SUPREME COURT

STATE OF LOUISIANA

NO. 2012-C-2182

COLLETTE JOSEY COVINGTON AND JADE COVINGTON
Plaintiffs

Versus

McNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS
FOR THE UNIVERSITY OF LOUISIANA SYSTEM
Defendants

CIVIL PROCEEDING

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF LEGAL FEE ANALYSIS (NALFA) IN SUPPORT OF RESPONDENTS COLLETTE JOSEY COVINGTON AND JADE COVINGTON'S REQUESTED ATTORNEY'S FEES

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The National Association of Legal Fee Analysis (NALFA) files this *Amicus Curiae* Brief in support of Respondents Collette Josey Covington and Jade Covington, ("Covington" or "Plaintiffs") in the captioned matter, in compliance with the Rules of the Louisiana Supreme Court. Our organization has reviewed the briefs of both parties prior to preparing this Brief.

STATEMENT OF AMICUS CURIAE

The National Association of Legal Fee Analysis (NALFA) is a 501(c)(6) professional association for the attorney fee and legal billing community. We are listed as an A.M. Best's 2012 Recommended Expert Service Provider for legal fee disputes and we specialize in analyzing and resolving high-stakes fee disputes nationwide. We employ proven methodologies which adhere to the ethical and best practices of all 50 states, federal courts, and the American Bar Association as well as accepted and best practices in the legal community to assure consistency, quality, and reliability in analyzing the reasonableness of fees. We maintain one of the largest proprietary databases devoted to attorney fee cases and standards and our members testify frequently both in support of and against fee requests in substantial cases.

Our Association and its members analyze the reasonableness of hours billed, the prevailing hourly rate in a given community, customary law firm billing practices, billing judgment, the results obtained in a case verses the amount spent, factors affecting whether a case is novel and complex, and other issues which would affect a fee award. We are familiar with the nation's most state-of-the-art litigation management practices and have extensive familiarity with the best practices in evaluating fees since *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010).

Our Association files *Amicus Curiae* Briefs only in rare and exceptional cases where our analysis may assist courts in rendering fee awards using established precedent and standards and in the interest of fairness and consistency within the legal profession. We have reviewed Louisiana Supreme Court Rule VII and file this brief based on two of the three criteria set forth:

(1) As the nation's only non-profit professional association devoted to assuring reasonable and consistent nationwide standards for the award of attorney's fees, we have an interest in numerous cases involving similar questions throughout the United States; and

(2) As the nation's only non-profit professional association devoted exclusively to assuring reasonable and consistent nationwide standards for the award of attorney's fees, we are aware of matters of fact and law that might otherwise escape the court's attention.

INTRODUCTION

We became aware of this case during a routine evaluation of national fee award cases, and *Covington v. McNeese*, 98 So.3d 414 (La.App. 3 Cir. 9/5/12) immediately captured our attention as a landmark ruling. Indeed, prior to communicating with counsel, we discovered an article about this case in the *National Law Journal* and published our own article regarding the extraordinary facts in this case. We have since had the opportunity to review the briefs and exhibits submitted by both parties and requested plaintiff's counsel's timesheets for an independent review. We feel compelled to submit an *Amicus Curiae* Brief in support of the plaintiffs and to urge that they be awarded the $5.1 million in fees that they have earned in keeping with both the letter and spirit of the law.

Our Association and its members are involved in some of the most protracted fee litigation in the nation, often in amounts which far eclipse that sought by Covington's counsel for far less work. We rarely see cases which last this long, involve parties in such unequal bargaining positions, and in which an attorney's sheer perseverance results in such a substantial benefit to his client and community. Moreover, we rarely encounter an attorney required to work so hard and long against such odds for such a small fee award. Like the Louisiana Third Circuit Court of Appeals, it shocks our conscience that McNeese State University ("McNeese") would be so brazen as to argue that its opponent is entitled to no compensation under these circumstances or that it would continue such an unprovoked assault against an attorney awarded so little for so much work over 12 years.

