid by the governmental authority which is appropriating the property, it is not a contingent fee, but an amount equal to the actual reasonable value of the attorney's services. Dumas v. King, 157 F.2d 463 (8th Cir. 1946); Henlopen Hotel Corp. v. Aetna Ins. Co., 251 F.Supp. 189 (D. Del. 1966); Morton County Bd. of Park Comm'rs v. Wetsch, 136 N.W.2d 158 (N.D. 1965); Merchants' Fire Ins. Co. v. McAdams, 88 Ark. 550, 115 S.W. 175 (1908).
>
> Reasonable counsel fees may be determined in part by the amount of the verdict obtained in the condemnation proceeding in the light of the proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consideration in determining the amount of his fee. Under G.S. § 160–456 (10)(h)(3), however, there is no uncertainty about the payment of an attorney fee commensurate with the services performed. The use by the court in this case of the contingent fee as the sole guide for a determination of reasonable counsel fees when there is no possibility that the attorney fee may go unpaid does not meet the statutory standard. There are numerous factors for consideration in fixing reasonable attorney fees—the kind of case, the value of the properties in question, the complexity of the legal issues, the time and amount involved, fees customarily charged for similar services, the skill and experience of the attorney, the results obtained, whether the fee is fixed or contingent, all afford guidance in reaching the amount of a reasonable fee. *See* Canon 12, N.C. Canons of Professional Ethics (effective until 31 December 1973) and Disciplinary Rule 2–106(B) of the North Carolina State Bar Code of Professional Responsibility (effective 1 January 1974); Henlopen Hotel Corp. v. Aetna Ins. Co., *supra;* Morton County Bd. of Park Comm'rs v. Wetsch; *supra,* Annot., 56 A.L.R.2d 13, 20–50 (1957); Annot., 143 A.L.R. 672, 676–726 (1943).

So, too, a fee based on a percentage of the total amount involved is improper:

> The rigid adherence to the setting of fees by using a percentage of the amount involved has the effect of ignoring most of the factors enumerated in DR 2–106(B). From the standpoint of a public authority, the practice is helpful in budgetary planning and may be useful to avoid being criticized for the payment of fees on preferential basis. Yet, when the amount involved is so much greater than the customary transaction, the application of percentages, even on a sliding scale, runs the risk of setting a fee which is disproportionately higher than the extra responsibility placed upon the attorney by reason of the magnitude of the matter. *Manatee County v. Harbor Ventures, Inc.,* 305 So.2d 299, 2 Fla. App. (1975).

Nevertheless, it should be noted that in the foregoing instances the individual statutes required an attorney's fee to be paid regardless of the outcome of the suit. In *City of Miami Beach v. Liflans Corp.,* 259 So.2d 515 (3 Fla. App. 1972), for example, the Court held that the landowner was entitled to a reasonable attorney's fee and costs even though the jury awarded zero compensation for his rights taken.[6]

The majority of states having provisions for payment of attorneys' fees in normal condemnation proceedings require the landowner to obtain more than the condemnor's original offer. Under such circumstances, such a suit is not without a contingency that should be considered. See *City of Wichita v. Chapman,* 214 Kan. 575, 521 P.2d 589 (1974). In such states, the fee must still be based on all the factors which could be considered in determining a fee. See *Municipal Airport Authority of City of Fargo v. Stockman,* 198 N.W.2d 212 (N.D. 1972), upholding an award of a fee one-third of the difference between the State's offer and the verdict, where the fee was based on all relevant factors, the Court noting:

> The trial court is expert on value of legal services and may consider its own knowledge and experience in making an appraisal of the reasonable value of legal services rendered.

In summary, the general attitude of the courts relating to contingent fees in eminent domain proceedings is that the fee awarded should be based on all applicable factors, that a strict contingent fee is based only on one factor, results obtained, and is improper. But, on the other hand, if the fee is based on a consideration of all factors even though it may coincide with an amount generally recognized as that given in a contingent fee situation, it will be held to be proper.

As already noted, in those states in which the landowner must prevail before he may recover attorneys' fees, contingency remains an element to be considered. *City of Wichita v. Chapman,* 214 Kan. 575, 521 P.2d

[6] Although zero compensation may seem strange, in this suit the city sought to condemn certain rights of the upland owner with reference to the foreshore property line along the highwater line of the Atlantic Ocean in advance of a proposed beach extension restoration. It would thus seem that the project for which the rights were taken would improve the value of the landowner's remaining properties and that at the conclusion of the project the landowner would have the same rights as he had before.

589 (1974). Even in those states in which attorneys' fees are not contingent on a verdict in excess of the state's offer, results remain an important factor. See *Division of Admin., State Dep't of Transp. v. Condominium International,* 317 So.2d 811 (3 Fla. App. (1975).

Effect of Award of Fees

One of the big issues that has concerned both the courts and legislators is the effect of allowance of fees. Is the effect beneficial or detrimental? Is it, as stated in the petition for hearing on behalf of the county of Los Angeles in *County of Los Angeles v. Ortiz,* 6 Cal.3d 141, 98 Cal. Rptr. 454, 490 P.2d 1142 (1971) ". . . a boon to attorneys who handle eminent domain proceedings . . . and a disaster to the public treasury," or is it as indicated by a leading Florida landowner's attorney, Toby Prince Brigham of Miami, a most "reasonable" statute which has "probably saved the state money" by requiring the state to have a better quality of appraisers, thus resulting in a higher number of settlements and verdicts favorable to the state, or as put by another landowner's attorney:

> The obvious fairness of . . . provision for payment of the owner's attorneys' fees is generally accepted by all, including the courts and administrative agencies of government. Proof of this is that many states are now beginning to follow, as well as the Federal Government.[7]

The observation of the Court in *Ortiz, supra,* is apropos:

> In this provocative debate the coloring is not black and white; all but the participants can see shades of grey.

The most feared consequence is that the number of cases that must go to condemnation will drastically increase. Thus, the California Court in *Ortiz,* in considering the policy arguments for and against the allowance of litigation expenses, noted the argument that in Florida, following the decision in *Dade County v. Brigham,* 47 So.2d 602 (Fla. 1950), the percentage of properties acquired by purchase was reduced from 90 percent before 1950 to 20 percent by 1957.

To determine whether there is a correlation between the allowance of such litigation costs and the ratio of properties acquired by purchase as opposed to those acquired by condemnation, a survey was made of the different states covering the three-year period of 1974–1976. These figures were also compared with similar data obtained in 1971 and previous years. In addition, figures were compared for several specific states where the applicable statute was recently changed so as to allow such costs. A review of the various states fails to reflect any clear pattern between those that pay such fees and those that do not. At least some states paying fees have a more favorable record than

[7] Foerster, David W., *A Look at Condemnation Attorneys' Fees,* 46 FLA. B.J. 130 (Mar. 1972).

other states which do not. During the three-year period, approximately 88 percent of acquisitions in Oregon were by purchase, approximately 79 percent in Nebraska, 90 percent in Iowa, and 80 percent in Alaska. On the other hand, approximately 66 percent of acquisitions in Alabama were by purchase, 62 percent in Connecticut, 40 percent in Hawaii, and 65 percent in Minnesota, all of which do not pay such fees.

