

## Recovering Expert-Witness Fees in Civil Rights Litigation: Fitting *Crawford Fitting* into the Picture

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In the last year, much attention has been focused on the Supreme Court's recent, restrictive interpretations of federal civil rights legislation.<sup>1</sup> These decisions will increase the difficulties women and minorities face in proving and remedying employment discrimination. No less significant, however, are those decisions minimizing the amount of fees attorneys can expect to recover should their clients eventually succeed in proving a civil rights violation.<sup>2</sup> By diminishing the economic incentives for attorneys to take these cases, the Court has increased the chances that a civil rights plaintiff will not be able to obtain effective legal representation. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,<sup>3</sup> the Court continued this trend, possibly dealing a "lethal blow" to many civil

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1. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (limiting 42 U.S.C. § 1981 (1982) to racial discrimination in actual making and enforcement of contract; on-the-job harassment not covered); *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989) (requiring employees to file a complaint with Equal Employment Opportunity Commission when seniority system with alleged discriminatory purpose is adopted, even if employee is not actually harmed at that time); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (allowing job applicants not represented in fair employment case to bring action later to challenge changes resulting from litigation or decree); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (requiring Title VII plaintiffs who allege disparate impact to prove discrimination by isolating specific employment practices causing disparity).

2. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (rejecting contingency nature of litigation as support for bonus or fee enhancement except in limited circumstances); *Webb v. County Bd. of Educ.*, 471 U.S. 234 (1985) (disallowing recovery of fees for time spent in optional administrative proceedings); *Blum v. Stenson*, 465 U.S. 886 (1984) (eliminating novelty and complexity as factors to be considered in enhancing fee award); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (elevating to critical importance degree of plaintiff's success).

3. 482 U.S. 437 (1987).

rights cases.<sup>4</sup>

The Court in *Crawford* limited a prevailing federal litigant's recovery of expert witness fees under 28 U.S.C. § 1920<sup>5</sup> to the \$30-per-day cap set forth in 28 U.S.C. § 1821(b).<sup>6</sup> This amount, of course, represents a small fraction of the actual cost of expert witnesses. One concurring and two dissenting Justices tried to minimize *Crawford*'s effect by specifically stating that the Court's opinion did not reach the question of whether a prevailing civil rights litigant could recover the full cost for expert witnesses under the fee-shifting provision of 42 U.S.C. § 1988.<sup>7</sup>

This article reviews *Crawford* and canvasses the post-*Crawford* decisions addressing the question of recovery of witness fees under 42 U.S.C. § 1988. Several of these decisions conclude that, in light of *Crawford*, the \$30-per-day cap applies to recovery of expert witness fees under Section 1988.<sup>8</sup> Other courts have not read *Crawford* so literally. Rather, these courts rely on the significant adverse impact on civil rights litigation a \$30-per-day cap causes.<sup>9</sup> Reflecting the tension between these two approaches, one court of appeals which addressed the question en banc, split with a five-to-five vote.<sup>10</sup> On February 26, 1990, the Supreme Court granted certiorari to resolve the split of authority among the circuits on this issue.<sup>11</sup>

The article then examines the legislative history and policies underlying Section 1988. Although these policies justify full recovery of expert witness fees, given the Court's current approach to federal civil rights legislation, it is unlikely that a majority of the Court would uphold such a recovery absent further congressional directive.<sup>12</sup> Finally, the article explores how a civil rights litigant

4. See Ray Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 Lab. Law. 63, 72 (1989).

5. Title 28 U.S.C. § 1920 (1982) provides in relevant part: "A judge or clerk of any court of the United States may tax as costs . . . (6) Compensation of court appointed experts."

6. Title 28 U.S.C. § 1821(b) (1982) provides that a witness shall be paid an attendance fee of \$30 per day for each day's attendance and for the travel time going to and returning from the place of attendance. This does not apply to court-appointed experts.

7. 482 U.S. at 445 (Blackmun, J., concurring); *id.* at 446 n.1 (Marshall and Brennan, JJ., dissenting).

8. See *infra* note 47 and accompanying text.

9. See *infra* note 50 and accompanying text.

10. See *infra* text accompanying notes 51-57.

11. West Va. Univ. Hosps. v. Casey, 885 F.2d 11 (3d Cir. 1989), *cert. granted*, 58 U.S.L.W. 3545 (U.S. Feb. 26, 1990) (No. 89-994).

12. There has been no congressional action to amend § 1988 to provide explicitly for awarding expert witness fees to prevailing plaintiffs. New legislation introduced in Congress that has addressed the issue of shifting litigation costs in specific

might, pending congressional action, still recover some portion of the expenses of an expert witness in excess of the \$30-per-day cap.

