UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1364, 81-1424

NATIONAL ASSOCIATION OF CONCERNED VETERANS, et al.,
Appellees/Cross-Appellants,

v.

SECRETARY OF DEFENSE, et al.,
Appellants/Cross-Appellees.

No. 81-1791

MARK GREEN, et al.,
Appellees,

v.

DEPARTMENT OF COMMERCE,
Appellant.

JOINT PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

David C. Vladeck
Alan B. Morrison

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Barton F. Stichman
David F. Addlestone

National Veterans Law Center
4900 Massachusetts Avenue, N.W.
Washington, D.C. 20016
(202) 686-2741

Attorneys for Petitioners

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SECRETARY OF DEFENSE, et al.,	)	
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Concise Statement of Issues and Their Importance

These two cases, decided on April 23, 1982, along with Parker v. Lewis, No. 81-1965, in a single opinion, should be reheard en banc for two principal reasons. First, the panel's stringent standards governing the evidence that fee applicants are required to submit in order to prove the "prevailing rates" conflict with the standards laid down in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)(en banc), and Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42 (D.C. Cir. 1982)("EDF v. EPA")(petition for rehearing and

suggestion for rehearing en banc pending). Moreover, the panel's rules concerning proof of prevailing rates would reverse many long-standing practices in this Circuit. For example, under the panel's new standards, fee applicants may no longer rely on affidavits discussing the "going rate" in the community for attorneys with similar qualifications. Nor may trial court judges rely on their own expertise in determining the reasonableness of the requested rates. Instead, applicants must submit extremely detailed evidence setting forth the fees that attorneys with comparable experience have actually received from paying clients and "specific evidence" of their "actual billing practices."

These requirements are not simply onerous, they are unworkable. Most attorneys litigating Freedom of Information Act ("FOIA") and civil rights cases cannot submit "specific evidence" of their "actual billing practices." In the present cases, for example, the attorneys involved have no commercially established "market rates" and have no "actual billing practices" because they are employed full-time by public interest organizations. Moreover, for many practitioners, the reduced rates that they charge their clients in statutory fee cases, such as those under the FOIA or Title VII, bear no relation at all to the "prevailing rates," because the rates charged take into account the possibility of recovering a statutory fee. There is also no basis to believe that law firms will voluntarily share detailed billing information

with outsiders. Hence, litigation is certain to ensue if applicants must seek to obtain specific fee information from other attorneys through compulsory process in order to support their fee applications.

The strict documentation requirements established by the panel for proving the hours reasonably expended also far exceed those set by the Court in Copeland and will substantially increase the burden on attorneys' fee applicants and the courts. Petitioners submit that, because the requirements mandated by the panel are inconsistent with those set in Copeland, litigants, district judges, and future panels of this Court will be without clear guidelines, thereby further increasing litigation.

Finally, review by the full Court is particularly appropriate here because a panel, consisting of the two dissenting judges in Copeland and a district judge, has sought to establish broad rules governing all aspects of fee litigation in this Circuit. Indeed, to set comprehensive rules, the panel reached beyond the issues presented in these cases and announced standards which will affect fee applicants who had no opportunity to be heard. If allowed to stand, these new stringent requirements so expand the scope of the fee inquiry that competent counsel may well be discouraged from handling civil rights and FOIA cases, thereby threatening the important policies underlying those laws. Thus, if broad rules are to be established, they should be written by the entire Court sitting en banc.

I. THE RULES SET BY THE PANEL CONCERNING PROOF OF THE "PREVAILING RATE" DIRECTLY CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT AND ARE UNWORKABLE.

This Court has consistently held that in determining whether the hourly rates sought are reasonable, "the proper focus is the market value of services rendered;" i.e., the prevailing rate "for similar work in the community." Copeland, supra, 641 F.2d at 898, quoting Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974). See also National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975); Evans v. Sheraton Park Hotel, 503 F.2d 177, 187-88 (D.C. Cir. 1974). Thus, under Copeland, "a reasonable hourly rate is the product of a multiplicity of factors: . . . the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case." 641 F.2d at 891-92 (citations omitted).