In sharp contrast, however, Florida, as already noted, pays fees under all circumstances, including those situations in which the property owner obtains less than offered by the state. During three periods from 1973 to 1976, Interstate and Federal-aid primary acquisitions by the Florida Department of Transportation were:

1973–74	43%	(12 months)
1974–75	47%	(12 months)
1975–76	8%	(15 months)

The Florida Department of Transportation has advised that the increase from the 1974–75 year to the figures in the 1975–76 period resulted from the priority handling of right-of-way acquisition for I-75 along the southwest coast of Florida and I-95 on the southeast coast. It was indicated that the Department would make but one contact in which the amount of the approved appraisal was offered and if declined by the property owner, condemnation suit would be immediately filed.

Inasmuch as the Florida experience was cited in *Ortiz,* some background research was done to determine the relationship of the figures cited in *Ortiz* with conditions in Florida and Dade County at the time. The statistics quoted by the California court came from the brief of the County of Los Angeles as follows:

> In 8 *Nichols on Eminent Domain* (Revised 3d Ed. 1968) § 15.03 we find the following:
>
> > Florida is the only state which allows all litigation expenses incurred by the condemnee irrespective of the outcome of the suit; and experience there indicates the need for some restriction on the payment of these expenses. The results of a 1950 decision holding that the condemnee must be paid for appraisers', engineers', and photographers' fees (as well as attorneys' fees) were: (1) to reduce the percentage of properties acquired by purchase from ninety before 1950 to twenty by 1957, and (2) to substantially increase the cost of acquisition—with a large part of the increase attributable to the litigation expenses of condemnor and condemnee.
>
> The shocking situation in Florida is graphically described by Thomas C. Britton, First Assistant County Attorney of Dade County, in *"Effect in Florida of Requiring the Condemnor to Pay Condemnee's Entire Litigation Expense"* published in the 1963 *Highway Research Record* and reprinted in the October 1963 issue (Vol. 10, No. 5) of *Right of Way,* published by the American Right of Way Association

According to Toby Prince Brigham, conditions in Dade County were rapidly changing in the period following *Dade County v. Brigham,*

supra. At that time acquisitions of land for roads changed from primarily new road construction through virgin land to road widening projects involving strip takings. Mr. Brigham indicated that was a new situation involving severance damages. The situation probably did, in actuality, result in an increase in the numbers of parcels acquired by condemnation. Mr. Brigham continued, however, by indicating some doubt as to the percentage of increase. It should also be noted that at that time Florida was one of the few states to recognize business damages as a separate element of damages in condemnation proceedings. Prior to 1955, the Florida Statutes, now F.S. 73.10, provided:

> (W)hen the suit is by a board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years standing owned by the party whose lands are being so taken, located upon adjoining, adjacent or contiguous lands owned or held by such party, the jury shall consider the probable effect the use of the property so taken may have upon the said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the use of the property so taken may reasonably cause. Any person claiming the right to recover such special damages shall set forth in the pleadings filed by him the nature and extent of such special damages. The jury shall in all cases view the property, unless the parties interested in the issue consent to dispense with the viewing.

Business damages are, of course, apt to be more prevalent in strip takings along established highways than in cases involving totally new highway construction. The practice of condemning authorities in Florida until comparatively recently was to make no assessment of business damages but, instead, to leave the matter entirely up to the jury with the only testimony presented as to the issue being that of the landowner. See *Behm v. Division of Admin., State Dep't of Transp.,* 292 So.2d 437 (4 Fla. App. 1974). Thus, invariably, if a business of more than five years standing was affected by the taking, condemnation would result, there being no effort to negotiate the landowner's damage.

Interestingly, statistics from Dade County provided by the current Director of Public Works, Burt Knuckles, does not indicate the drastic situation reflected by the Florida Department of Transportation statistics nor the "shocking" figures relied upon by Los Angeles County in its brief in *Ortiz.* According to Mr. Knuckles, currently 80 to 90 percent of all parcels are acquired without the necessity of trial. Mr. Knuckles cited two recent projects, in one of which the county acquired all 25 parcels without the necessity of filing a suit. In the other, the county acquired 20 out of 22 parcels without suit; the remaining two parcels belonged to members of the family of an attorney.

Mr. Knuckles indicated, however, that the Florida statute has an effect on condemning authorities. Specifically, he stated his belief that the statute put pressure on the county to settle. He noted that Dade

County currently has a procedure of automatically offering the property owner a set percentage above the county's appraisal in order to induce settlement without the necessity of filing suit and thereby incurring a liability on the part of the county to pay the landowner's attorneys' fees. Through this procedure, he noted, many parcels that do go to trial receive a verdict less than the amount offered. He stated, however, that the statute "put more pressure on the condemning authorities to be fair." Nevertheless, he expressed concern with landowners' appraisers, who "always seem to be able to come up to 20 percent more" than the condemning authority's figures.

In addition to the payment of landowners' attorneys' fees under all circumstances and the payment of business damages, Florida also allows payment of moving expenses as an element of "full or just compensation." See *Pensacola Scrap Processors, Inc. v. State Road Department,* 188 So.2d 38 (1 Fla. App. 1967). Thus, the exact effect on the percentage of cases going to condemnation as a result of the Florida statute is difficult to tell. Undoubtedly the liberality of the Florida interpretation of "just compensation" may lead to additional cases that would not occur under more conservative or traditional interpretations. This is particularly true where the effort to negotiate with landowners may be less than in other states. Also, apparently in many cases in Florida witnesses are not produced on behalf of the State to testify as to a reasonable fee. As stated in *Division of Administration, etc. v. Denmark,* 354 So.2d 100 (4 Fla. App. 1978):

> Finally, the case at bar reveals that the expert witness' testimony as to the appropriateness of an $85,000 fee went unchallenged by the State except for routine cross examination which left his testimony unshaken. It is difficult to fault the trial judge for accepting same, although he is obviously not bound to do so. [citation omitted]. We are of the opinion that if the State wishes to successfully oppose such expert testimony it should produce contra evidence to bolster its position. It did not do so in this case. . . ."

Thus, it would appear that the variables present in Florida do not make it an accurate guide for determining the effects of the payment of litigation costs.[8]

A review was also made of several states[9] recently adopting attor-

[8] The Florida Department of Transportation has, itself, recognized that its situation is different from other states having an attorneys' fee provision. An undated report prepared by Kenneth Ridlehoover of the Office of Legal Operations, Florida Department of Transportation, concluded, based on comparison of Florida with 4 other states paying attorneys' fees and 36 that did not:

> First it should be noted that Florida settles thirty-eight percent fewer of the parcels taken than states without attorneys' fees. Secondly, the percentage of parcels going to condemnation is twenty percent in states without attorneys' fees and almost twice the percentage of parcels going to condemnation compared to states with attorneys' fees.