Despite our extensive experience in this field of law, we have never encountered a six day trial solely on the issue of attorney's fees in which a losing party engaged in this level of "vitriol" toward an officer of the court as that which was "heaped" upon Seth Hopkins. *Id.* at 432. In our experience, and in the jurisdictions in which we most frequently practice, any attorney who chose to defend a fee application the way McNeese's counsel has done would have risked sanctions. Our Association regards this conduct as detrimental to the legal profession.

Anything less than a full award of $5.1 million for 12 years of hard work harms the integrity of the legal profession, which has an interest in assuring fair attorney compensation for quality work in accordance with uniform standards. Furthermore, in a civil rights case such as

this, anything less than a full award provides attorneys with no incentive to represent discrimination victims and denies them fundamental access to the courts.

In federal fee shifting cases, there are three components to a fee calculation. First, a court determines the reasonable number of hours expended. Second, a court determines the reasonable rate to be awarded. And finally, a court determines an appropriate enhancement. We submit this *Amicus Curiae* Brief to assist the Court in applying these factors to this case using uniform standards accepted in the national legal community.

ARGUMENT

I. BASED ON STANDARD TIMEKEEPING PRACTICES AND LITIGATION METRICS, THE APPELLATE COURT CORRECTLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING LESS THAN 6,500 HOURS OVER 12 YEARS

A. Hopkins' time records are consistent with industry billing practices.

We have reviewed Covington's lead counsel's records, and we concur with the opinions of the four experts in this case. It is our unqualified view that Covington's lead counsel was methodical about recording hours, and we would have expected far more time recorded in a complex civil rights case like this, as such litigation typically requires the expenditure of several thousand hours per year. Because Covington's lead counsel took almost exclusive responsibility for working on the case (a practice known as "lean staffing") there was considerable savings of time and cost to McNeese, a fact which McNeese clearly has not appreciated.

We reviewed McNeese's complaints about the number of hours worked per day and found no merit to them. It is unusual for an attorney's records to be as detailed as Covington's counsels' records, and we routinely find complaints far greater than those which McNeese has belabored for the last two and a half years. The time recorded for individual tasks is exceptionally modest considering the work product produced and results obtained.

Covington's lead counsel's records comply with national billing standards and reflect an attorney who worked hard on a case when required to do so yet was diligent about not billing when work was not required. McNeese's accusations about the veracity of these records are unfounded, and its tactics disingenuous. After losing this case, McNeese manufactured a complaint about Covington's counsel's records by adding a given daily entry in *Covington* to a given daily entry for another firm (which objected to its records being used in this manner) and

alleging fraud. That is not an acceptable methodology for reviewing time, and we commonly see daily totals higher than 24 hours in our review of time records for many reasons.

For instance, attorneys do not always record time on the day it was worked and often consolidate multiple days of work into one entry. Covington's counsel testified about specific instances when this occurred. This is a common and accepted practice, so long as the total amount of time sought is correct. Without question, Covington's counsel sought less time that he worked. Indeed, had he not kept any records at all (many attorneys do not) and asked us to reconstruct his time based upon the evidence in the record, (as experts and courts often do) we would have concluded that he worked far more hours than he documented.

There has never been a single federal or Louisiana case in which a court reduced time based on an attorney's consolidation of entries. Indeed, the practice of consolidating entries (stating how much time was spent on a particular task, though the task spanned more than one day) is preferable to the more common practice of block billing (stating how much time was worked on a particular day without identifying how much time was spent on a particular task).

In any event, this is not an issue. Hopkins graciously eliminated every consolidated entry in his 12 years of records, even though these entries satisfied all industry time recording standards and was evaluated by numerous independent experts. He further eliminated many entries which not only were properly recorded, but already underreported. He then went even further to provide the courts with numerous precise metrics proving his time beyond any reasonable doubt. Moreover, in earlier submissions, he offered to accept even less time in the hopes of achieving a prompt resolution to this case.