To establish the prevailing rates, the attorneys here submitted a wide range of material, including, inter alia: (a) affidavits detailing counsel's educational background, litigation experience, their qualifications generally, and their belief as to the approriate "market rates," (b) evidence of prior fee awards; and (c) citations to district court decisions in comparable litigation in which awards were based on equivalent hourly rates See Slip op. at 21-32.1/ The panel rejected the adequacy of the proof

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1/ The government did not submit any rebuttal evidence.

of the prevailing rates in each of these cases. In so ruling, the panel laid down strict new rules governing the evidence fee applicants must furnish, including:

> * "affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases";
> * affidavits detailing "the actual rate that applicant's counsel can command in the market . . . .";
> * "specific evidence of [the attorney's] . . . actual billing practices during the relevant time period; and
> * "[r]ecent fees awarded . . . to attorneys of comparable reputation and experience performing similar work," provided that the fee awards demonstrates that the fee awards "were based on actual evidence of prevailing rates . . . ."

Slip op. at 8-9 & n.7 (emphasis added).

As demonstrated below, these rules not only conflict with the prior decisions of this Court, they are also unworkable.

A. The Panel's Decision Conflicts With This Court's Prior Decisions.

The panel's stringent new documentation requirements concerning proof of the prevailing rate are not supported by any prior ruling of this Court. The panel offers no citations as authority for the standards it sets, and so far as petitioners can ascertain, no case support exists. Indeed, to petitioners' knowledge, no court has ever suggested the strict standards adopted by the panel.

1. Not only is the panel's decision unprecedented, it is also in sharp conflict with at least two recent decisions of this Court. First, the panel's decision cannot be reconciled with EDF v. EPA, which was handed down less than three months before the panel's ruling. In EDF, the Court found that "citations to authorities [were more than adequate] to justify the reasonableness of the hourly rates claimed by each attorney" for EDF. 672 F.2d at 54. EDF relied solely on prior fee awards and affidavits detailing its counsel's background and qualifications; no additional affidavits or any other evidence concerning prevailing rates were before the Court. Nonetheless, the Court emphasized that the "documentation furnished by EDF [was] more than enough to satisfy the test set forth in Copeland." 672 F.2d at 54 (emphasis in original).2/ With respect to the hourly rates requested by the law firm of Trilling & Kennedy, which handled EDF's fee application, the Court approved the requested hourly rate of $110 per hour over EPA's vigorous objection. The sole ground for the award was that both Mr. Trilling and Mr. Kennedy possessed qualifications similar to the lead EDF lawyers who had been awarded comparable rates. No additional evidence relating to Trilling & Kennedy's "market rate" was before the Court. 672 F.2d at 61-64.3/

2/ It should be noted that, contrary to the panel's suggestion, the EPA contested the adequacy of EDF's documentation of the hourly rates it sought. Compare EPA's Petition for Rehearing and Suggestion for Rehearing En Banc at 8-11 with slip op. at 8 n.6 (in EDF "the government did not challenge the reasonableness of the rates").

3/ Both Mr. Trilling and Mr. Kennedy submitted brief affidavits describing their educational background and prior experience. See 672 F.2d at 62 nn.17 & 18.

Nor can the panel's decision be squared with Copeland. The submissions endorsed by the full Court in Copeland fall far short of the panel's standards. In Copeland, this Court approved the hourly rates awarded by the district court even though they were based solely on "statistics" presented by the applicant law firm concerning the attorneys' normal billing rates and a letter from a civil rights organization stating that "the typical fee charged by large Washington firms in employment discrimination cases ranged from $35 to $100 per hour." 641 F.2d at 902. 4/ Virtually the identical evidence was found unacceptable by the panel. See slip op. at 8-9.

The documentation standards established by the panel thus conflict with the approach uniformly taken by this Circuit. Petitioners submit that this conflict, standing alone, warrants reconsideration en banc. However, there are additional serious conflicts between the panel decision and prior decisions of this Court which underscore the panel's radical departure from prior law.

4/ It should be noted that the district courts, in applying Copeland, have taken a far different tack in evaluating the prevailing rate than that adopted by the panel. Indeed, not a single reported attorneys' fee decision in this district required the sort of showing envisioned by the panel, and in most cases, the level of documentation on the market rate issue is far less detailed than the evidence presented in both of these cases. See, e.g., Fells v. Brooks, 522 F. Supp. 30, 35 (D.D.C. 1981); Davis v. Bolger, 512 F. Supp. 61, 64-65 (D.D.C. 1981); In Re Swine Flu Immunization Products Liability Litigation, 89 F.R.D. 695, 703 (D.D.C. 1981).