[9] Primarily California, Pennsylvania, and Louisiana.

neys' fees provisions to determine if a change in percentage of parcels acquired by negotiations had occurred following the adoption of the statute. There are some indications, but not conclusive, that the percentage of parcels acquired by negotiation will decline but not significantly upon the adoption of a provision for litigation expenses. In California, as an example, the following figures were provided by John B. Matheny, Assistant Chief Counsel for the Department of Transportation, as they relate to the adoption in 1975 of a statute permitting payment of litigation expenses:

Year	Total Acquired	Acquired by Condemnation	
		No.	Percent
1973–74	2119	28	1.3
1974–75	1836	54	2.9
1975–76	678	29	4.2

Mr. Matheny commented:

> Our statutes which would permit the payment of attorneys' fees, witness fees and other litigation costs became effective in 1975. Our statutes are limited to a determination by the court that the condemnor's last offer for the property was unreasonable when compared to the result of the jury verdict. Based upon this first year of experience in acquisition after the enactment of the attorneys' fees legislation you will note that the percentage of condemnation almost doubled. We also had an entirely new enactment of our condemnation law which became effective during 1976. This statute contains many procedures new to California and also includes payment for goodwill. These changes will undoubtedly have an effect on the percentage of cases which require litigation.

In Pennsylvania, an increase will also be noted following adoption of the statute effective December 29, 1971:

Year	Amicable [10] Acquisitions	Administrative Settlements	At Viewer's or at Trial Level
1971	2217	303	975
1972	2850	433	1347
1973	1660	297	840
1974	1504	270	779
1975	906	242	1711

[10] Amicable acquisitions are those parcels settled at the amount of the approved appraisal, whereas administrative settlements are those settled administratively by the Right-of-Way Administrator in excess of the pre-approvals.

Pennsylvania's statutes authorizing reimbursements of appraisal, attorney and engineering fees authorizes reimbursements "not to exceed five hundred dollars ($500) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees." Purdon's Pennsylvania Statutes Annotated § 1–610.

Prior to 1972 the percentage of parcels acquired by the Legal Bureau were for fiscal year commencing July 1969, 23.9 percent; 1970, 21.8 percent; 1972, 29 percent; 1973, 30.5 percent; and 1975, 38.2 percent.

The increase in the percentage of parcels acquired by the Legal Bureau is not, however, necessarily as a result of the limited reimbursement of attorneys' fees. Alexander V. Sarcione, Assistant Chief Counsel—Land Acquisition, for the Pennsylvania Department of Transportation commented:

> You will note that it appears that since the imposition of attorneys fees by our Legislature the Court case load, both Viewers and Courts of Common Pleas has increased to a substantial degree. However, our experience indicates that this is not a result of the allowance of attorneys' fees but rather it is caused by the drastic slowdown in our acquisitions as a result of our fiscal deficiencies and the inordinate number of Court cases are really carry-overs from previous years.

Other states that have recently adopted such provisions have not yet had sufficient time to determine the effect. In Louisiana, as an example, the Executive Assistant General Counsel for the Department of Transportation and Development has indicated that since adoption of the attorneys' fee provision of § 453 in the Department's quick-taking statute authorizing reasonable attorneys' fees if the amount of the deposit is less than the amount of compensation awarded in the judgment, there has been, surprisingly, no increase in condemnation. The actual percentage of parcels acquired by condemnation after the effective date of the legislation actually declined slightly (from 18 to 17 percent). He did expect, however, any effect to be felt in the forthcoming acquisition for the new North-South Highway from Shreveport to Opelousas.

A review of other states indicates a number of other variables that have a greater effect on the percentage of parcels acquired by condemnation than an attorneys' fee provision. Such factors can include relocation assistance payments,[11] the quality of appraisals, the ability

[11] Relocation assistance has been noted as a factor by at least two states. In 1971, Idaho reported that the relocation act (under the 1968 Highway Act) effective March 28, 1969, had a direct and definite influence on reducing the ratio of condemnations. See Table 5, Appendix. Asher F. Shroeder, Special Assistant Attorney General for the State of Iowa, has noted that in his state "the relocation assistance allowance probably would have more to do with limiting the number of condemnations and the appeals therefrom than any other single item." Letter to writer dated February 17, 1977.

to negotiate prior to the filing of suit, and the financial circumstances of the state. It will be recalled that Toby Prince Brigham cited the quality of appraisals as a factor. Thus, as an example, the Alaska Attorney General's Office [12] in 1971, while advising that approximately 50 percent of parcels were acquired by condemnation, noted one project south of Anchorage where condemnation ran as high as 95 percent "due, in part, to some unfortunate prior appraisals." Mr. Brigham also noted a recent example in Florida in which the state used an appraisal of $160,000 for a parcel on I-75 which had been prepared by a 29-year-old appraiser who had just recently moved into the state.[13] At no time during the proceeding was there any discussion of settlement and ultimately the jury returned a verdict of $600,000.

Thus, it would appear that although there may be an effect on the percentages of parcels going to condemnation when the state is required to pay attorneys' fees, the effect is slight [14] and is probably overshadowed by other factors. The Florida example is probably not a valid one because of other factors that may exist. The difference between the percentages acquired by condemnation between the Florida Department of Transportation (92 percent) and the Dade County Department of Public Works (10 percent) is indicative of the effect of other factors.

It will be recalled that it was earlier suggested that the presence of attorneys' fees as a consideration induced settlements on the part of the condemning authority. This observation has been made by attorneys for both condemning authorities and landowners. Burt Knuckles, Dade County Director of Public Works, observed a recent case involving three parcels having an aggregate value of $12,000 but which was estimated to take five days to try so that the costs to the county for appraiser and attorneys' fees would probably exceed $6,000. Thus, the county settled for $5,000 over its appraisal because the cost of going to trial would

[12] Letter dated June 8, 1971, from John E. Havelock, Attorney General, by Richard P. Kerns, Ass't. Atty. Gen., to writer.

[13] It is not the intention of the writer to be involved in the debate as to the advantages of "fee" versus "staff" appraisers. However, an interesting comparison may be made between the percentage of appraisals made by staff and percentage of parcels acquired by negotiation in Iowa. Table 4, Appendix seemingly indicates that whether appraisals are prepared by "fee" or "staff" has little effect, if any.

[14] That there is an effect is also confirmed by the Ridlehoover report, *supra,* note 8, comparing 36 unidentified states paying such fees. The report indicated that in the four states paying fees 24 percent of parcels went to condemnation whereas in the 36 states 20 percent went to condemnation. It has been argued that there should be a substantial increase in percentage going to condemnation because the landowner "has nothing to lose." If as a general practice the case is taken on a contingent fee basis, the only loss to the landowner in a non-fee-paying state would be the engineering and appraisal fees. The only one who would lose would be the attorney. This loss is the same if the state statute requires the landowner to prevail. On the other hand, in a state that pays attorneys' fees regardless of outcome, it is the attorney "who has nothing to lose."

have exceeded the settlement even if the jury verdict came in on the county's figures.

The opposite side of the coin was noted by Professor Gideon Kanner of Loyola University School of Law, Los Angeles, who cited a recent case that went to trial twice with one appeal basically for the sake of $2,500 difference between what the matter could have been resolved for prior to appeal and the ultimate award. Professor Kanner observed that the state had probably expended some $30,000 and that if attorneys' fees had been awardable to the landowner at the time there would have been strong pressure on the state to have settled the matter in the first instance.