### I. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*

In *Crawford*,<sup>13</sup> the Supreme Court considered consolidated appeals from two cases from the Court of Appeals for the Fifth Circuit. In *J.T. Gibbons, Inc. v. Crawford Fitting Co.*,<sup>14</sup> J.T. Gibbons brought an action against Crawford Fitting for alleged violations of the antitrust laws.<sup>15</sup> After a directed verdict in favor of Crawford, Crawford sought reimbursement from Gibbons for litigation expenses which included substantial expert witness fees.<sup>16</sup> The district court, finding that some of the expert testimony was "indispensible to the determination of [the] issues in [the] case,"<sup>17</sup> awarded \$86,480.70 for expert witness fees under Federal Rule of Civil Procedure 54(d).<sup>18</sup> The Fifth Circuit reversed, holding that the Section 1821 cap was dispositive.<sup>19</sup>

In *International Woodworkers of America, Local No. 5-376 v. Champion International Corp.*,<sup>20</sup> IWA brought an action against Champion for alleged racial discrimination in violation of Title VII and 42 U.S.C. § 1981.<sup>21</sup> After a successful defense, Champion sought reimbursement for, inter alia, \$11,807 in expert witness fees.<sup>22</sup> Although the district court found defendant's expert was "helpful and perhaps necessary to its case," it declined to award fees in excess of the \$30-per-day cap.<sup>23</sup> The Fifth Circuit af-

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areas has typically specified that costs include attorney's fees and expert witness fees. See, e.g., S. 2104, H.R. 4000 (Amendment to Civil Rights Act of 1964), 101st Cong. 2d Sess. (1990); S. 2105 (Amendment of District of Columbia Appropriations Act), 101st Cong., 2d Sess. (1990); S. 1630 (Clean Air Act Amendments), 101st Cong. 2d Sess. (1990); S. 1897, 101st Cong., 1st Sess. (1989); S. 1879 (Cargo Preference Reform), 101st Cong., 1st Sess. (1989); S. 1089 (Office of Environmental Quality), 101st Cong., 1st Sess. (1989); S. 869 (Capital Gains Deduction), 101st Cong., 1st Sess. (1989); S. 643 (Radon Tax Credit), 101st Cong., 1st Sess. (1989); S. 491 (Stratospheric Ozone and Climate Protection Act), 101st Cong., 1st Sess. (1989); S. 322 (American Conservation and Youth Service Corps Act), 101st Cong., 1st Sess. (1989).

13. 482 U.S. 437 (1987).

14. No. 86-322.

15. 482 U.S. at 438.

16. *Id.*

17. 102 F.R.D. 73, 86 (E.D. La. 1984)

18. *Id.* at 90. Rule 54(d) provides in relevant part: "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

19. 790 F.2d 1193, 1194 (5th Cir. 1986) (en banc).

20. No. 86-328.

21. 482 U.S. at 438.

22. *Id.*

23. No. WC 78-33-WK-P, slip op. at 9 (N.D. Miss. Aug. 24, 1983).

firmed.<sup>24</sup> In each of these cases, the prevailing litigants argued that Federal Rule of Civil Procedure 54(d), which provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs,"<sup>25</sup> granted the court discretion to award expert witness fees as costs in excess of the Section 1821 cap.<sup>26</sup>

Upon granting certiorari, the Supreme Court first reviewed the history of the 1853 Fee Act,<sup>27</sup> the precursor to 28 U.S.C. § 1920,<sup>28</sup> which gives federal courts authority to tax specified items. Before the 1853 Fee Act, taxable costs in most federal cases depended upon the practice of the state courts of the forum state.<sup>29</sup> The Act was passed to eliminate the diversity of practice among the federal courts, and because "losing litigants were being unfairly saddled with exorbitant fees."<sup>30</sup> The Act listed certain taxable costs, providing that "the following *and no other* compensation shall be taxed and allowed."<sup>31</sup> The rate for witnesses was set at \$1.50 per day.<sup>32</sup>

The words "and no other" do not appear in Section 1920. The majority in *Crawford*, however, did not find this absence significant and concluded that Section 1920 sets forth the universe of costs a federal court could tax under Federal Rule of Civil Procedure 54(d).

The logical conclusion from the language and interrelation of [Section 1920, Section 1821, and Rule 54(d)] is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs.<sup>33</sup>

The Court rejected the petitioners' argument that Rule 54(d) constituted a separate source of power to tax as costs expenses other than those enumerated in Section 1920, finding that this interpretation would make Section 1920 superfluous.<sup>34</sup>

24. 790 F.2d 1174 (5th Cir. 1986) (en banc).