2. The panel sharply criticized the district court's reliance on the hourly rates awarded in a Title VII case in assessing fees in National Association of Concerned Veterans (NACV), which was brought under the FOIA. Slip op. at 23. In so doing, the panel strongly implied that reliance on fee awards in litigation under different attorneys' fees statutes is improper. Id. The panel's ruling on this score is not just unprecedented, it contradicts prior decisions of this Court and others, and cannot be reconciled with the express Congressional intent underlying attorneys' fee provisions.

To begin with, the panel's ruling is plainly at odds with EDF v. EPA, where the Court found that a listing of recent awards under a range of fee statutes should be accorded weight in determining the prevailing rate. 672 F.2d at 58 n.11. The approach in EDF is consonant with both the prevailing view that awards under other fee provisions are relevant, see, e.g., Knighton v. Watkins, 616 F.2d 795, 800 (5th Cir. 1980); Population Services International v. Carey, 476 F. Supp. 4, 10 (S.D.N.Y. 1980), and with the fact that "lawyers engaged in a litigation practice ordinarily do not vary their rates . . . depending on the subject matter of the litigation." Berger, Court Awarded Attorneys' Fees: What Is Reasonable?, 126 U. Pa. L. Rev. 281, 321 n.160 (1977). See infra at 16 n.12. See also Palmigiano v. Garrahy, 616 F.2d 598, 901 (1st Cir. 1980); Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624, 638 (6th Cir.

1979), cert. denied, 447 U.S. 911 (1980); Wheeler v. Durham City Bd. of Education, 88 F.R.D. 27, 30 (M.D.N.C. 1980).

Moreover, the panel's ruling is at odds with Congress' express direction in many attorneys' fee provisions. For example, in the legislative history of the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. § 1988, Congress stressed that it "intended that the amount of fees awarded be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976)(emphasis added). Similarly, in enacting the FOIA attorneys' fee provision, at issue in both NACV and Green, Congress made clear that prior experience in implementing other fee provisions, including Title VII, should provide a guidepost for courts assessing reasonable fees in FOIA litigation. E.g., H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 6-7 (1974); S. Rep. No. 93-854, 93d Cong., 2d Sess. 17-20 (1974). The panel's ruling plainly does not conform to these Congressional dictates.

Most troubling, however, is the panel's implicit suggestion that there are different "classes" of federal court litigation for the purpose of setting hourly rates. To categorically rule that fee awards in Title VII cases, let alone antitrust litigation, have no bearing on the prevailing rate for FOIA litigation is to foster disparate treatment among lawyers who handle different kinds of complex litigation. While petitioners agree that the relative complexity of the cases may be relevant, the mere fact that a case is brought under Title VII or the FOIA should not, without more, establish that it is "not complex,"

or lead to the conclusion that only precisely the same kind of litigation is relevant in assessing the prevailing rate in the community.5/

3. On a related point, the panel warned that "fees awarded in other cases are probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys had similar qualifications, and issues of comparable complexity were raised." Slip op. at 9 n.7 (emphasis added). No support is cited for this ruling, nor does the panel explain how such an exhaustive showing would be made, except by relitigating the earlier actions. The panel's ruling also conflicts with settled practice. Courts have routinely relied on prior fee awards without requiring a showing of the kind contemplated by the panel. See, e.g, EDF v. EPA, supra, 672 F.2d at 58 n.11; Fells v. Brooks, 522 F. Supp. 30, 35 (D.D.C. 1981); In re Ampicillin Litigation, 81 F.R.D. 395, 404 n.3 (D.D.C. 1978); Population Services International v. Carey, supra, 476 F. Supp. at 10; Meisel v. Kremens, 80 F.R.D. 419, 426 (E.D. Pa. 1978). Thus, the panel's ruling on this score departs from the approach typically taken by courts and litigants.6/

5/ Indeed, because the complexity of the litigation is typically reflected in the number of hours expended and in counsel's hourly rates, the panel's formulation overemphasizes the importance of this factor.