Accordingly, data from several states were reviewed to determine if an increase in the number of settlements may have taken place as a result of adoption of an attorneys' fee provision. Figures from Pennsylvania reflect that prior to adoption of the partial attorneys' fee provision in 1971 approximately 74.5 percent of litigated cases were resolved at the Viewers level without the necessity of a jury trial. In 1972 the figure was 77 percent, in 1973 it was 84.5 percent, in 1974 it was 84 percent, in 1975 it rose to 90 percent, and in 1976 it dropped back to 84 percent. However, the over-all percentage is consistent with those from states such as Delaware, North Carolina, Wyoming, New York and Arizona, which did not at the time have provision for payment of such fees. Other states which paid such fees, such as Oregon and North Dakota, reflected a much lower settlement rate, Oregon being 54 percent and North Dakota 60 percent.[15] Of course, it should be observed that settlements are often directly related to the attitude that a particular legal bureau or office might have as to its role, some, perhaps, taking the attitude that administrative settlements were for the right-of-way bureau or office to make and their role being to "try cases." No attempt was made to delve into such speculative theory.

In conclusion, it seems likely that in some instances additional cases go to condemnation because of an attitude on the part of the landowner that they have "nothing to lose." It also appears likely that pressure is put on a condemning authority to settle because of the risk of larger attorneys' fees if the case were to go to trial. However, it is unlikely that this can be documented in any individual case. The Federal Highway Administration, as an example, normally will not participate in that portion of any settlement which represents attorneys' fees; nor is the possibility of such fees being assessed a proper consideration for settlement in any documentation required by the Federal Highway Administration.[16]

Thus, the following effects can be noted as a result of an attorneys' fee provision:

[15] See, however, note 8 above, which indicates fewer settlements in Florida, which pays attorneys' fees.

[16] *Federal-Aid Highway Program Manual,* Vol. 7, Chap. 2, Sec. 4, Transmittal 60, Sept. 4, 1974, HRW-10.

1. The direct expense representing actual payment of the fees and litigation expenses.—The direct expense is a result of the number of cases in which fees must be paid and the size of the fees as a result. In an area of high land values this can be substantial. In Florida, where the statutes allow such fees under all circumstances, the direct cost for attorneys' fees rose from $1.5 million in the 1969–70 fiscal year to $4.4 million in fiscal 1974–75. In contrast, states that either limit the fees or limit the situation in which fees are paid have a substantially lower cost. In Pennsylvania, for example, which limits fees to $500, except in inverse condemnation, the following payments were made for the years indicated:

	Payments	
Year	No.	Total Value ($)
1973	151	49,606.14
1974	238	146,493.40
1975	290	132,516.64
1976	274	141,229.85

In Kansas, where fees are paid when the condemnor appeals and the jury verdict is in excess of the award of the court's appraisers or commissioners, an aggregate of $31,753 was paid for six cases during the period 1974–76.

Apparently, because of the direct costs of attorneys' fees, at least two states have found it necessary to modify their original statute allowing such costs. Washington modified its statute in 1971 to tie the amount paid to minimum fee schedules on an hourly basis. Florida, in 1976, modified its statute so as to spell out the factors to be considered by the court in assessing fees, apparently in reaction, in part, to the practice of setting the fees based on a percentage of the entire award including that part which the condemning authority had originally offered.

2. The indirect costs.—In addition to the direct costs, there are the indirect costs resulting from the increase in the number of cases going to condemnation and the increase in jury verdicts over the amount of the original offer. Although the latter factor can be measured, it is difficult to measure the increase in number of cases because of provisions for attorneys' fees. In addition there are indirect costs because of increased numbers of settlements made to avoid litigation expenses.

ATTORNEY FEES IN ENVIRONMENTAL CASES

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 was, as stated by the Seventh Circuit Court of Appeals in *Bailey v. Meister Brau, Inc.,* 535 F.2d 982 (7th Cir. 1976), "a trend toward extending the award of attorneys' fees and expenses in public interest litigation . . ." Considerable controversy, therefore, raged as to whether such fees should properly be allowed in environmental lawsuits. It was hoped, by each side of the issue, that the Supreme Court decision would resolve the matter.

In its decision the Supreme Court, recognizing the "American rule," declined an invitation "to fashion a far reaching exception to the rule." Instead, the Supreme Court determined that it would be "inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by the respondents and approved by the Court of Appeals." Thus it was that the Supreme Court held that, absent a statute or other clearly recognized exception, attorneys' fees were not costs that could be taxed by the Court. So, too, other courts rejected assessment of the fees in environmental cases. See *Swift v. Island County,* 87 Wash.2d 348, 552 P.2d 175 (1976), rejecting both the "private attorney general" rule and the "common fund" arguments for assessment of attorneys' fees.

The effect of the decision by the Supreme Court in *Alyeska* was as noted in *Bailey v. Meister Brau Inc., supra,* to "effectively" halt the trend toward payment of attorneys' fees and expenses. Nevertheless, areas continued to exist in which attorneys' fees may be assessed and the trend toward "fee shifting" in public interest litigation continues. Now, however, the trend is a statutory one.[17] See proposed "Public Participation in Federal Agency Proceedings Act of 1977," which would allow federal courts to award fees and costs to successful plaintiffs in actions

[17] Although *Alyeska* may have halted the judicial trend, it may have accentuated the statutory trend, at least with regard to Civil Rights cases. Thus, as an example, the Fifth Circuit Court of Appeals in Wallace v. House, 538 F.2d 1138 (1976), discussed the effect of *Alyeska* and noted in footnotes 14 and 15 that:

> 14. 42 U.S.C. § 19731(e) provides: In any action or proceeding to enforce the voting guarantees of the fourteenth and fifteenth Amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> This provision was passed in reaction to *Alyeska* See S.Rep. 94–295, 94th Cong., 1st Sess. 39–43, 1975 U.S. Code Cong. & Admin. News 806–810.
>
> 15. The legislative history of the amendment does not indicate clearly whether the attorney's fee provision was intended to have retroactive effect. The Senate Report, note 14, supra, observes:
>
> Before May 12, 1975, when the Supreme Court handed down its decision in *Alyeska* many lower Federal courts followed these Congressional policies and exercised their traditional equity powers to award attorney's fees under earlier civil rights laws as well.
>
> These pre-*Alyeska* decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in *Alyeska,* the Supreme Court held that the federal courts did not have the power to grant fees to 'private attorneys general,' or private enforcers of civil rights laws, except under statutes whose language specifically authorized such fee awards.
>
> The *Alyeska* decision created an unexpected and anomalous gap in our civil rights laws whereby awards or fees are barred in the most fundamental civil rights cases.
>
> Section 403, like section 402, provides the specific statutory authorization required by the court in *Alyeska.*

for judicial review of agency decisions, where the litigation serves to vindicate public policies.

The area of "environmental law" is not yet a distinct area of the law encompassing a separate body of law as do some other recognized areas, such as admiralty, contract law, administrative law, etc. Only recently, as an example, has the West Key Number System begun to consider it as a separate area encompassed within the previous area of "health." It continues to be found under the subject of "pollution control" in some of the publications of the Lawyers Co-operative Publishing Company. Environmental law encompasses all the traditional areas of the law and often many statutes are utilized towards environmental ends. Andres Robert Greene, in discussing "The Practice of Environmental Law," GEORGIA STATE BAR J. 185, April 1977, states:

> Environmental law can be viewed as a descriptive term focusing the more traditional legal disciplines (tort, contract, etc.) on accomplishing goals in a specific subject area, i.e., the environment, or as a substantive legal discipline with its own principles and concepts expanding the body of law.
>
> Timothy Atkeson, the first General Counsel of the Council on Environmental Quality, is one of those who leans toward the latter position. In his introduction to Federal Environmental Law, he notes that as late as 1969 it would have been difficult to discern a separate body of law meriting analysis and study as "environmental law." Pollution prevention and control statutes and laws dealing with public lands, natural resources and conservation were perceived as legislative responses to particular problems rather than as parts of a unified body of law.