McNeese's claim that an attorney may not ethically work more than eight hours per day is equally outrageous. Attorneys in the largest firms work more than 18 hours per day when necessary for sustained periods prior to deadlines. Indeed, a typical medium or large firm's business model depends on attorneys billing these hours to cover the firm's costs, and we would have been surprised not to find Hopkins keeping long hours working at a national firm while also representing an indigent client in his free time.

If we accepted McNeese's hypothesis that it is unethical to work more than eight hours per day, not only would every good attorney in the nation be disbarred, but most firms would be

unable to meet their overhead, the quality of legal work would decline precipitously, and litigation would grind to a halt in many jurisdictions. The legal profession is a difficult one, and it is hard to imagine any lawyer who has ever been in a successful private practice making the arguments McNeese's counsel has made.

Furthermore, McNeese's claim that Covington's counsel should be limited to a percentage of his client's cash recovery and its claim that Hopkins committed "fraud" for not expressing a willingness to sue his indigent client if she cannot pay the fees McNeese forced upon her is equally outrageous and has been specifically rejected by the United States Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989). Any fee arrangement Covington had with her counsel has no relevance to the amount McNeese owes to Covington under federal law.

Certainly, McNeese would quickly abandon this position if Covington had the means and desire to pay her attorneys $1,000 per hour, as many sophisticated corporate clients do. Just as Covington's wealth would not obligate McNeese to pay more in attorney's fees, her poverty does not excuse McNeese from paying the prevailing market rate. We have never encountered an attorney making such a clearly irrelevant argument as a means of personal attack on the character of another attorney before a state's Supreme Court.

For any defendant to continue to allege "fraud" against an officer of the court after such overwhelming proof to the contrary is unconscionable and appears to be solely calculated to destroy the reputation of an honest attorney who has sacrificed more than a decade for his indigent client. That kind of vicious and unwarranted attack on an unpaid attorney, solely to secure a litigation advantage to a client seeking to evade paying an earned fee, demeans our profession and deters diligent and successful attorneys from seeking fair compensation for hard work. The Louisiana appellate court correctly held that Covington's lead counsel earned the hours he sought, and if this reasonable and documented time is not honored, it will undermine the value of our profession and render attorneys' time and labor meaningless.

B. The trial court erred in disregarding Covington's four experts' testimony regarding the reasonableness of hours worked.

In enacting 42 U.S.C. Section 1988, Congress required that prevailing parties be awarded fees which are reasonable based on prevailing market conditions. Determining these market conditions can be complex. For instance, what an attorney would accept as reasonable

compensation from a prestigious client who will guarantee steady business and additional referrals is far different than what an attorney would accept from an indigent client when he has a great risk of never being paid or forced to seek payment from his adversary years later.

While the ultimate determination of a fee award is left to the sound discretion of a trial judge, that discretion is not unlimited, and judges must take into account the current economic realities in which attorneys practice. Thus, expert attorneys who specialize in evaluating the reasonableness of fee bills are indispensible in assisting courts and can most accurately evaluate the reasonableness of hours because they review fee bills every day and have an understanding of the practices of hundreds, if not thousands, of other attorneys.

Covington provided the trial court with four experts who conducted a thorough analysis of the fee request. Three of these experts were senior members of the local bar and the only members of the local bar known to have ever handled an Americans with Disabilities Act case. The fourth expert was a national attorney's fee expert who has reviewed thousands of attorneys' fee bills from throughout the world. This reflects a broad spectrum of both local and national opinions and practices of law from at least four attorneys working for four firms. All four experts appear to have engaged in a lengthy dialogue with Covington's counsel during their independent analysis, and at least two of the experts appear to have analyzed the client file as well. The fact that all four concluded that this time was reasonable indicates that this time was proven to be reasonable beyond any doubt.