6/ The Court should be mindful of the kinds of documentation the panel rejected. For example, in Green, the panel discounted the value of plaintiffs' "numerous [citations to] recent FOIA and Privacy Act cases in the District of Columbia in which hourly rates allowed . . . were comparable to the rates . . . [footnote continued]

4. The panel fails to come to terms with the fact that the government did not submit rebuttal evidence in either of these cases, and thus, under well-established rules of practice, the district courts were entitled to award fees based on plaintiffs' applications. E.g., Imprisoned Citizens Union v. Sharp, 473 F. Supp. 1017, 1025 (E.D. Pa. 1979); Population Services International v. Carey, supra, 476 F. Supp. at 10. In each of these cases, the applicants met their initial burden by submitting evidence on the number of hours expended and their market rates. Although the burden then shifted to the government, it only filed memoranda generally objecting to the awards; not a single affidavit or other evidentiary submission was offered in either of the cases.7/ Nor did the government file affidavits explaining why it was unable to provide evidentiary support for its opposition. Cf. Rule 56(f), Fed. R. Civ. P. Given the government's failure to come forward with evidence casting doubt on plaintiffs' submissions, the district courts' reliance on them was plainly proper.

[footnote continued]

sought in this case . . .," even though the cases relied on were ones in which the same attorneys had been awarded the same basic hourly rate sought in Green. Compare Slip op. at 27 with J.A. 29. The panel also acknowledged that plaintiffs relied on two stipulations entered in FOIA cases in 1977 in which the government agreed to compensate counsel at hourly rates equivalent to those sought in Green. Although the panel correctly observes that only one of the attorneys covered by the stipulation served as counsel in Green, the panel ignores the evidentiary value of the stipulations in terms of establishing the prevailing rate in the community. Compare Slip op. 27 with J.A. 34-37 & 47-57.

7/ In NACV, the government filed the slip opinion in Jordan v. Department of Justice. See NACV J.A. at 82.

The fact that the Department of Justice represented defendants should not be overlooked. Surely, the "law firm" which defends virtually every FOIA attorneys' fee case and a great number of Title VII actions is in an exceptional position to provide the court with evidence relating to the reasonableness of the hourly rates requested. Yet the Department produced no evidence whatsoever in response to plaintiffs' submissions. Accordingly, there was no need for the elaborate additional proceedings required by the panel, and the lower court rulings should have been affirmed.8/

5. The panel's decision reverses the time-honored doctrine that "a judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony . . .." National Treasury Employees Union v. Nixon, supra, 521 F.2d at 322 n.18, quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 169 (3d Cir. 1973); Tanberg v. Tanberg, 465 F.2d 173, 175 (3d Cir. 1972); cf. Evans v. Sheraton Park Hotel, supra, 503 F.2d at 189 (Robb, J., concurring in part, dissenting in part); Manhart v. City of Los Angeles, 652 F.2d 904, 908 (9th Cir. 1981). See also Trustees v.

8/ As this Court warned in a related context:

> Under Rule 56(e) . . . a party opposing a motion for summary judgment cannot rest on the allegations in his complaint, but must come forward with evidentiary affidavits; otherwise, the undisputed statements contained in the movants' affidavits are taken as true. Fitzke v. Shappell, 468 F.2d 1072, 1077 (6th Cir. 1972).

Smith v. Saxbe, 562 F.2d 729, 733 (D.C. Cir. 1977)(Leventhal, J.).

Greenough, 105 U.S. 527, 537 (1882)(trial court "has a far better means of knowing what is just and reasonable than an appellate court can have").9/

The panel decision not only cuts back on the district court's discretion, it also requires the district court to set aside its own considerable expertise in fee matters in favor of detailed submissions which may be impossible to produce. See infra at 15-19. Experienced district court judges should be presumed to know at least as much about the prevailing rate in the community as any practitioner. Yet the panel discounts any reliance on the trial judge's expertise. The panel even rejects what amounts to "expert testimony" by attorneys regarding the "going rate," see infra at 14-15, preferring instead to require other kinds of extremely detailed submissions. Petitioners submit that this major shift is neither warranted nor wise; in any event, it should not be reached without consideration by the full Court.

6. The panel departed from prior practice by discounting the value of what it described as "friendly" affidavits submitted by local attorneys setting forth the prevailing rate. The same

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9/ The panel's approach would restructure the practice most district judges follow, since judges routinely decide questions of reasonable hourly rates based, at least in part, on their own experience. See, e.g., In re Swine Flu Immunization Products Liability Litigation, 89 F.R.D. 695, 703 (D.D.C. 1981)(trial court set hourly rates based solely on its knowledge of prevailing rates); Davis v. Bolger, 512 F. Supp. 61, 64-65 (D.D.C. 1981): Fells v. Brooks, 522 F. Supp. 30, 35 (D.D.C. 1981); Payne v. Travenol Laboratories, Inc., 74 F.R.D. 19, 21 (N.D. Miss. 1976); Becker v. Blum, 487 F. Supp. 873, 876 (S.D.N.Y. 1980); Meisel v. Kremens, supra.

panel subsequently reemphasized this point in Veterans Education Project v. Secretary of the Air Force, No. 81-1741 (D.C. Cir. May 11, 1982) Mem. Op. at 1, an FOIA attorneys' fee case, where it held that two affidavits from local counsel "indicating their beliefs as to the prevailing market rate" were of "no evidentiary value."10/

In issuing these rulings, the panel, without discussion, rejected clear precedent. As noted above, in Copeland, this Court found probative an unsworn letter provided by a civil rights organization discussing the range of rates charged by law firms handling discrimination cases. 641 F.2d at 902. Copeland is consistent with the view uniformly taken by other courts that this kind of submission is helpful in assessing market rates. E.g., Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980); Farris v. Cox, 508 F. Supp. 222, 228 (N.D. Cal. 1981); Wheeler v. Durham City Bd. of Education, supra, 88 F.R.D. at 30; Pugh v. Rainwater, 465 F. Supp. 41, 44-45 (S.D. Fla. 1979); Payne v. Travenol Laboratories, Inc., 74 F.R.D. 19, 20 (N.D. Miss. 1976); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). The panel's decision to categorically reject this sort of affidavit undoubtedly will place a heavy strain on public interest and small firm practitioners in proving the prevailing rate, and, accordingly, should not be adopted without the concurrence of the full Court.

10/ Petitioners understand that a Petition for Rehearing and Suggestion for Rehearing En Banc will be filed in the Veterans Education Project case simultaneously with the filing of this Petition.

B. The Rules Set By The Panel Are Unworkable.

In rejecting the documentation provided by the plaintiffs in these cases, the panel made clear that fee applicants will be required to submit evidence detailing the fees that attorneys with comparable experience have actually received from fee-paying clients, as well as affidavits setting forth "specific evidence" of the attorneys' "actual billing practices." Slip op. at 7-8. See also Veterans Education Project, supra.

These requirements are unworkable, largely because the two critical premises underlying the panel's formulation are wrong. First, the proposition that law firms will voluntarily share specific fee information with outsiders is unfounded. The experience of the fee applicant in Jordan v. Department of Justice, 89 F.R.D. 537 (D.D.C. 1981)(appeal pending, No. 81-1380), demonstrates the steadfast resistance of most lawyers to revealing specific fee information. In Jordan, the plaintiff filed the affidavit of Stuart J. Land, a partner at Arnold & Porter, to establish general prevailing rates for litigation in the District of Columbia.11/ The United States Attorney's Office deposed Mr. Land and questioned him at length about his firm's billing practices. See Jordan Joint Appendix at 23-59. Mr. Land refused to answer any questions on that subject,

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11/ Mr. Land's affidavit would no doubt fall in the category of "friendly" affidavits rejected by the panel, since it discussed only Mr. Land's opinion about general billing rates rather than setting forth Mr. Land's specific hourly rate for litigation. Slip. op. at 8-9.

citing the antitrust implications of sharing fee information and the confidential nature of his firm's billing rates. Id. at 26, 32. He did, however, explain in detail the basis of his opinions on prevailing rates. Id.12/

Mr. Land's experience provides two lessons: first, attorneys who provide affidavits run the risk of becoming deeply enmeshed in the litigation, as did Mr. Land. Second, even "friendly" lawyers will not reveal their billing practices willingly. Thus, in order to establish the "precise fees that attorneys with similar qualifications have received from fee-paying clients", applicants will have to seek other means of obtaining that evidence.