25. Fed. R. Civ. P. 54(d).

26. *Crawford*, 482 U.S. at 441.

27. The 1853 Fee Act provided in relevant part, that "in lieu of the compensation now allowed by law to attorneys, solicitors, . . . and . . . witnesses . . . in the several states, the following and no other compensation shall be taxed and allowed." Act of Feb. 26, 1853, 10 Stat. 161.

28. The text of 28 U.S.C. § 1920 is set forth *supra*, at note 5.

29. *Crawford*, 482 U.S. at 439-40.

30. *Id.* at 440 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 251 (1975)).

31. 10 Stat. 161 (emphasis added).

32. *Id.* at 167.

33. *Crawford*, 482 U.S. at 441.

34. *Id.*

The Court held that it would "not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees."<sup>35</sup> Later in the opinion, the Court again stated that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920."<sup>36</sup>

The dissent, on the other hand, thought the majority's interpretation rendered Rule 54(d) superfluous and stressed the fact that Section 1920 "does not purport to be exclusive."<sup>37</sup> In a footnote, Justice Marshall stated that, in his view, the majority did not decide the question whether a federal district court could award expert witness fees under 42 U.S.C. § 1988 in excess of the amount set forth in Section 1821.<sup>38</sup> *Crawford Fitting* was an antitrust case not involving Section 1988.<sup>39</sup> In *International Woodworkers*, which had been based in part on 42 U.S.C. § 1981, the prevailing defendant filed a motion for attorney's fees "and expenses" under Section 1988, and filed a bill of costs under Rule 54(d).<sup>40</sup> The bill of costs included over \$30,000 for "'expert witness fees and expenses.'"<sup>41</sup> The district court denied the motion for attorney's fees and expenses under Section 1988.<sup>42</sup> This order was not appealed. Later, by separate order,<sup>43</sup> the district court denied the application for expert witness fees under Rule 54(d); the appeal was only from this order.<sup>44</sup> Thus, the issue of recovery under Section 1988 was not before the Court.

## II. Post-Crawford Response

Lower courts have not agreed on *Crawford's* effect on awarding witness fees in Section 1988 cases. Before *Crawford*, courts routinely denied requests made pursuant to Section 1821(b) for expert witness fees in excess of the \$30-per-day cap,<sup>45</sup> but allowed recovery of full expert witness fees as expenses or attorney's fees

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35. *Id.* at 445.

36. *Id.*

37. *Id.* at 449.

38. *Id.* at 446 n.1 (Marshall, J., dissenting).

39. *Id.*

40. *Id.* (quoting the record).

41. *Id.* (quoting the record).

42. *Id.*

43. No. WC 78-33-WK-P (N.D. Miss. Aug. 24, 1983).

44. 482 U.S. at 446 n.1 (Marshall, J., dissenting).

45. See, e.g., *Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285 (11th Cir. 1983); *Quy v. Air Am., Inc.*, 667 F.2d 1059 (D.C. Cir. 1981); *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855 (7th Cir. 1981); *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Berkey Photo, Inc., v. Eastman Kodak Co.*,

under 42 U.S.C. § 1988 and other fee-shifting statutes.<sup>46</sup> Since *Crawford*, however, several courts have found Section 1988 and similar civil rights statutes lacking in the explicitness required to shift the cost of expert witnesses.<sup>47</sup> These courts have offered little analysis of the issue and support the holdings by focusing on *Crawford*'s requirement of "explicit statutory authority."<sup>48</sup> Indeed, under *Crawford*, the absence of any mention of expert witness fees in Section 1988 would seem to preclude a finding of statutory authority, especially when compared with the numerous fee-shifting provisions in other federal statutes specifically enumerating witness fees as a recoverable cost.<sup>49</sup>

Other courts have declined to read *Crawford* so literally. These courts have noted that Congress's purpose in enacting Section 1988 was to provide equal access to the courts and to promote efficient enforcement of civil rights legislation and effective representation of persons seeking to vindicate violations of their civil rights.<sup>50</sup> These courts have held that limiting recovery of expert

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603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Goodwin Bros. Leasing, Inc. v. Citizens Bank*, 587 F.2d 730 (5th Cir. 1979).