Significantly, McNeese never even attempted a systematic and methodical analysis of how much time Covington's attorneys earned and never suggested reasonable compensation. If McNeese had employed a reputable expert familiar with standard timekeeping practices, it would have been forced to concede every hour. Instead, McNeese's expert admitted that he failed to conduct any meaningful analysis of the record and was forced to "recant" under oath his conclusions. He supplied no report, did not appear at trial to be cross-examined, and his deposition was stricken from the record without opposition. Without a shred of evidence to contradict a single hour, McNeese inexcusably demanded that they all be denied.

The trial court ostensibly reduced 1,098 hours of Covington's lead counsel's time because of his supposed inexperience with the Americans with Disabilities Act. But that directly

contradicts the opinions of all four experts, who, according to their affidavits, have collectively practiced nearly 120 years. Even if they worked only 2,000 hours per year apiece, these experts have likely billed approximately 240,000 hours of their own time in private practice, and it was simply wrong for their valued and unopposed opinions to be dismissed without comment.[1]

The trial court and Louisiana Third Circuit admitted in their rulings that they had sympathy for the taxpayers of Louisiana. However, that sympathy must not be allowed to override the uniform consensus of every expert in the case, practicing members of the bar who devoted considerable time and resources to determining fair and equitable compensation based on their collective knowledge and experience and established market principles. We strongly urge the Court to uphold the hours proven beyond a reasonable doubt by Covington's counsel, reduced without basis by the trial court, and properly reinstated by the Louisiana Third Circuit.

II. THE TRIAL COURT ERRED IN REDUCING COVINGTON'S COUNSEL'S EXCEPTIONALLY LOW RATE EVEN FURTHER

After determining the reasonable number of hours worked, a court must next determine the reasonable rate to award. It is important to note that a reasonable rate for one type of case is not always reasonable in another type of case. Americans with Disabilities Act cases, for instance, are particularly difficult to win, and practitioners in this field (both plaintiff and defense) command higher rates than most attorneys. Attorneys who must wait longer to be paid in a case or accept a case only on contingency must typically be better compensated than those who accept volume work from paying clients. Thus, a party may not support a proposed rate with cases which are not of similar duration, complexity, and risk.

The federal Fifth Circuit recently held that when members of the local bar do not rise to prosecute a meritorious civil rights case, an attorney from another jurisdiction who does is entitled to be paid the rate in the district in which he practices, rather than the rate where the litigation is based. *McClain v. Lufkin Industries,* 649 F.3d 374, 379-82. (5th Cir. 2011).

Based upon the facts provided, McNeese's discrimination was well known in the Lake Charles community, yet no member of the local bar brought an action against McNeese. Had Hopkins not prosecuted this case from Houston for the last eight years of the 12-year case,

[1] Even if the trial court had any basis for concluding that Hopkins, an experienced counselor with one of the most prestigious law firms in the nation, worked less efficiently than older attorneys, his voluntary reduction of 710 hours and his testimony as to the many undocumented hours in this case would have more than compensated for this finding.

McNeese would still be discriminating against this country's disabled citizens. The additional burden of managing a case from a distant location while local attorneys were unwilling to file suit in their own backyard further reinforces the need to compensate Hopkins at least the rate he would have received from paying clients in Houston, where he practices.

Thus, Covington's lead counsel is entitled to the prevailing rate in Houston. Our analysis of the Houston legal market has determined the prevailing rate in a case such as this to be at least $450-$650 per hour before the award of an enhancement. Thus, there is no question that if we had been retained in this case, either for McNeese or Covington, we would have testified that Hopkins should receive a minimum of $450 per hour before an enhancement.