Obviously, the government has information about what it has paid in other cases, but the panel discounted the value of such information absent an elaborate showing of comparability. Slip op. at 9 n.11. Therefore, as a practical matter, applicants would have no option but to subpoena the billing records of law firms engaging in similar litigation. This approach would undoubtedly generate a series of difficult legal and factual questions, such as, for example, which cases meet the panel's definition of "similar," which firms are really "comparable,"

12/ Mr. Land's deposition also reveals another flaw in the panel's reasoning. Contrary to the panel's suggestion that billing rates should be adjusted to reflect various sorts of litigation, Mr. Land testified that all litigation is generally billed at the same rate. Jordan Joint Appendix, at 58-59.

and how many different rates must an applicant present in order to establish the "prevailing rate." Inevitably, disputes would also arise over whether plaintiff and defense work is in fact "comparable," cf. Samuel v. University of Pittsburgh, 80 F.R.D. 293 (W.D. Pa. 1978), and whether a fee applicant has a right to conduct discovery on billing rates, an issue which is far from settled. Compare Mirabel v. General Motors Acceptance Corp., 576 F.2d 729, 731 (7th Cir.), cert. denied, 439 U.S. 1039 (1978); and Samuel v. University of Pittsburgh, supra; with Stastny v. Southern Bell Telephone & Telegraph Co., 77 F.R.D. 662 (W.D.N.C. 1978); and Naismith v. Professional Golfers Ass'n, 85 F.R.D. 522 (N.D. Ga. 1979). At a minimum, the panel's approach is bound to spawn extensive litigation, often involving third parties, and producing precisely what this Court warned against in Copeland: an inquiry of "massive proportions, perhaps even dwarfing the case in chief." 641 F.2d at 903 (citations omitted).

The second erroneous premise underlying the panel's decision is that all lawyers have "actual billing practices" which reflect their "market rates." The panel insists that applicants furnish evidence of their actual billing practices.13/ However, for those practitioners who litigate FOIA and Title VII cases against the government, such as the attorneys seeking

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13/ Because counsel in these cases are salaried public interest lawyers who charge no fees, they obviously cannot be faulted for not submitting such evidence.

fees in Parker v. Lewis, their fee paying clients typically cannot afford, and are not charged, the prevailing rate. As courts have repeatedly held, where "the attorneys' billing practices reflect fees lower than those prevailing in the marketplace, they are irrelevant." North Slope Borough v. Andrus, 515 F. Supp. 961, 968 (D.D.C. 1981)(appeal pending, No. 81-1752); Imprisoned Citizens Union v. Sharp, 473 F. Supp. 1017, 1025 (E.D. Pa. 1975); Richardson v. Restuarant Marketing Associates, Inc., 527 F. Supp. 690, 700-701 (N.D. Cal. 1981). Yet the panel nonetheless seems to equate these attorneys' actual billing rates with their "market rates." Such an equation, if intended, would be pernicious and would be contrary to the Court's decision in Copeland, where the Court flatly rejected the suggestion that fees be calculated on any basis other than the prevailing rate in the community. 641 F.2d at 898.

To the extent practitioners have billing rates which have been set by traditional market forces, such as the lawyers involved in Copeland, petitioners do not quarrel with the panel that the attorneys' actual rates are relevant and should be furnished to the court. But to imply that an attorney's billing rate is always probative, which is precisely what the panel has done by requiring actual rate information to be submitted, is to undercut nearly a decade of precedent in this Circuit. As this Court explained:

> It may well be that counsel serve organizations like appellants for compensation below that obtainable in

> the market because they believe the organizations further a public interest. Litigation of this sort should not have to to rely on the charity of counsel . . .. The attorneys who worked on this case should be reimbursed the reasonable value of their services.

Copeland v. Marshall, supra, 641 F.2d at 898, quoting Wilderness Society v. Morton, 495 F.2d 1026, 1037 (1974)(en banc), rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); accord, National Treasury Employees Union v. Nixon, 521 F.2d 317, 322-23 (D.C. Cir. 1975).