46. See, e.g., *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (en banc), *cert. denied*, 453 U.S. 950 (1981).

47. See *West Va. Univ. Hosps. v. Casey*, 885 F.2d 11, 32-35 (3d Cir. 1989) ("we are constrained by the language of *Crawford* [requiring explicit statutory authority] . . . to limit expert witness fees to thirty dollars a day"); *Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988) (Section 1988 does not authorize award of expert witness fees in excess of that set forth in § 1821); *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987) (citing *Crawford* for proposition that prevailing civil rights party not entitled to tax expert fees as costs), *cert. denied*, 485 U.S. 991 (1988); *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1272 (8th Cir. 1987) (holding that in light of *Crawford*, defendant in § 1983/Title VII case could challenge assessment of class's expert witness fees), *cert. denied*, 485 U.S. 1021 (1988); see also *Denny v. Westfield State College*, 880 F.2d 1465, 1471 (1st Cir. 1989) (reserving question of whether experts' full fee can be shifted even when § 1988 is directly controlling); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573-76 (11th Cir.) (the Fair Labor Standards Act, 29 U.S.C. § 216(b), does not authorize award of expert witness fees in excess of amount permitted by § 1821), *cert. denied*, 109 S. Ct. 378 (1988); *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987) (Voting Rights Act does not allow recovery of witness fees), *cert. denied*, 486 U.S. 1008 (1988).

48. *Crawford*, 482 U.S. at 445.

49. See, e.g., *Natural Gas Pipeline Safety Act*, 49 U.S.C. § 1686(e) (1982); *Hazardous Liquid Pipeline Safety Act of 1979*, 49 U.S.C. § 2014(e) (1982); *Consumer Product Safety Act*, 15 U.S.C. § 2060(c) (1982); *Toxic Substances Control Act*, 15 U.S.C. § 2618(d) (1982); *Safe Drinking Water Act*, 42 U.S.C. § 300j-8(d) (1982); *Noise Control Act of 1972*, 42 U.S.C. § 4911(d) (1982); *Energy Policy and Conservation Act*, 42 U.S.C. § 6305(d) (1982).

50. See *Friedrich v. City of Chicago*, 888 F.2d 511, 515 (7th Cir. 1989) (*Crawford* does not control because "literal interpretation of judicial language is no more defensible than the literal interpretation of statutory language"); *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1347 (1st Cir. 1988) (*Crawford* may not directly control);

witness fees to \$30 per day would frustrate these purposes.

Perhaps the clearest reflection of the split of opinion on this issue, as well as an indication of the stakes involved, is the evenly split vote of the Eighth Circuit sitting en banc in *Gilbert v. City of Little Rock*.<sup>51</sup> The case represented the final chapter in nearly ten years of litigation concerning racial discrimination in the Little Rock, Arkansas, Police Department. The appellants were four police officers who eventually prevailed on their claim of discriminatory promotional policies brought under Title VII and 42 U.S.C. §§ 1981 and 1983.<sup>52</sup> The district court calculated attorney's fees to be awarded the appellants, and awarded them full transcript and deposition costs and approximately \$4,000 for out-of-pocket expenses.<sup>53</sup> The appellants also sought \$93,946.69 in expert witness fees and expenses.<sup>54</sup> The district court noted that "[u]ntil recently, the Court would have been inclined to award [the appellants] the lion's share of the expert witness fees requested" but felt constrained by *Crawford* to limit the recovery of expert witness expenses to \$30 per day.<sup>55</sup> Accordingly, the district court limited its award of expert witness fees to \$900.00.<sup>56</sup> After oral argument in front of the en banc court, the award of \$900.00 was summarily affirmed by the vote of an equally divided court.<sup>57</sup>

### III. The American Rule and Section 1988's Fee-Shifting Provision

Under the "American Rule," the prevailing party generally may not recover expenses incurred to aid the party in preparing his or her case.<sup>58</sup> This rule has been justified as a means of: (1)

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*SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988) (*Crawford* not applicable because award of expert's fee "not made as a taxation of costs pursuant to 28 U.S.C. § 1821, but as an expense under 42 U.S.C. § 1988"); *United States v. Yonkers Bd. of Educ.*, 118 F.R.D. 326, 330 (S.D.N.Y. 1987) (*Crawford* does not preclude an award of full expert witness fees "[i]n light of past practice, the congressional policy of encouraging the assertion of legal rights in civil rights matters as manifested in 42 U.S.C. § 1988 and the adverse impact which a \$30-per-day limitation on expert witness reimbursement would have on such litigation"); cf. *Johns v. Whirlpool Corp.*, No. 86-2003 (D. Kan. filed Feb. 4, 1988) (LEXIS, Genfed library, Dist. file at LEXIS page 18) (Fair Labor Standards Act, 29 U.S.C. § 216(b), authorizes award of witness fees in excess of § 1821 limits because applying this limit would be inconsistent with the "policy underlying the attorney's fees provisions in discrimination statutes . . . to encourage private persons to bring meritorious actions and provide a public service by discouraging and eliminating unlawful discrimination").