However, Hopkins was willing to accept the prevailing rate in the Western District of Louisiana, a further testament to the exceptional reasonableness of his request. Based upon this act of good faith, we reviewed the prevailing rates in that district and were surprised to learn that *Covington v. McNeese* has already been adopted by the federal courts in Lake Charles to support the local prevailing rate of $265 per hour as "extremely reasonable" and a "modest base rate." *Leleux v. Assurance Co. of America*, 2012 WL 5818226 at 4 (W.D.La. Nov. 15, 2012).

Moreover, Covington's four experts all uniformly testified that the requested $265 per hour was lower than average for even a paying client on a negotiated volume contract in Southwest Louisiana. These four experts are the most familiar with customary rates in their community, as they charge their clients these rates every day. Indeed, McNeese's own expert testified that he charged $350 per hour in this very case.

To further bolster their position, Covington's counsel cited many highly relevant cases, including one in which McNeese's own counsel was compensated $805 per hour in a similar case based out of Lake Charles only a few years earlier. McNeese cited only three cases, none of which were Americans with Disabilities Act cases. Two of McNeese's three cases were too old to be of any relevance to the current market rates (one was from 1996). The only recent case cited by McNeese involved a defendant seeking fees against a plaintiff for filing a frivolous claim. The defense counsel had already been paid by the client, who provided the firm with volume work and prompt payment. A situation such as this does not reflect the economic realities faced by Covington's counsel in this case, who has waited 12 years for payment, was

pressured into reducing 710 hours of documented work, subjected to a six day trial and nearly two years of appeal, had his character attacked in the public record, and has still gone unpaid.

Thus, McNeese's three cases were clearly not relevant, and it is difficult to understand how the trial court could discuss them in its opinion while ignoring all of Covington's cases. The trial court's conclusion that $240 per hour is the prevailing rate in this case was completely unsupported by any evidence.

Our interest in filing this Brief is to assure consistency in the award of legal fees. Considering the law and evidence presented, and particularly after the Louisiana Western District has already endorsed Covington's $265 per hour as a "modest" base rate in cases much less protracted than this, we agree with the Louisiana Third Circuit that the trial court committed a clear abuse of discretion in awarding only $240 per hour as a base rate.

III. COVINGTON'S COUNSEL HAS EARNED $3.0 - $5.2 MILLION UNDER THE MOST RECENT UNITED STATES SUPREME COURT GUIDANCE

The United States Supreme Court has long recognized that the hourly rate and number of hours expended (the lodestar) do not always adequately compensate counsel for their work, and that fees should be enhanced when a case is "rare" and "exceptional." In the last two years, the federal Fifth Circuit has determined several cases to be "rare" and "exceptional," and there is no doubt that *Covington* meets this criteria for the reasons established by the Louisiana Third Circuit. Certainly, any case which lasts 12 years, affects millions of dollars of public property, attracts the attention of the United States Department of Justice, and is repeatedly discussed in the national media is "rare" and "exceptional." We became familiar with this case by reading the *National Law Journal*, and in our experience working on substantial national cases, there is no question that this is a "rare" and "exceptional" case meriting an enhancement.

An enhancement may be calculated based on any of three criteria: (1) the amount of an attorney's expenditures in the case; (2) the true market value of services provided by an attorney to his client or society by helping to deter discriminatory conduct; or (3) a sum to approximate the lost value of money in lieu of interest after an exceptional payment delay. *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010). Covington's counsel admirably controlled costs in this case and did not apply for an enhancement based on the first criteria. However, they more than proved their entitlement to an enhancement based on the second and third criteria.

A. Covington's counsel's market value is $4.5 million

When a court awards an enhancement under the first *Perdue* criteria, it should calculate the value of the attorney's services to his client or society. This can be difficult in civil rights cases, in which it is hard to determine how much a particular right is worth. However, Covington has made this task easy by presenting an abundance of objective, reasonable evidence to support an award of $4.55 million.