* * *

As is evident, the panel's decision amounts to nothing less than a complete restructuring of the process by which fee applicants prove their market rates. The panel places heavy and unrealistic burdens on fee applicants, while lifting the responsibility of producing rebuttal evidence from the government's shoulders. Petitioners submit that, at the very least, a departure from prior practice as radical as that mandated by the panel should not be imposed without the concurrence of the full Court.

II. THE PANEL'S FORMULATION OF THE EVIDENCE REQUIRED TO PROVE THE NUMBER OF HOURS EXPENDED ON THE LITIGATION IS INCONSISTENT WITH THIS COURT'S DECISION IN COPELAND.

The standards set by the panel concerning the factual showing necessary to establish the number of hours reasonably

expended on the litigation also cannot be reconciled with this Court's decision in Copeland. Contrary to the panel's implication that the Court in Copeland steered clear of setting specific standards for fee applications, slip op. at 5, this Court in fact provided significant guidance.

Addressing the proper content of fee applications, the Court expressly adopted the approach of the Third Circuit and explained that applicants for attorneys' fees should provide "'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 . . ..'" 641 F.2d at 891, quoting Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973)(Lindy I). The Court emphasized, however, that "[i]t is not necessary to know the exact number of minutes nor the precise activity to which each hour was devoted nor the attainments of each attorney." Id.14/

14/ Numerous other courts have similarly held that a description of the hours spent on the major phases of a case is ample documentation to support a statutory fee award. See, e.g., Furtado v. Bishop, 635 F.2d 915, 921 (1st Cir. 1980); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1275 (8th Cir. 1980); Milgo Electronic Corp. v. United Business Communications, Inc., 623 F.2d 645, 667 (10th Cir. 1980); Gluck v. American Protection Industries, Inc., 619 F.2d 30, 33 (9th Cir. 1980); Harkless v. Sweeney Independent School District, 608 F.2d 594, 597 (5th Cir. 1979); City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1102-03 (2d Cir. 1977); Davis v. Board of School Commissioners of Mobile County, 526 F.2d 865, 867-68 (5th Cir. 1976); Wheeler v. Durham City Board of Education 88 F.R.D. 27, 30 (M.D.N.C. 1980); Armstrong v. Reed, 462 F. Supp. 496, 503 (N.D. Miss. 1978); In Re Ampicillin Antitrust Litigation, 81 F.R.D. 395, 401 (D.D.C. 1978); Meisel v. Kremens, 80 F.R.D. 419, 423-24 (E.D. Pa. 1978).

The Court further stated that it did not intend:

> a district court, in setting an attorneys' fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It . . . is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief . . . [The district court] need not conduct a minute evaluation of each phase or category of counsel's work.

641 F.2d at 903, quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976)(en banc)(Lindy II). Thus, in Copeland, this Court affirmed a fee award based on "affidavits that only roughly itemized the hours spent." 641 F.2d at 905.

In marked contrast to the approach outlined in Copeland, the panel calls for the submission of highly detailed information concerning the exact number of hours spent on each phase of the litigation by each attorney. Slip op. at 10-11. Thus, the panel rejected the adequacy of the submission in Green, even though it followed the course charted in Copeland, and was far more detailed than the affidavits provided by the applicants in Copeland. Moreover, despite the fact that the Court in Copeland specifically rejected the contention that a fee applicant must submit time records as a matter of course, 641 F.2d at 905, the panel here strongly implies that a district court cannot properly act without them. Slip op. at 11-12, 16 and n.12. 15/

15/ It bears noting that even Arnold & Porter's highly sophisticated and computerized time-keeping practices might not measure up to the panel's standards. See Land Deposition, Jordan Joint Appendix, at 52-56.

In so ruling, the panel reached out to decide an issue not presented by any of the cases and accordingly not briefed by the parties. The panel states that "[a]ttorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney." Slip op. at 11. Thus, according to the panel, an applicant who has failed to follow this newly announced rule is entitled to no fee award at all. See slip op. at 20 n.19. Significantly, in making this declaration, the panel does not cite a single decision of this Circuit, and relies instead on two Second Circuit decisions which have not been followed strictly. Compare cases cited at slip op at 11, with Detroit v. Grinnell Corp., 560 F.2d 1093, 1102-1103 (2d Cir. 1977).

Until the panel decision, the law in the District of Columbia did not require the filing of contemporaneous time records as a matter of course. See, e.g., In Re Ampicillin Antitrust Litigation, 81 F.R.D. 395, 401 (D.D.C. 1978). Moreover, the panel's view is not the prevailing one among the Circuits. Compare Lindy II, 540 F.2d at 109; Gluck v. American Protection Industries, Inc., supra, 619 F.2d at 33; Milgo Electronics Corp v. United Business Communications, Inc., supra, 623 F.2d at 667; Harkless v. Sweeny Independent School District, 608 F.2d 594 (5th Cir. 1979), aff'g, 466 F. Supp. 457 (S.D. Tex. 1978); International Travel Arrangers, Inc. v. Western Airlines, Inc., supra, 623 F.2d at 1275. It may well be that the Court, in an appropriate case and after briefing

and argument, will determine prospectively that the panel's view is to be the law of the Circuit. However, since the effect of such a rule would be to deny any fee to attorneys who have performed valuable services, petitioners submit that this Court should adhere instead to the prevailing approach. In any event, principles of fundamental fairness counsel against this sort of retroactive law-making, especially where broad rules are imposed on absent litigants.

Moreover, in imposing strict documentation standards, the panel made mandatory procedures which historically have been employed on a discretionary basis by the district courts.16/ Under the prior decisions of this and other courts, district judges have generally been accorded wide latitude in fee matters, particularly when they assess the reasonableness of the hours for which compensation is sought. See cases cited supra at 12-13. The documentation requirements set by the panel divest the district courts of much of their discretion, and require the fee applicant to routinely furnish documentation well beyond that required by Copeland. In so ruling, the panel does not explain why such elaborate procedures are necessary as a matter of course, particularly since there has not been considerable

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16/ The Court in Copeland stressed that district courts have wide discretion in determining what procedures should be followed in attorneys' fee litigation, including requiring the submission of time records or more detailed information whenever they deem such information necessary. 641 F.2d at 905.

litigation on this point in the district court.17/

If there is a need for restructuring the rules governing proof of hours expended, petitioners submit that it should be undertaken by the Court sitting en banc. For although the panel was undoubtedly seeking to promulgate standards that would be applied uniformly, the requirements it set are not consistent with those set forth in Copeland. As a result, unless this Court vacates the panel decision and rehears this case en banc, subsequent panels of this Court, the district court, and litigants will be left without clear guidelines, which will almost certainly result in further litigation.

CONCLUSION

There can be no dispute that the net effect of the panel's new documentation requirements will be to increase substantially the quantum of information a fee applicant is required to file, and a court is required to analyze, in every fee case. Nor can there be any doubt that the panel's decision will spawn a great deal of additional litigation, focusing on, among other issues, access to law firms' fee information and the comparability of prior fee awards sought to be relied on to prove prevailing rates. The fee applicant, however, will not ultimately be the loser. As this Court pointed out in Copeland, "[b]ecause time spent litigating the fee request is itself

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17/ Only one of the reported post-Copeland decisions in the district court concerned the adequacy of the fee applicant's proof of hours expended in the litigation. Jordan v. Department of Justice, supra.

compensable, the depth of the inquiry ironically might lead to an increase, rather than a diminution, in fee awards." 641 F.2d at 896 (emphasis in original, footnotes omitted). In addition, the courts, including increasingly this Court, will be required to devote more time to fee matters.

To the extent that the panel decision makes it more difficult to obtain a reasonable fee award, it may also produce precisely the result this Court cautioned against in Copeland.

> The prospect of enduring an inquiry of this scope might discourage competent counsel from undertaking Title VII representation at all. This possibility cannot be tolerated in light of Title VII's purpose "to encourage individuals injured by . . . discrimination to seek judicial relief."

641 F.2d at 897 (citation omitted). To limit further litigation and to ensure that Congress' decision to encourage Title VII and FOIA plaintiffs to bring suit is not thwarted, this Court should vacate the panel decision and set these cases down for rehearing en banc.

Respectfully submitted,

David C. Vladeck
Alan B. Morrison

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Mark Green, et al.

Barton F. Stichman
David F. Addlestone

National Veterans Law Center
4900 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 686-2741

Attorneys for National Association
of Concerned Veterans

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