51. 867 F.2d 1062 (8th Cir. 1989) (en banc).

52. *Gilbert v. City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986).

53. *Gilbert v. City of Little Rock*, 709 F. Supp. 856, 858-61 (E.D. Ark. 1987).

54. *Id.*

55. *Id.*

56. *Id.*

57. 867 F.2d at 1062.

58. This is in contrast to the "English Rule" which awards the prevailing party

guarding against excessive litigation and unreasonable fees generated in the expectation that the cost will be borne by the losing party;<sup>59</sup> (2) protecting those with monetarily small claims from being discouraged from instituting actions to vindicate their rights for fear they will be saddled with their opponents' counsel's fees;<sup>60</sup> and (3) avoiding the substantial burden of judicial administration which would result from litigation fees.<sup>61</sup>

In *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>62</sup> the Supreme Court declined to carve a broad exception into the American Rule for attorney's fees. Respondents in *Alyeska* had instituted federal litigation to prevent the issuance of government permits required for construction of a trans-Alaska oil pipeline.<sup>63</sup> Although legislation eventually terminated the litigation and granted the permit,<sup>64</sup> the Court of Appeals for the District of Columbia granted respondents' request for attorney's fees because they had acted "to vindicate important statutory rights of all citizens whose interests might be affected."<sup>65</sup>

In reversing, the Supreme Court noted that the "circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."<sup>66</sup> The Court reasoned that Congress's intent, as evidenced in 28 U.S.C. §§ 1920 and 1923, was to preserve the American Rule.<sup>67</sup> The Court further concluded that it would be inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation.<sup>68</sup>

Congress responded swiftly and enacted the fee-shifting provisions of the Civil Rights Attorney's Fee Awards Act of 1976,<sup>69</sup> which later became 42 U.S.C. § 1988. The Act authorizes courts to award reasonable attorney's fees to prevailing parties, unless spe-

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his or her counsel fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

59. See *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 230-31 (1872).

60. See *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1031 (D.C. Cir. 1974), *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

61. See *Fleischmann*, 386 U.S. at 718.

62. 421 U.S. 240 (1975).

63. *Id.* at 242-43.

64. *Id.* at 244 n.11 (citing Pub. L. 93-153, § 101, 87 Stat. 576 (1973) (codified at 30 U.S.C. § 185 (1982)) which amends the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287).

65. 495 F.2d 1026, 1032 (D.C. Cir. 1974) (en banc).

66. 421 U.S. at 262.

67. *Id.* at 255-60.

68. *Id.* at 263-69.

69. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1982)).



cial circumstances make such an award unjust.<sup>70</sup> The legislative history indicates two justifications for fee-shifting. First, because civil rights litigants are often poor and judicial remedies are often non-monetary, shifting litigation costs from civil rights victim to civil rights violator gives victims effective access to the judicial process.<sup>71</sup> Second, the Act encourages individuals to act as "private attorneys general," thereby playing a significant role in the enforcement of important congressional policies.<sup>72</sup> In providing for the realization of these objectives, Congress recognized that competent counsel was an essential and critical ingredient.<sup>73</sup>

Both justifications indicate that all reasonable expenses, including the full expense of expert witnesses, should be recoverable under Section 1988. First, the increasingly complex fact patterns of civil rights litigation frequently require civil rights attorneys to make significant out-of-pocket expenditures for assistance from non-legal experts. If these expenses are not taxable as costs and the client cannot afford to pay them (as is often the case), they must be borne by counsel. For example, the successful plaintiffs in *Gilbert* incurred \$93,946.69 in expert witness fees over an eight-year period, only \$900.00 of which was awarded by the Eighth Circuit as costs.<sup>74</sup> If counsel is forced to absorb these costs, generally billable in fee-paid cases, the effect will be to steer attorneys away from civil rights cases and toward more lucrative types of litiga-

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70. Title 42 U.S.C. § 1988 states:

In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title], title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, 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.

71. See, e.g., S. Rep. No. 1011, 94th Cong. 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5909-10 (fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate their rights); H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1. (1976) (bill designed to give persons effective access to the judicial process); 122 Cong. Rec. 31, 471 (1976) (statement of Sen. Mathias) (goal of bill is to ensure high cost of litigation does not bar access to federal courts to citizens seeking to enforce their civil rights); 122 Cong. Rec. 31, 472 (statement of Sen. Kennedy) (bill addressed issue of citizen access to the courts, ensuring that beneficiaries of civil rights have means of enforcing them); see also 122 Cong. Rec. 31,832 (1976) (statement of Sen. Hathaway).