First, despite McNeese's representations to the contrary, it is obvious that Covington's counsel's work resulted in an injunction enabling his client to fulfill her 17-year ambition of attending college in a wheelchair. Indeed, one year after Hopkins secured Covington a scholarship and injunction to return to McNeese, she became the first person in her family to graduate from college and is now working on several Master's degrees as she prepares to enter the workforce and contribute to the Louisiana economy for the next 15 years of her work life expectancy. This is a direct result of her counsel's tireless dedication to this case.

Covington's economist opined that Covington's attorneys' efforts will result in $804,000 in direct economic benefits to Ms. Covington for every eight years she is able to work, and these benefits will extend to hundreds of other disabled students now able to follow in her footsteps and take advantage of Louisiana's college educational opportunities. McNeese's own economists opined that for every $1 that the state invests in educating its college students, there is a $8 return to the Louisiana economy. Thus, the market value of Covington's counsel's work is easily in the tens of millions of dollars on this basis alone.

McNeese itself recognized on April 23, 2010, that Covington's counsel's work resulted in "substantial" benefits both to his client and to society as a whole. Hopkins had the forethought to contact the U.S. Department of Justice, work with it to build a case, and then secured his client concurrent rights to require McNeese to correct 15,000 violations affecting 1.35 million square feet of buildings.[2] Thus, he secured his client an injunction valued at $13.8 million. This injunction and the settlement did not occur by happenstance; it occurred through the tireless

[2] Covington's counsel's success at persuading the U.S. Department of Justice to become involved in this case for approximately two years is a testament to his skill and experience, as this decision saved McNeese from having to compensate him for hours which were, instead, borne by federal prosecutors. Indeed, Covington's counsel agreed to write off every hour spent conferring with the U.S. DOJ, even those this time was rightfully earned.

dedication of counsel. Under *Buckhannon Board & Care Home v. West Virginia,* 532 U.S. 598 (2001), any judicially enforceable right secured for a client is part of the "market value" of an attorney's work for purposes of calculating a fee enhancement. Indeed, the defendants themselves signed an injunction acknowledging the "substantial benefits" provided by Covington's counsel and failed to appeal their own judicial admissions. For McNeese to now claim to the contrary is inexcusable.

As the Louisiana Advocacy Center noted in its *Amicus Curiae* Brief to the Louisiana Third Circuit, Covington's counsel has provided unprecedented value to his client and society, and this is among the most "rare" and "exceptional" cases they have ever seen. The market value of bringing full access to educational opportunities at McNeese to Covington and all similarly situated citizens cannot be overstated.

Because these improvements occur on the McNeese campus, Covington's counsel's work also produced a $13.8 million windfall to McNeese. This amounts to approximately $2,128.97 in value for every hour Hopkins recorded in his timesheets, or approximately $111,500 per month in direct value to McNeese for the first 10 years of this case. In complex class action litigation, courts typically cross-check a fee award by assuring that an attorney is awarded 25-33% of the total class benefit. In this case, 25%-33% of the $13.8 million recovered by McNeese (as well as Covington's $400,000 cash recovery) totals between $3,550,000 and $4,686,000. This is consistent with an enhancement of approximately 250%. This does not even consider the immense societal benefits that arise from this case and the astonishing positive economic impact this case will have on the Louisiana economy by allowing those with disabilities the opportunity to become gainfully employed.

This is the largest single-client Title II Americans with Disabilities Act recovery in history, and even the $400,000 cash recovery is "rare" and "exceptional" in a field of law in which victims typically receive little or no cash and only nominal injunctive relief. We typically expect attorney's fees in ADA cases to be 10-40 times a client's recovery. Using objective, market-based criteria, Covington's counsel have certainly earned $4.55 million, and the Louisiana Third Circuit and trial courts erred in not conducting this evaluation and, instead, allowing misplaced sympathy for the defendants to result in the denial of approximately $3 million in earned compensation to dedicated attorneys.

B. The exceptional delay merits an enhancement to at least $3 million

Even if Louisiana's courts had not awarded Covington's counsel their earned enhancement under Covington's well-documented market-value analysis, they should have because of the exceptional payment delay. As the Supreme Court held in *Missouri v. Jenkins*, 491 U.S. at 274, 281-83 (1989):

> [c]ompensation received several years after the services were rendered—as it frequently is in complex civil rights litigation, is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed.

Moreover, pre-judgment interest on attorney's fees is generally not available. To compensate for this in normal cases, courts generally award an attorney the rate he charges clients at the end of the case, rather than the beginning. However, when a delay has been exceptional, as it is in this case, that is not sufficient. Covington's attorneys have conservatively earned 6,481.8 documented hours (after self-reducing at least 710 hours). According to the Louisiana Judicial Interest Rate Calculator on the Louisiana Bar Association website (http://www.lsba.org/newintcalc.htm) had they been awarded standard Louisiana pre-judgment interest, their fees would be worth approximately $3 million.

Moreover, all six lower court judges unanimously concluded that this 12-year delay was caused by McNeese inexcusable conduct. McNeese filed eight continuances, three appeals, engaged in conduct which required a third party to file protective orders against it in two states, recused the trial judge days before a crucial hearing, required an entire year to respond to a summary judgment it now claims was "simple" (which it lost), was admonished by the United States Attorney General's Civil Rights Division, had its first appeal referred to as "frivolous" by the Louisiana Third Circuit Court of Appeals, required that Covington's counsel document at least 58 meetings for unanswered discovery and ultimately file six motions to compel, and was the subject of at least 20 violations of established Louisiana rules of ethics and professionalism documented in Covington's Application for Attorney's Fees. All of this to avoid spending $4,000 to provide a single compliant restroom on its campus for the 400 Louisiana citizens that its own official concluded needed these facilities to receive an education.

Amazingly, at trial, McNeese's counsel blamed Hopkins for the case delays, suggesting that if he had filed sanctions against McNeese sooner, McNeese might have behaved better. This is much like a criminal asking to be freed because the police did not catch him sooner.

Thus, the United States Supreme Court has determined that an attorney's fee should be enhanced when he suffers an exceptionally long payment delay. This 12 year case has lasted longer than any other known Americans with Disabilities Act case. That is certainly "rare" and "exceptional" and McNeese's strategy of "justice delayed is justice denied" has resulted in Covington's counsel's lost interest exceeding their award. There has never been a case which so demanded the award of an enhancement due to an exceptional delay caused by the defense, and an award of at least $3 million is appropriate for this reason alone.

C. $5.2 million is required to attract competent counsel

The United States Supreme Court also requires that attorneys' fees be high enough to "encourage competent counsel to take on such complicated and time consuming cases" and to "enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of litigation on the wrongdoer. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20.

Stated bluntly, in our experience in fee shifting cases, we do not know of any attorney willing to work for 12 years for such a noble cause and be slandered in the public record for anything less than $5 million. The lost value of money, the lost value of time, and the inherent risk of taking an Americans with Disabilities Act case less than 10 years after the statute was enacted and before its Constitutionality was even decided made this an incredibly undesirable case. Moreover, as in most civil rights litigation, the client sought a disproportionately small monetary recovery compared to the work required. To make matters worse, had the defendants voluntarily spent only $4,000 to upgrade a single bathroom, Covington's attorneys might have ended up losing their right to seek any fees at all.

It is no surprise that not a single member of the Louisiana bar challenged McNeese's 20 year legacy of discrimination. The Louisiana Supreme Court is tasked with compensating Covington's attorneys in an amount high enough to honor Congressional mandates and encourage other members of the Louisiana bar to put their lives and careers on hold and be willing to take some of society's most risky but important cases. This requires compensation high enough to compete with other landmark Louisiana cases such as *Corbello v. Iowa Production,* 2001-567, p. 27-30 (La. App. 3 Cir. 12/26/01); 806 So.2d 32, 51-52, *affirmed in part,* 2002-826, p. 34-36 (La. 2/25/03), 850 So.2d 686, 709-11).