As an example, eminent domain cases, in which attorneys' fees might be awarded, are sometimes used as a means to the environmental end. See, for example, *Chipola Nurseries, Inc. v. Division of Administration,* 294 So.2d 357 (1 Fla. App. 1974); *Ragland v. State Dep't of Transp.,* 242 So.2d 475 (1 Fla. App. 1970).

As pointed out by Mr. Greene, there is a tendency to overlook many environmental laws that have been enacted in the past few years.

Thus, it may be that in the great debate over "fee shifting" (see *Attorneys' Fees as Recoverable Costs,* C. Dallas Sands, 63 A.B.A. JOURNAL 510, April, 1977) statutes currently authorizing imposition of such fees have been overlooked. In other words, situations now exist in which attorneys' fees will be allowed in some "environmental cases." Professor Sands points out that fee shifting is allowed in bankruptcy proceedings, that there are 28 provisions in legislation relating to consumer protection, 6 in environmental protection legislation, 6 in statutes granting employees' rights against an employer, 4 in the civil rights statutes, as well as others totaling 50 in what he termed a "limited list."

Among statutes arising in an environmental context that authorize the assessment of attorneys' fees and litigation of costs are 5 U.S.C. § 552(a)(2)(E), relating to the availability of public information; 49 U.S.C. § 1686(e), relating to pipeline safety; 33 U.S.C. § 4115(g)(4), relating to water control; and 15 U.S.C. § 261(c)(2), relating to toxic substances.

In addition, state statutes may authorize the imposition of fees in environmental suits. See, for example, Florida Statutes 403.412. Fees may be granted in cases brought on a nuisance theory, see *Benton v. Kerman,* 130 N.J.Eq. 193, 21 A.2d 755 (1941). As previously noted, environmental suits may be brought as "inverse condemnation" where the actions of the public body amount to a "taking." See *City of Jacksonville v. Schumann,* 167 So.2d 95 (1 Fla. App. 1964). However, it may well be that such statutes will not authorize assessment of such fees and costs against the state but only against private parties. See *State ex rel. Shevin v. Indico Corp.,* 319 So.2d 173 (1 Fla. App. 1975). See also *Alyeska Pipeline Co. v. Wilderness Soc'y, supra.* It should be noted that Justice White in *Alyeska,* footnote 46, specifically questioned a number of lower federal court cases, including some environmental cases, employing the "private attorney generals" approach to award attorneys' fees, but did indicate that alternative grounds to uphold the award of such fees, such as bad faith, might be upheld.

That alternative grounds may be utilized to require payment of attorneys' fees is clearly indicated in *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.,* 417 U.S. 116, 40 L.Ed.2d 703, 94 S.Ct. 2157 (1974):

> The American Rule has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the cost of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .

With regard to the setting of the fees, where the same are allowed by statute or on other grounds, the same factors mentioned in the section on eminent domain attorneys' fees are applicable to environmental cases and are not repeated here except to note that, there being far fewer cases, an attorney facing an assessment of fees will have to place greater reliance on cases outside the area. In addition, it should be noted that there is a greater likelihood of the fee assessment being discretionary with the court. See *Benton v. Kerman, supra; State ex rel. Bowman v. Fipps,* 266 N.C. 535, 146 S.E.2d 395 (1966). As an example 49 U.S.C. § 168(e) sets forth the fee that shall be set:

> (1) Actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this section, and (B) such reasonable expenses as may be incurred by the attorneys in the provision of such services, and
>
> (2) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fees.

As indicated by the California Court in the *Ortiz* decision, *supra,* with reference to eminent domain the issue of fee shifting is viewed by each side in terms of black and white. One side views it as necessary to afford an "effective remedy" and speculates that the imposition of such fee shifting would discourage litigation on weaker claims and defenses "and increase the number of settlements and, thus, decrease actual litigation." See Sands, *Attorney's Fees as Recoverable Costs,* 63 A.B.A. JOURNAL 510, April 1977. Professor Sands, however, notes that such arguments are "in the realm of hypothesis" and that there is a need for further research in the area.[18]

So, too, Judge Harold Leventhal has considered the question in *Attorney's Fees for Public Interest Representation,* 62 A.B.A. JOURNAL 1134, September 1976, in which he discusses the assessment of such fees:

> On the pros and cons of awarding attorneys' fees, my experience may be pertinent. The Agencies should assume some burden in determining fees. Excessive fees can be avoided. They have occurred sometimes when courts have awarded percentages of funds or monetary recoveries. In agency and judicial review proceedings, time would be a better standard. In Freeman v. Ryan, 408 F.2d 1204 (1968), in which attorneys' fees were assessable because an escrow fund developed while milk prices were being challenged, our court reduced the application for fees by 40 percent. We acknowledged that considerable time had been spent and that an award was appropriate because farmers had benefited and the unauthorized agency action had been halted. But we tempered the award not only because of questions as to the amount of time spent but also because of our own appraisal that counsel had offered a useful general approach but had left the court with a considerable research requirement.
>
> In my recent opinion for the court en banc (517 F.2d 1275), we adopted Judge Wilkey's approach to awards, with time and a suitable hourly rate as the appropriate and objective starting point, adjusted for quality of work as judged by the court. Setting the rate requires some reflection. The Criminal Justice Act allows a maximum of $20 an hour out of court and $30 an hour in court for representing an indigent criminal defendant. When we review those vouchers, we know many counsel charge their regular clients a high rate, but some element of professional contribution is permissible for attorneys in remunerative practice. One factor to take into account might be what the same work would have cost the government from its employees—if fully costed—but this cannot be made determinative without also considering the realities of costs outside the government.

In conclusion, as many of the same arguments relating to attorneys' fees are made in the environmental or public interest areas as are made

[18] Because of the newness of the field and because in many instances the statute granting the legal remedy also grants the right to an attorney's fee, direct methods of comparison to determine if such provisions lead to more litigation is difficult and, as pointed out by Professor Sands, hypothetical.

in the eminent domain area. Whether the same conclusions as to any increase in litigation or increase in settlements can be made in the environmental area is difficult to say because of the presence of public interest groups. Many environmental suits are not brought on behalf of an individual who is financing a litigation, as in the case of the landowner in an eminent domain proceeding. Instead, in general, many environmental suits are brought on behalf of groups. Although many groups may have adequate finances because of large membership, others may not be so fortunate and the realities of the cost and expenses of complex litigation may well be a deterrent on a prospective plaintiff.[19]

The deterrent effect, even in class actions and large groups, has been noted by the courts. Thus, as an example, in referring to actions brought under Section 307 of the Clean Air Act, the Court in *Natural Res. Defense Counsel, Inc. v. Environmental Protection Agcy.,* 512 F.2d 1351 (D.C. Cir. 1975), noted:

> Groups such as NRDC have never been secure financially, and only recently the foundations have indicated their intent to divert their support to projects in other areas. Provision for fees could thus have a strong impact on their continued willingness and ability to pursue Section 307 actions. If Congress fails to act, there may come a day soon when EPA's determinations, though frequently attacked because they are too stringent, are only seldom contested because they are not stringent enough.

