CASE ARGUED ORALLY ON APRIL 14, 1988

APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUBMIA

No. 87-5304

HAROLD WEISBERG,

Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. June L. Green, Judge

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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In its supplemental brief on the issue of whether this case must be remanded further proceedings under Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987)("Delaware Valley II"), the Department of Justice ("the Department") notes that the Supreme Court's decision in this case permits contingency enhancements only in extraordinary cases. The Department argues that this is not the "rare case" which meets that standard.

To the contrary, if this case does not meet that standard, it is hard to imagine a case which might. Although this case may

not yet reached Dickensian proportions, it is now in its thirteenth year. Thus, it is already several times as long as the average Freedom of Information Act ("FOIA") case.

Only a handful of FOIA cases have involved disclosures approaching the 60,000 pages of records produced as a result of this lawsuit. At the outset, there was little or no case law to guide resolution of critical issues such as the legal status of the copyrighted crime scene photographs and entitlement to a fee waiver. From the time of Nat. Ass'n of Concerned Vets v. Sec. of Defense, 675 F.2d 1319 (D.C.Cir. 1982) forward the law applicable to attorney fee awards under federal fee-shifting statutes has repeatedly undergone sea-tide changes. As a result, this case is now before this Court for the third time. Although this is by no means unprecedented, it is not the normal case.

Nor is it customary that the large burden of representing an unpopular client against a large government agency would be assumed by a sole practicioner and, at that, one who had few paying clients at the time.

A. Difficulty in Obtaining Representation

Under Delaware Valley II, a prevailing party who seeks to obtain a contingency enhancement must first show that without an adjustment for risk he would have faced substantial difficulties in finding counsel. Delaware Valley II, 107 S. Ct. at 3091 (O'Connor, J., concurring). In response to Weisberg's assertion

that he is an unpopular litigant and that unpopular litigants face substantial difficulties in obtaining counsel unless added compensation is possible, the Department argues that a litigant's unpopularity does not have "any legitimate role to play in the calculation of a reaonable attorney's fee." Appellee's Supplemental Brief, at 4. Whatever the merits of this argument, it does not address Weisberg's point that unopular litigants encounter substantial difficulties in finding counsel without an adjustment for risk. It is this point which is directly pertinent to Delaware Valley II's requeirement that difficulty in obtaining counsel must be demonstrated by a litigant seeking to obtain a contingency enhancement.

The Department takes issue with Weisberg's proffer of evidence that he made a number of unsuccessful attempts to obtain counsel to represent him in FOIA cases prior to 1974. Describing the probative value of this evidence as "virtually nil," the Department suggests that there is an obvious explanation for Weisberg's pre-1974 difficulties in obtaining counsel: namely, the attorneys he approached may have been reluctant to take his cases because FOIA's exemption for law enforcement records was far more expansive prior to 1974 than after the 1974 amendments. Appellee's Supplemental Brief, at 3. In support of this speculation, the Department cites Weisberg v. U.S. Department of Justice, 489 F.2d 1195 (D.C.Cir. 1973)(en banc), cert. denied, 416 U.S. 993 (1974).

There are three problems with the Department's suggestion. First, to show that the pre-1974 law on law enforcement records was more restrictive than the post-1974 law, the Department cites a decision which drastically changed the prior law. The Weisberg en banc decision, issued October 23, 1973, overturned a panel decision in Weisberg's favor which had applied the prior law. It was the drastic change in prior law made by Weisberg en banc which led Congress to amend the law one year later. Prior to Weisberg en banc, requesters did have some success in prying losse law enforcement records. See, e.g., Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973).

Second, Weisberg's many unsuccessful efforts to obtain counsel were virtually all made prior to the Weisberg en banc decision. Thus, this decision could not have been a factor in the whether or not an attorney would represent him.

Third, Weisberg's unsuccessful attempts to secure counsel included cases which did not involve law enforcement records or even, in some instances, law enforcement agenices. The case which Weisberg brought pro se after having failed to obtain legal counsel was brought against a non-law enforcement agency, the General Services Administration, to compel the National Archives to provide him with meaningful photographs of President Kennedy's clothing. See Weisberg v. General Services Administration, Civil Action No. 2569-70 (D.D.C.).

B. Market Treatment of Contingent Cases

Delware Valley II's second requirement demands a showing that the rates of compensation in the private market for contingent fee cases as a class differ from those where counsel is paid on a regular basis whether successful or not. 107 S. Ct. at 3089-3090 (O'Connor, J., concurring). The Department submits that Weisberg's portrayal of the riskiness of FOIA litigation is "grossly overdrawn; even a casual inspection of decided FOIA cases shows that hundreds of FOIA plaintiffs have managed to prevail in litigation. . . ." Appellee's Supplemental Brief, at 7.

The issue, of course, is not whether "hundreds" of FOIA litigants have managed to "prevail," but the percentage who have managed both to substantially prevail and to show entitlement to fee awards.