72. S. Rep. No. 1011, 94th Cong. 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910; H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1 (1976) (effective enforcement depends on efforts of private citizens); 122 Cong. Rec. 31,471 (statement of Sen. Hugh Scott) (Congress should encourage citizens to go to court in private suits to vindicate civil rights policies).

73. H.R. Rep. 1558, 94th Cong. 2d Sess. 9 (1976) (award of reasonable fees ensures attraction of competent counsel in civil rights cases); S. Rep. No. 1011, 94th Cong. 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5913 (referring to prior cases resulting in fees adequate to attract competent counsel).

74. *Gilbert v. City of Little Rock*, 709 F. Supp. 856, 861 (E.D. Ark. 1987).

tion. Decreasing the availability of attorneys restricts a civil rights plaintiff's effective access to the courts.

Second, although the "private attorney general" theory is usually discussed in terms of the parties to an action, the often complex nature of civil rights litigation makes the theory equally applicable to civil rights counsel. The valuable public service civil rights litigation performs could not be achieved without the services of counsel, who would be severely penalized if they could not recover the real costs of their services.

Thus, the congressional policies underlying Section 1988 support extending Section 1988's fee-shifting provision to cover full expert witness fees. However, since neither Section 1988 itself nor its legislative history specifically mentions witness expenses, it does not seem to meet the "explicit statutory authority" requirement of *Crawford*.

The Seventh Circuit, in a recent decision, *Friedrich v. City of Chicago*,<sup>75</sup> took an ironic approach to this problem by questioning whether *Crawford*'s own language<sup>76</sup> was to be read literally. Writing for the court, Judge Posner stated:

Read literally this statement [in *Crawford* requiring explicit statutory authorization for the taxation of expert witness fees as costs] provides strong support for the defendants' argument [that such fees were not taxable under section 1988], but the literal interpretation of judicial language is no more defensible than the literal interpretation of statutory language.<sup>77</sup>

Judge Posner went on to reason that, in any event, all *Crawford* requires is that Congress's intent to shift full expert witness fees be clear. *Crawford* does not require that the statute in question explicitly contain the words "expert witness fees" or language which specifically repeals Sections 1920 and 1821.<sup>78</sup> An examination of the purposes of Section 1988 and the circumstances surrounding its enactment convinced the Seventh Circuit that Congress clearly intended that full expert fees could be shifted.<sup>79</sup>

#### IV. A Loose Fit?

Even in those circuits where *Crawford* has already slammed the door on successful civil rights litigants attempting to recover full expert witness fees under 42 U.S.C. § 1988, *Crawford*'s holding may be significantly limited. Civil rights litigators should closely

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75. 888 F.2d 511 (7th Cir. 1989) (Posner, J.)

76. See *supra* text accompanying notes 35-36.

77. *Id.* at 515.

78. *Id.* at 515-16.

79. *Id.* at 517-19.

examine these limits to see if their expert witness fees may qualify for full or partial reimbursement. Section 1821 specifies the amount an expert can be paid "for each day's *attendance*."<sup>80</sup> Yet, in the course of preparing and presenting a case, an expert is likely to spend considerable time engaged in non-testimonial activity such as identification, collection, analysis, synthesis of data, and consultations with the attorney.<sup>81</sup> In this capacity, the expert contributes to the attorney's understanding of the case.

In *Missouri v. Jenkins*,<sup>82</sup> a post-*Crawford* Supreme Court decision interpreting "reasonable attorney's fees" under Section 1988, the Court stated that a reasonable attorney's fee should encompass the reasonable fee for the work product of an attorney, taking into account the work of paralegals, law clerks, others "whose labor contributes to the work product for which an attorney bills her client," and "other expenses and profit."<sup>83</sup> Although *Jenkins* did not address expert services, the same rationale applies to that part of an expert's fees related to providing assistance in preparing the case, such as educating the attorney on statistical issues.<sup>84</sup> Costs for expert advice and consultation certainly qualify as incidental and necessary expenses incurred in furnishing effective and competent representation.

Alternatively, a prevailing party may be able to recoup some costs of an expert's services under 28 U.S.C. § 1920(4) which allows reimbursement of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case."<sup>85</sup> A leading commentator has interpreted this section as covering the reasonable expenses of preparing demonstrative evidence such as models, graphs, charts, and photographs.<sup>86</sup> Moreover, some courts have construed Section 1920(4) to permit awards of costs for statistical consulting and computer expenses. These cases, however, specifically differentiate between the expenses of an expert's research and analysis necessary for preparation of exhibits and surveys *presented to the court* (which are reimbursable under Section 1920(4)) and the expenses associated with the research and analysis necessary for *prepara-*

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80. 28 U.S.C. § 182(b) (1982) (emphasis added).

81. See, e.g., Expert Witnesses' Statements of Professional Services, Appellants' Addendum, at 29-32, *Gilbert v. City of Little Rock*, No. 87-2128 (8th Cir. filed Oct. 16, 1987) (expert was required to stay in Little Rock for 17 days during the trial to work on complex statistical analyses).

82. 109 S. Ct. 2463 (1989).

83. *Id.* at 2470.

84. See *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989).

85. 28 U.S.C. § 1920(4) (1982).

86. 6 James Moore, Walter Taggart & Jeremy Wicker, *Moore's Federal Practice* ¶ 54.77(6), at 54-463-54-466 (2d ed. 1988).

tion of the case for trial (which are not reimbursable under Section 1920(4)).<sup>87</sup>

It should be noted, however, that although prior court approval is not required for recovery under Section 1920 of justifiably incurred expenses, a party is less likely to recover these costs absent prior court approval.<sup>88</sup> Nonetheless, counsel have occasionally convinced the court to tax these costs despite lack of prior court approval.<sup>89</sup>

Finally, and probably most significantly, *Crawford* applies only to a litigant's attempt to recover expert witness fees under federal law. At least one federal court has affirmed an award of expert witness fees in excess of the \$30-per-day cap as authorized under a state cost-shifting statute. In *Freeman v. Package Machinery Co.*,<sup>90</sup> the plaintiff brought and recovered on parallel federal and state age discrimination claims. The First Circuit discussed the applicability of *Crawford* to claims brought under the Age Discrimination in Employment Act,<sup>91</sup> but concluded that it did not have to reach the issue because Massachusetts had enacted its own cost-shifting statute.<sup>92</sup> After analyzing the statute and case law, the First Circuit found no discernible cap to the plaintiff's recovery under state law and upheld the amount of the award as wholly within the court's discretion.<sup>93</sup>

Although a few states specifically prohibit recovery of additional compensation for expert witnesses,<sup>94</sup> twice as many states

87. *In re Air Crash Disaster*, 687 F.2d 626, 631 (2d Cir. 1982); *Equal Employment Opportunity Comm'n v. Kenosha Unified School Dist. No. 1*, 620 F.2d 1220, 1227-28 (7th Cir. 1980). *But see* *Shipes v. Trinity Industries, Inc.*, 685 F. Supp. 612 (E.D. Tex. 1987) (prevailing civil rights plaintiffs after *Crawford* not entitled to fees for out-of-court services performed by experts in analyzing statistical evidence presented at trial regardless of whether experts testified at trial).

88. *See, e.g., Studiengesellschaft Kohle mbMH v. Eastman Kodak Co.*, 713 F.2d 128, 132-33 (5th Cir. 1983) (reversing award for charts, models, and photographs because no pretrial authorization); *Shakey's Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983) (surveys not essential to defense).

89. *See* cases cited *supra* note 87.

90. 865 F.2d 1331 (1st Cir. 1988).

91. 29 U.S.C. §§ 621-634 (1982).

92. 865 F.2d at 1346-47 (citing Mass. Gen. L. ch. 151B, § 9 (1988)) (court shall award successful employment discrimination petitioner reasonable attorney's fees and costs unless special circumstances make award unjust).

93. 865 F.2d at 1347-50.

94. ARIZONA: *see* Ariz. Rev. Stat. Ann. § 12-332 (1982) (costs include witness fees); *State v. McDonald*, 88 Ariz. 1, 352 P.2d 343 (Ariz. 1960) (no extra recovery when witness is expert). *But cf.* *Rabe v. Cut & Curl of Plaza 75, Inc.*, 148 Ariz. 552, 715 P.2d 1240 (Ariz. Ct. App. 1986) (party can recover as costs money paid to opponent's expert to obtain testimony before trial). CALIFORNIA: *see* Cal. Gov't Code § 68092.5(a) (West 1989) (party employing expert responsible for fees); *Posey v. State*, 180 Cal. 3d 836, 225 Cal. Rptr. 830 (Cal. Ct. App. 1986) (prevailing party not entitled to recover expert witness fees as costs). KANSAS: *see* Kan. Stat. Ann.