The Court noted, in making the statement, the expression by McGeorge Bundy, President of the Ford Foundation, that "in the next couple of years, public interest law firms . . . [must look] to alternative sources of funds." [Quoted from *New York Times* (Apr. 17, 1974)].

Thus, if the D.C. Circuit Court of Appeals is correct, a provision for attorneys' fees in environmental cases may have a substantial impact.

[19] See examples cited by Kennedy, Edward M., *Beyond "Sunshine" Promoting Effective Citizen Participation in the Federal Administrative Process,* 13 TRIAL 41 (June 1977).

APPENDIX

TABLE 1

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

STATE	POSITION
Alabama	Generally not awarded, but see title 19 § 25, ALA. CODE, allowing fees if award not paid within six months.
Alaska	ALASKA R. CIV. PRO. 72 (k): Attorney fees will be assessed against the condemnor if the condemnation is unsuccessful, is dismissed, or award is 10 percent greater than amount deposited by condemnor or the allowance from which appeal is taken, or it is necessary to give property owner just compensation.
Arizona	ARIZ. REV. STAT. § 11–972: Attorney fees are avaialble to defendant upon unsuccessful or abandoned condemnation; they are awarded to successful inverse condemnor.
Arkansas	Generally, no attorney fees are available to defendant. Exception: when condemnor acts in bad faith, attorney fees may be awarded to defendant.
California	Under § 1250.410, title 7, EMINENT DOMAIN LAW, 30 days prior to trial parties are to serve on each other a final offer or demand for compensation. After entry of judgment if the court ". . . finds that the offer of the plaintiff was unreasonable and the demand of the defendant was reasonable viewed in light of the evidence admitted and the compensation awarded in the proceedings, the costs . . . shall include the defendant's litigation expenses. . . ."
Colorado	No attorney fees are available to condemnee.
Connecticut	Generally, no attorney fees awarded. CONN. GEN. STAT. ANN. § 48–17A: Attorney fees may be awarded upon abandonment or unsuccessful condemnation.
Delaware	DEL. CODE ANN. 10 § 6111: Attorney fees are not awarded under any circumstances.
Florida	FLA. STAT. § 73.091 provides: "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. Attorney's fees on appeal, under Florida Statutes 73.031 are paid by the petitioner 'except upon an appeal taken by a defendant in which the judgment of the trial court shall be affirmed'."
Georgia	Attorneys' fees allowed as part of "just compensation" by case law, *White v. Georgia Power,* 237 Ga. 341, 227 S.E.2d 385 (1976). See text.
Hawaii	HAWAII REV. STAT. § 101–27, § 113–3: Attorneys' fees are awarded upon abandonment, dismissal or unsuccessful condemnation. § 113–4: Attorney fees available to successful inverse condemnor. § 206–6, § 516–23: Attorney fees are awarded if lands are not acquired within 12 months of beginning of eminent domain proceedings for specific land development tracts.
Illinois	ILL. ANN. STAT. 47 § 10: Attorney fees awarded on dismissal of or unsuccessful condemnation or plaintiff fails to pay award within allotted time. ILL. ANN. STAT. 47 § 9.8: Attorney fees awarded to plaintiff in successful inverse condemnation.
Indiana	Burns IND. STAT. ANN. § 8–13–18.5–13 (301738): Attorney fees awarded upon abandonment of or unsuccessful condemnation. They are also awarded to successful inverse condemnor.
Idaho	Attorneys' fees not traditionally allowed in condemnation proceeding. But recently enacted legislation provides for award of attorneys' fees in any civil action.

TABLE 1—Continued

STATE	POSITION
Iowa	IOWA CODE ANN. § 472–33: Attorney fees awarded if commissioner's award exceeds plaintiff's final offer by 110 percent, also if the award is increased on appeal from the commissioner's award. § 472.34: Attorney fees awarded to condemnee if condemnor fails to take the property after an appeal from judgment of compensation commission.
Kansas	Attorney fees generally are not awarded. Exception: KAN. STAT. ANN. § 26–509: Attorney fees are awarded if condemnor incurs higher award on appeal than court-appointed appraisers awarded.
Kentucky	KEN. REV. STAT. § 416.470: Attorney fees are available to condemnee upon unsuccessful or abandonment of condemnation.
Louisiana	LA. REV. STAT. 48: 453 E provides: "Reasonable attorney fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed 25 percent of the difference between the award and the amount deposited in the registry of the court." Fees are also allowed for unsuccessful suits or on abandonment of expropriation suits.
Maine	Public Laws of 1967, Chapter 436, now title 23, § 157, as amended, provides a reasonable attorneys' fee if the Department of Transportation appeals and does not prevail.
Maryland	MD. CODE ANN. §§ 12–106, 108, 109: Attorney fees are awarded to defendant if condemnation is unsuccessful or abandoned.
Massachusetts	Attorneys' fees not generally awarded.
Michigan	MICH. COMP. LAWS ANN. §§ 213.37, 213.132, 213.190: Attorney fees are awarded to condemnee if condemnation is abandoned after jury is empaneled.
Minnesota	MINN. STAT. ANN. § 117.195: Attorney fees are awarded if condemnor is unsuccessful or abandons the suit, or if it fails to pay the damages and costs awarded to defendant within 90 days of final judgment.
Mississippi	MISS. CODE 1972 ANN. § 11–27–37: Attorney fees are awarded if condemnor is unsuccessful or abandons the suit, or if it fails to pay the damages and costs awarded to defendant within 90 days of final judgment.
Missouri	No attorney fees awarded.
Montana	MONT. REV. CODE § 93–9921.1, 1947 provides, in part: ". . . In the event of litigation, and when the private property owner prevails, by receiving an award in excess of the final offer of the condemnor, the Court shall award necessary expenses of litigation to the condemnee."
Nebraska	NEB. REV. STAT. § 76–720: If a condemnee on appeal from award by court-appointed appraisers gets an award 15 percent greater than appraisers' award, attorney fees are awarded.
Nevada	NEV. REV. STAT. §§ 37.180, 342.320: Attorney fees are awarded upon abandonment or unsuccessful condemnation; also awarded to plaintiff in successful inverse condemnation.
New Hampshire	No attorney fees are awarded.
New Jersey	N.J. Stat. Ann. § 20:3–26: Attorney fees are awarded upon successful inverse condemnation also if condemnation is abandoned or unsuccessful.
New Mexico	No attorney fees are awarded.
New York	N.Y. CONSOLIDATED LAWS ANN., Condemnation Law § 16: If condemnee receives an award from condemnation commissioners which is greater