The most recent edition of the Department's own Freedom of Information Case List (September 1987 Edition) lists 2,708 FOIA cases. Only 328 (12%) have involved attorney fee issues at all. Id., at 498. Weisberg's counsel has identified 114 of these 328 cases as having been brought in the District of Columbia. By examining reported decisions, unofficial reports, court dockets and his own files, he has determined that attorney's fees were awarded in 41 cases and denied in 55 cases. He was unable to determine the results in the remaining 18 cases.

This indicates that 57% of FOIA attorney fee cases in the District of Columbia result in no fee awards whatsoever. Even when pro se cases are eliminated from consideration, the cases in which awards are denied outnumbers those in which they are granted

by 42 to 39. Thus, even when a FOIA litigant represented by counsel thinks he has a good enough case for attorney fees to make it worth litigating, he loses more than half of the time.

In view of this, it is clear that there is great risk in taking taking FOIA suits on a contingent fee basis. It follows inexorably from this that competent counsel in the private market will be unwilling to take FOIA cases on a contingent fee basis for the same wage they demand of clients who pay their bills promptly.

The Department refuses to concede the obvious and demands more rigorous proof, including testimony from an expert in legal economics who is able to develop some kind of econometric model. Appellee's Supplemental Brief, at 7-8. However, the Court which it quotes for this proposition noted that this would be "extremely expensive" and suggested that the District Court might wish to consider "whether such studies are feasible and whether there are alternatives that will meet the" Delaware Valley II test. Blum v. Witco Chemical Corp., 829 F.2d 367, 380 (3rd Cir. 1987).

The kind of expert opinion and econometric evidence sought by the Department is unnecessary and runs counter to the sound policy of determining legal issues inexpensively where it is possible to do so. The typical contigent fee case is a tort action, and it is common knowledge that the payment sought by attorneys in this field is keyed to an assessment of the risk that there will be no recovery or an inadequate recovery. Thus,

an attorney taking such a case may charge a contingent fee of 25% if the case is settled prior to trial, a 33% fee if there is a trial, and a fee of 40% or more if there is an appeal. Affidavits or testimony from attorneys experienced in this and other kinds of contingent fee cases should suffice to demonstrate that lawyers in the private market charge a premium for the risk of nonpayment or delayed payment. As in Blum v. Witco, this Court should remand the contingency enhancement issue to the district court with instructions to consider alternatives to an expensive trial involving expert economists and econometric models.

C. Weisberg's Current Fee Award Does Not Compensate Him for the Risk of Undertaking this Lawsuit

The Department inveighs against the fact that the District Court awarded Weisberg fees at his counsel's then current hourly rate of $100 rather than his "historical" rate of $75. It argues that this was improper because Shaw v. Library of Congress, 106 S. Ct. 2957 (1986) "squarely forecloses courts from awarding delay enhancements under fee-shifting statutes which (like FOIA's) do not expressly authorize such enhancements." Appellee's Supplemental Brief, at 9. This argument is based on the theory that such enhancements are in effect payments of interest which courts are not authorized to make because there has been no waiver of sovereign immunity for such payments.

In this case, the District Court's award cannot be considered payment of interest because the resulting award is less than the amount of principal lost to the ravages of inflation. Rather than

awarding Weisberg a 33% increase as a payment of interest, all the District Court did was to partially restore his loss of principle. In 1975, when this lawsuit began, the consumer price index for the Washington, D.C. area stood at 161.6. Statistical Abstract of the United States (107th Edition), at p. 466 (Table 779). In 1985, a decade later, it was 321.9, a gain of 160.3 or slightly over 99%. By the time Weisberg's counsel was paid in late 1987, the loss due to inflation was over 100% for work done in 1975, and close to that for work done in 1976-1977. Instead of paying Weisberg interest, the District Court merely restored, a third of what had been lost to inflation. Moreover, this does not measure the full extent of his loss, since the fees could have been invested at a high rate of return had they been paid promptly.

The FOIA and other fee-shifting statutes speak of a "reasonable" fee, and the courts universally acknowledge that this is required by the law. There is nothing the least bit "reasonable" about a fee which, when it is finally paid, is worth substantially less that its value had it been paid promptly.

The Department also argues that even if it is assumed that Weisberg is entitled to a contingency enhancement, it is not available because he is only requesting a 30% enhancement and has already been given a 33% enhancement. But Weisberg seeks a 30 percent enhancement of the $100/hour lodestar rate awarded by the District Court, not a 30 percent enhancement of his "historical" $75 hour rate.

CONCLUSION

For the foregoing reasons and the reasons given in Appellant's Supplemental Brief, the issue of the propriety of an enhancement for contingency representation under Delaware Valley II should be remanded to the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of May, 1988, mailed two copies of the foregoing Appellant's Reply to Appellee's Supplemental Brief to Scott R. McIntosh, Appellate Staff, Civil Division, Room 3614, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar