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Escalating attorneys' fees in our highly litigious society generate justifiable concern about who should bear the burden of these expenses. Plaintiffs or defendants have equally compelling arguments for shifting litigation costs to the other party. The allocation and amount of attorneys' fees affect not only whether suits are brought, but also whether justice is achieved. Individuals may be dissuaded from litigating meritorious claims when confronted by the expense. Also, the quality of legal services provided can be affected, unfortunately by the amount the individual is willing and able to spend.

In addressing the issue of attorneys' fees, the United States Supreme Court has held that the prevailing parties in a civil action ordinarily are not entitled to collect a reasonable fee from the losing parties. This principle is known as the 'American Rule' of attorneys' fees, and it derives from the common law. Several statutory and judicial exceptions to the American rule have developed recently. Congress, for example, may authorize the awarding of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976. The Act covers litigation brought under the civil rights acts and antidiscrimination provisions, and certain actions under the Internal Revenue Code. The Act was intended to attract competent counsel to civil rights litigation.

The growing interest in the topic of attorneys' fees to lawyers and clients prompted this symposium issue. The status of recognized exceptions to the American rule, and the existing and proposed statutory provisions pertaining to attorneys' fees warrant reexamination. The following issues are addressed by authors who are among the nation's leading authorities and practitioners on this subject.

Hon. James L. Oakes, U.S. Court of Appeals for the Second
Circuit, surveys the ramifications of fee awards in four areas: (1) Whether litigation commenced prior to enactment of the Civil Rights Attorney’s Fees Awards Act of 1976 is encompassed within the Act; (2) whether statutes providing for awards to a prevailing party should differentiate between prevailing plaintiffs and defendants; (3) whether attorneys fees are an element of costs or of damages; and (4) whether statutes permit fees to legal organizations such as legal aid societies or public interest law firms funded partially by the government.

Henry Cohen, legislative attorney for the American Law Division of the Congressional Research Service of the Library of Congress, discusses the statutory exceptions enacted by Congress for allowing fee awards. He explains the availability of the common law exceptions to the American rule, the common benefit doctrine and the bad faith doctrine. Also, he discusses the applicability of the sovereign immunity doctrine which protects the government against suit. Cohen offers his conclusions about the wisdom of barring awards of attorneys fees against the United States.

Arthur D Wolf, Associate Professor of Law at Western New England College School of Law sets forth the difficulties in awarding fees in multiple-claim litigation where the judgment rests on a complaint not enumerated in the Civil Rights Attorney’s Fees Awards Act of 1976. He focuses on federal and state cases in which the plaintiff’s pleadings involve both constitutional and non-constitutional issues and cases in which the plaintiff’s claims involve only nonconstitutional considerations.

Mary Frances Derfner, director of the Lawyers Committee for Civil Rights, Attorneys Fees Project, addresses the importance of attorneys fees for public interest litigants. She analyzes three general categories of attorneys fees legislation: Omnibus, specific and generic. Omnibus provisions authorize fee shifting in any civil litigation whether the interests promoted are public or private. Specific provisions authorize fee awards under a particular statute or particular sections of a statute. Generic provisions authorize fees for cases which fall within congressionally specified areas such as for environmental protection, consumer protection and the like.

Linda F Thome, attorney with the Lawyers Committee for Civil Rights Under Law traces the courts discretion in assessing fees under the federal statutes. She explains that courts consider criteria such as the parties ability to pay and whether the litigants are federally funded. She examines the courts methods of calculating appropriate fees to be awarded based upon the number of
hours devoted by the attorney multiplied by an established hourly rate reflecting the complexity and novelty of the issues, the quality of the work provided and the amount of recovery obtained. Some courts have followed guidelines set forth by the ABA Code of Professional Responsibility.

Harold Brown, partner in the Boston firm of Brown, Prifti, Leighton & Cohen, also discusses the courts decisions in assessing fees. He proposes standards and procedures for the courts to compute fee awards in complex litigation such as franchise and antitrust cases. His article provides hypotheticals and a mathematical formula which assists the court in calculating the appropriate award.

Mary C. Dunlap, Visiting Associate Professor of Law at University of Texas School of Law suggests that a new approach to awarding fees should be enacted in suits involving the government. She submits that since the government has an economic advantage over most litigants, attorneys fees should be granted in all suits against the government regardless of which party prevails, presuming the suits are meritorious. She contends that otherwise, litigants may be dissuaded from challenging the government merely because the government can use its economic advantage to defeat adverse parties.

The symposium concludes with three student pieces. The first article provides an overview of pending congressional bills. The Senate bill, S. 265, for example, titled "Equal Access to Justice, proposes that litigation expenses be awarded to parties who prevail against the United States in almost all administrative and judicial civil proceedings. Fees would be awarded based on a standard which considers whether the government's action was substantially justified. Also, two student articles analyze court decisions on fees in Alyeska Pipeline Service Co. v. Wilderness Society and Carey v. New York Gaslight Club Inc.

The Editorial Board and Staff of the Western New England Law Review thank the authors for their scholarly contributions. Their articles provide valuable insights on a timely and provocative subject of interest to the legal community.

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