STATE	POSITION
	than the condemnor's highest offer plus interest, the court may grant costs plus up to 5 percent of award for additional costs (which may cover attorney fees).
North Carolina	N.C. GEN. STAT. §§ 40–25, 40–19, 1–209.1, 153A–161: Attorney fees are awarded if condemnor abandons, for unknown party, and to plaintiff in successful inverse condemnation.
North Dakota	N.DAK. CENT. CODE § 32–15–32: Attorney fees are awarded in general.
Ohio	OHIO REV. CODE ANN. §§ 163.21, 163.62: Attorney fees are available if condemnation is unsuccessful or is abandoned.
Oklahoma	OKLA. STAT. ANN. 27 § 11: Attorney fees are awarded if condemnation is unsuccessful or abandoned or if condemnee on appeal gains award greater than 10 percent of award by commissioners. 27 § 12: Attorney fees are awarded to plaintiff in successful inverse condemnation.
Oregon	OREG. REV. STAT. § 35–275: Private condemnor must pay attorney fees. § 35–335: Attorney fees are awarded on abandonment. § 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 is made in bad faith. § 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	No attorney fees are awarded.
South Carolina	S.C. CODE LAWS § 25–3: Attorney fees are awarded if any corporation or municipality with power of eminent domain fails to take land sought to be condemned.
South Dakota	No attorney fees are awarded.
Tennessee	TENN. CODE ANN. § 23–1423: Attorney fees are awarded to successful plaintiff in inverse condemnation.
Texas	TEX. REV. CIV. STAT. § 3265 (b): After appeal from commissioner's award or after condemnation proceeding comes to trial, attorney fees are awarded if condemnor dismisses, abandons, or refuses to take jury award unless he intends to refile within reasonable time and notifies the court.
Utah	UTAH CODE ANN. § T8–34–16: Attorney fees are awarded upon abandonment.
Vermont	VT. STAT. ANN. 19 § 230: Attorney fees are awarded to successful plaintiff in inverse condemnation.
Virginia	VA. CODE §§ 25–46.34, 25–250, 25–251: Attorney fees are awarded if condemnation is dismissed, abandoned, or is unsuccessful; also awarded to successful plaintiff in inverse condemnation.
Washington	WASH. REV. CODE ANN. § 8.27.070: Attorney fees are awarded in trial if (1) condemnor makes no written offer to settle within 30 days of trial, (2) jury award is greater by 10 percent of highest offer, or (3) by agreement. (Attorney fees are awarded above only if condemnation for airspace corridor is abandoned or unsuccessful.)

TABLE 1—*Continued*

STATE	POSITION
West Virginia	No attorney fees awarded.
Wisconsin	WIS. STAT. ANN. § 32.50, § 32.10: Attorney fees are awarded upon unsuccessful condemnation and to successful plaintiff in inverse condemnation. § 32.06: Attorney fees are awarded upon abandonment of condemnation in matters other than streets, sewers, alleys, airports and watercourses.
Wyoming	According to Glen A. Williams, Senior Assistant Attorney General, legislation has been recently enacted allowing fees, but, he adds: "We have not had to be troubled with this law." He does, however, anticipate some impact in the future.

TABLE 2

PERCENTAGE OF PARCELS TO CONDEMNATION

STATE	NEGOTIATED (%)	CONDEMNED (%)	YEARS
Alabama [1]	66	34	1974–76
Alaska	80	20	1974–76
Arizona [2]	75	25	——
Arkansas	84	16	1974–76
California [3]	97	3	1973–75
Colorado	80	20	1968–70
Connecticut	62	38	1974–76
Delaware	90	10	1973–75
Florida [4]	31	69	1974–76
Georgia [5]	71.6	28.4	1970
Hawaii	40	60	1974–76
Illinois [6]	77	23	1973–75
Indiana	71	29	1974–76
Idaho	91	9	1974–76
Iowa	90	10	1970–76
Kansas	61	39	1974–76
Kentucky [7]	74.5	25.5	1964–71
Louisiana	83	17	1974–76
Maine [8]	82	18	1974–76
Maryland	82	18	1970–71
Massachusetts [9]	—	—	——
Michigan	81	19	1974–76
Minnesota [10]	66	34	1974–76
Mississippi [11]	95	5	——
Missouri	81	19	1970
Montana [9]	—	—	——
Nebraska	79	21	1974–76
Nevada	90	10	1960–70
New Hampshire	85	15	1971
New Jersey	85	15	1971
New Mexico [9]	—	—	——
New York [12]	85	15	——

STATE	NEGOTIATED (%)	CONDEMNED (%)	YEARS
North Carolina [13]	85	15	1974–76
North Dakota	85–90	15–10	1970–76
Ohio	78	22	1974–76
Oklahoma [9]	—	—	——
Oregon	88	12	1974–76
Pennsylvania [14]	69	31	1971–75
Rhode Island [9]	—	—	——
South Carolina [15]	53	47	1975–Mar 1977
South Dakota [9]	—	—	——
Tennessee [9]	—	—	——
Texas	78	22	1974–76
Utah	97	3	1967–70
Vermont [16]	40	60	1971
Virginia	82	18	1970
Washington [9]	—	—	——
West Virginia	85.6	14.4	1969–70
Wisconsin	78	22	1974–76
Wyoming	93.5	6.5	1974–76

[1] Writer has been advised that Alabama uses a pure before-and-after valuation method that offsets benefits against the part taken, thus resulting in a comparatively large number of zero dollar offers requiring use of the condemnation power in order to be able to obtain title.

[2] Based on estimate furnished by office of the Attorney General. During the 5-year period 1966–1970, 15 percent of all parcels were condemned, with a sharp decline noted from 17.65 percent in 1968 to 7.89 percent in 1970.

[3] See text.

[4] See text. Substantial change in percentages of parcels acquired by negotiation in Florida: 43 percent in 1974; 47 percent in 1975; 8 percent in 1976. Figures provided by Office of Legal Operations, Florida Department of Transportation.

[5] Georgia position on attorneys' fees has changed since date of statistical breakdown was furnished. Interstate parcels acquired by negotiation 66.9 percent; primary and urban 74.6 percent.

[6] Substantial drop in percentages condemned to be noted; by negotiation 73.8 percent in 1973, 77.1 percent in 1974, 79.4 percent in 1975.

[7] Average percentage for period.

[8] Percentages of acquisitions resulting in litigation: 27 percent in 1974–75, 18 percent in 1974–75, 9 percent in 1975–76 (15 months).

[9] No response received.

[10] Percentages by negotiation: 74 percent in 1974, 63 percent in 1975, 60 percent in 1976.

[11] Estimate furnished by Office of the Attorney General based on information provided by Right-of-Way Division, Mississippi State Highway Department, for "past several years."

[12] Estimate furnished by Real Estate Division, New York State Department of Transportation, based on appropriation case load filed for litigation in Court of Claims.

[13] Percentage by negotiation: 80.5 percent in 1974, 88.4 percent in 1975, 90 percent in 1976.

[14] See text.

[15] Farm-to-market: 98 percent negotiation, 2 percent condemnation.

[16] Of 60 percent going to condemnation, approximately 35 percent appeal to the courts and about 15 percent to trial.