In *Corbello*, this Court affirmed $4 million in fees at a rate of $805 per hour to McNeese's own counsel for working only eight years and recording approximately 5,000 hours. It would be in the interest of fairness and consistency and would honor Congressional mandates for this Court to compensate Covington's attorneys at a similar rate. For 6,481.8 hours of undisputed time at $805 per hour, that amounts to $5,217,849.

D. Denying an enhancement to private attorneys general hurts the taxpayer

Congress and the Louisiana Legislature recognize as a matter of law that there is economic value to protecting the rights of Louisiana's disabled citizens and have created a market incentive for the bar to represent the public as private attorneys general. Attorneys such as Hopkins depend on the promises made in these statutes, and they must carefully select only meritorious cases or risk going unpaid. When they succeed in representing the public against abusive and wasteful government entities, they must be appropriately rewarded.

Ms. Covington, and Louisiana's 80,000 disabled citizens are also taxpayers, and Covington's counsel had to battle the very entities who should have protected their rights. When these government entities failed to do their jobs, it was Hopkins who stepped in as a private member of the bar to represent the public, and his 12 years of service to Louisiana has saved its taxpayers far more than he seeks in fees.[3]

For instance, Louisiana's taxpayers provided McNeese with a "Director of Services for Students with Disabilities," whose office was inaccessible to those with disabilities. He testified that he would not accommodate wheelchair-bound students, and when Covington reached his office seeking help, McNeese claimed she was faking her disabilities, since McNeese's litmus test for being disabled was not being able to access its disabilities office. That very official then admitted that McNeese discriminated against approximately 250 disabled students, each of whom cost the University $50,000 in grants every four years. Thus, the taxpayers paid a bureaucrat to help McNeese ***lose*** $12,500,000 every four years between 1990 and 2010 and then paid 12 lawyers to defend these wasteful actions for more than a decade. McNeese's lawyers see no irony in arguing Hopkins should be compensated nothing as their client basks in a massive

[3] *See "Buddy" Caldwell v. Janssen Pharmaceutical,* 11-1184 & 11-1185 (La. App. 3 Cir. 8/31/12), -- So.3d --, the Louisiana Third Circuit recently awarded $70 million to public and private attorneys general whose work protected Louisiana consumers.

windfall. And they are now even using Hopkins' 6,000 hours of unpaid labor as a springboard to sue their client's own contractors to recover even more for themselves under the ADA.

McNeese is a better university because Covington's counsel exposed these practices and forced reform, and Covington's counsel depends on Louisiana's courts to compensate them in accordance with the vast savings they have provided the state's taxpayers. For Louisiana's lower courts to deny an earned enhancement on the grounds of protecting the taxpayer is "penny wise and pound foolish." Rather than protect the taxpayer, the lower courts' modest award obliterates the market incentives so carefully created by Congress and victimizes dedicated attorneys who were subjected to a wasteful and inexcusable war of attrition. Louisiana's courts must encourage meritorious suits such as this and reward private attorneys general who go without pay to do the right thing on behalf of the public.

CONCLUSION

After reviewing this extraordinary case, there is no question in our minds that *Covington v. McNeese* represents an opportunity for Louisiana's judiciary to embrace the market reforms necessary to protect the state's taxpayers by motivating the private bar to serve as private attorneys general and take the risk of bringing meritorious cases. Covington's counsel's reasonable and modest enhancement request, supported by conservative and detailed timesheets, are among the best investments that could be made in Louisiana's future. This is a case which will determine whether Louisiana rewards its best lawyers with fair and uniform compensation or allows them to be defamed and denied honest pay for honest work. Because of the importance of this case, we strongly urge this Court to award the requested $5.1 million in attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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