specifically permit recovery of expert witness fees in an amount to be determined by the court.<sup>95</sup> Moreover, some states permit a court to include an expert's time spent in preparation for trial.<sup>96</sup> A few states, however, restrict the number of experts whose fees can be taxed.<sup>97</sup>

## V. Conclusion

Although some federal courts have interpreted *Crawford* as foreclosing a successful civil rights litigant's ability to recover full expert witness fees under the cost-shifting provisions of 42 U.S.C. § 1988, *Crawford* does not mandate such an interpretation. If

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§ 60-2003 (1983) (costs include witness fees); *Divine v. Groshong*, 235 Kan. 127, 679 P.2d 700 (Kan. 1984) (no extra recovery when witness is expert). NEW YORK: see N.Y. Civ. Prac. L. & R. 8301 (McKinney 1981) (costs can be taxed); *Board of Educ. v. Ambach*, 90 A.D.2d 227, 458 N.Y.S.2d 680 (N.Y. App. Div. 1982) (extra fee for expert not recoverable under Rule 8301 absent extraordinary circumstances). See also WISCONSIN: see Wis. Stat. § 814.04(2) (Supp. 1989) (recovery of expert witness fees not to exceed \$100 per testifying expert).

95. COLORADO: see Colo. Rev. Stat. § 13-16-122 (1987) (costs include expert witness fees); § 13-33-102(4) (1987) (court has discretion to assess amount of expert's fee); *Crawford v. French*, 633 P.2d 524 (Colo. Ct. App. 1981) (expert fees taxed as costs in adverse possession action). CONNECTICUT: see Conn. Gen. Stat. § 52-251b (Supp. 1989) (court can award costs to prevailing civil rights party); § 52-260(f) (Supp. 1989) (fees of medical witness determined by court and may be taxed as costs). DELAWARE: see Del. Code Ann. tit. 10, § 8906 (Supp. 1974) (expert witness fees fixed by court and may be taxed as costs); *Weinberger v. UOP, Inc.*, 517 A.2d 653 (Del. Ch. 1986) (expert witness fees awarded in shareholder suit). FLORIDA: see Fla. Stat. § 92-231(2) (1979) (expert witness allowed \$10 per hour or amount determined by the court, and fee may be taxed as costs); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245 (Fla. Dist. Ct. App. 1984) (taxing costs of expert witness in products liability action). GEORGIA: see Ga. Code Ann. § 9-15-8 (Michie 1982) (witness fees taxable as costs under some circumstances); *Schofield v. Little*, 2 Ga. App. 286, 58 S.E. 666 (1907) (although no statute allows or prohibits expert's fees as costs, physicians can demand more compensation than lay witnesses). ILLINOIS: see Ill. Rev. Stat. ch. 68, para. 8-108(G) (1987) (court can tax all or portion of costs of civil rights action "including . . . expert witness fees"). MAINE: see Me. Rev. Stat. Ann. tit. 14 § 1502-C (Supp. 1989) (prevailing party can recover expert witness fees); tit. 16 § 252 (expert's fees to be determined by court). MASSACHUSETTS: see Mass. Gen. L. ch. 151B, § 9 (1989) (court to award successful civil rights petitioner reasonable attorney's fees and costs); *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir. 1988) (no discernible cap; award within court's discretion). NEW MEXICO: see N.M. Stat. Ann. § 38-6-4 (Supp. 1987) (court may tax expert witness fee as costs). VIRGINIA: see Va. Code Ann. § 14.1-178 (1989) (prevailing party may recover costs); § 14.1-190 (taxing of expert's fees in court's discretion).

96. See *Yeager Garden Acres, Inc. v. Summit Const. Co.*, 32 Colo. App. 242, 513 P.2d 458 (1973) (assessment under Colorado statute can consider expert's preparation time); N.M. Stat. Ann. § 38-6-4 (Supp. 1987) (authorizing court to consider compensation for expert's time to prepare and investigate before testifying).

97. N.M. Stat. Ann. § 38-6-4 (Supp. 1987) (restricting taxable witness fees to one liability expert and one damage expert, unless court determines otherwise); Va. Code Ann. § 14.1-194 (1989) (court may restrict number of witnesses whose fees will be taxed).

*Crawford's* requirement of "explicit statutory authority" is read to include authority as expressed in legislative history, then the justifications underlying Section 1988 indicate full expert witness fees should be recoverable thereunder. In any event, *Crawford* does not foreclose the possibility of recovering the costs of some of an expert's services under other federal statutes or full expert witness fees under some state cost-shifting statutes.