TABLE 3

ATTORNEYS' FEES IN FLORIDA CONDEMNATION CASES 1969–1971

ATTORNEYS' FEES ($)	PARCELS CLOSED			ATTORNEYS' FEES		
	NO.	ASSESSED VALUE ($)[a]	AMOUNT AWARDED ($)	TOTAL ($)	AS % OF AMOUNT GAINED BY LANDOWNER	AS % OF AMOUNT AWARDED
0–500	99	24,187	82,767.88	26,731.41	45.6	32.0
501–2,500	142	180,070	413,892.28	72,596.88	31.0	17.0
2,501–10,000	257	1,465,227	2,538,561.96	324,357.89	30.2	12.7
10,001–25,001	179	2,901,956	4,169,691.23	445,879.05	35.0	10.6
25,001–100,000	80	3,685,136	5,477,350.09	521,488.01	29.0	9.5
100,001–+	18	5,205,150	6,512,150.23	448,042.24	34.0	6.7

[a] Total state-approved assessed value.

TABLE 4

IOWA HIGHWAY LAND ACQUISITION

FISCAL YEAR	PARCELS NEGOTIATED (NO.)	PARCELS CONDEMNED (NO.)	PARCELS CONDEMNED (%)	TOTAL COST OF PARCELS BY NEGOTIATION ($)	TOTAL COST OF PARCELS BY CONDEMNATION ($)	TOTAL COST OF PARCELS BY CONDEMNATION (%)	PARCELS APPEALED TO DIST. COURT (NO.)
July 67–68	738	264	25	4,245,406.26	3,287,884.26	43.6	—
July 68–69	1,155	163	12	6,296,044.26	2,133,844.00	25.3	—
July 69–70	1,258	413	25	10,004,479.67	4,608,381.55	31.5	—
July 70–71	1,138	220	16	9,488,652.93	3,495,520.60	26.9	98
July 71–72	1,226	179	13	8,806,558.40	3,665,820.38	29.4	84
July 72–73	1,287	175	12	11,007,882.16	5,399,448.40	32.9	47
July 73–74	1,384	113	7.5	8,873,419.50	2,241,059.33	20.2	59
July 74–75	1,334	81	5.7	9,114,615.78	1,074,263.25	10.5	50
July 75–76	1,008	80	7.5	7,906,440.05	3,283,214.82	29.3	27

APPRAISALS MADE BY STAFF AND FEE

FISCAL YEAR	APPRAISALS (NO.) STAFF	APPRAISALS (NO.) FEE	APPRAISALS (NO.) TOTAL	% BY FEE	AMOUNT OFFERED ($)	CONDEMNATION AWARD ($)	INCREASE (%)
July 67–68	1,033	435	1,468	30			
July 68–69	1,122	1,084	2,206	49			
July 69–70	874	1,624	2,471	66	3,754,861.25	4,608,381.55	22.7
July 70–71	570	1,353	1,923	70	2,838,971.00	3,495,520.60	23.1
July 71–72	789	1,260	2,049	61	3,056,981.08	3,665,820.38	19.9
July 72–73	1,261	779	2,040	38	4,690,611.50	5,399,448.40	15.1
July 73–74	1,458	560	2,018	28	1,943,044.00	2,241,059.33	15.3
July 74–75	1,055	469	1,551	32	940,560.00	1,074,263.25	14.2
July 75–76	1,115	174	1,289	13.5	2,743,227.10	3,283,214.82	19.7

TABLE 5

IDAHO HIGHWAY LAND ACQUISITION

YEAR	PARCELS NEGOTIATED (NO.)	PARCELS CONDEMNED (NO.)	PARCELS TOTAL (NO.)	PARCELS % CONDEMNATIONS	SETTLEMENTS OUT OF COURT	SETTLEMENTS TRIED	SETTLEMENTS % CONDEMNED	CONDEMNATIONS PENDING
1967	302	62	364	17.03	43	19	5.22	75
1968	342	48	390	12.31	22	26	6.67	61
1969	260	40	300	13.33	36	4	1.33	54
1970	249	24	273	8.79	29	11	4.03	32
1971	104	8	112	7.14	17	0	0	16
1972	260	17	277	6.13	10	3	1.08	21
1973	236	37	273	1.35	15	1	0.66	38
1974	145	16	161	9.94	20	10	6.21	48
1975	118	8	126	6.35	22	4	3.17	31
1976	198	21	219	9.59	11	5	2.28	20

TABLE 6

REPRESENTATIVE FEES AWARDED

CASE	AWARD	OFFER	STATE'S APPRAISAL	LAND-OWNER'S APPRAISAL	VALUE OF LAND	HOURS	FEE AWARDED
State Department of Highways v. Olsen, 531 P.2d 1330 (Mont. 1975)	$ 68,000.00	$ 3,460.00[a]	$ 39,033.00	$86,500.00	$		$ 19,300.50
City of Wichita v. Chapman, 521 P.2d 589	64,567.66	23,000.00[a]		45,000.00[d]			13,500.00
City of Renton v. Dillingham Corporation, 79 Wash.2d 374, 485 P.2d 613 (1971)	740,775.00	434,000.00				175	46,016.00
City of Inglewood v. C. T. Johnson Corp., 248 P.2d 536					3,500.00	92	1,755.00
State v. Westover Co., 140 Cal. App. 2d 447 295 P.2d 96 (Cal. 1956)	1,516,312.25	675,000.00[b]					150,000.00
State v. Roth, 479 P.2d 55 (Wash. 1971)	16,972,25	1,570.00[c]					3,500.00
Harmony Lanes v. State Department of Roads, 193 Neb. 826, 229 N.W.2d 203 (1975) (Fee reduced from 8,640.00 because of duplication)	57,500.00[d]		22,832.00[d]				6,000.00[e]
Municipal Airport Auth. of City of Fargo v. Stockman, 198 N.W.2d 212 (N.D. 1972)	578,573.50	448,173.00					43,466.83
The Canal Authority v. Ocala Manufacturing Ice and Packing Company, 253 So.2d 495 (1 Fla. App. 1971)	400,000.00[f]				1,000,000.00[g]	662	15,000.00[h]
Northeastern Gas Transmission Co. v. Tersana Acres, Inc., 20 Conn Super 445, 139 A.2d 63 (1957)	31,000.00	1,500.00					15,000.00
Application of Sullivan, 3 Misc.2d 719, 156 N.Y.S.2d 189 (1956)	30,000.00	2,500.00					15,500.00
Columbus v. Rugg, 69 Ohio 2 Abs. 573, 126 N.E.2d 613, aff 97 Ohio App. 26, 55 Ohio Ops 262, 123 N.E.2d 299	50,000.00	30,000.00					7,882.92
Miami Beach v. Cummings, 228 So.2d 109 (3 Fla. App. 1969)	663,840.00	450,400.00				750	65,000.00
United Development Corp. v. State Highway Dept., 133 N.W.2d 439, 22 A.L.R. 3d 662 (N.D. 1965)	81,250.00	49,800.00					4,650.00
Perry v. Iowa State Highway Comm., 180 N.W.2d 417 (Iowa 1970)	24,000.00	16,500.00					3,000.00

[a] Original offer.
[b] Best offer of State.
[c] Written offer; oral offer, $6,280.
[d] District Court award; appraisers' award, $22,832.
[e] Reduced to $6,000 because of duplication.
[f] Benefit to client.
[g] Amount in controversy, $1,000,000.
[h] $15,000 fee held inadequate.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and those responsible for land acquisition. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in condemnation cases.

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