SUMMARY OF BRIEF ON THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR AS AMICUS CURIAE IN SUPPORT OF APPELLANT IN KING V. PALMER

King v. Palmer, No. 89-7027 (D.C. Circuit) will be argued before the en banc United States Court of Appeals for the District of Columbia Circuit on February 27, 1991. The issue presented by King is the proper standards for awarding contingency enhancements of attorney's fees to prevailing plaintiffs in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The amicus curiae brief of the Section adopts the Brief of the American Bar Association As Amicus Curiae In Support Of Appellant.

In its brief, the ABA argues as follows:

The ABA has long recognized that the risk that an attorney will not be compensated for his or her services may justify a greater attorney's fee than would be appropriate where there is no risk of nonpayment. Consistent with this principle, the ABA urged the Supreme Court in Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 483 U.S. 711 (1987) ("Delaware Valley II"), to recognize that the "reasonable attorney's fee" mandated by fee-shifting statutes may contain an enhancement factor above the basic "lodestar" amount to reflect and compensate for risk of nonpayment. The ABA argued that such enhancement serves the important public policy, common to virtually all federal fee-shifting statutes, of attracting competent counsel to selected federal claims. Enhancement serves that policy, the ABA explained, not by equalizing prospective returns among different contingent cases with different degrees of merit, but by placing contingent practice as a whole on roughly the same economic footing as noncontingent practice.

The Supreme Court, through Justice O'Connor's controlling concurring opinion, adopted the substance of the ABA's position. Concluding that Congress had not foreclosed consideration of contingency enhancements under federal fee-shifting statutes, Justice O'Connor reasoned that "compensation for contingency must be based on the difference in market treatment of contingent fees as a class, rather than on an assessment of the 'riskiness' of any particular case." 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original). Accordingly, Justice O'Connor required a fee applicant to prove the degree to which the relevant market compensates for contingency, and to "establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" Id. (quoting Opinion of White, J., joined by Rehnquist, C.J., Powell, J. and Scalia, J., at 731).

The panel opinions under review in this proceeding faithfully applied the two-prong test embodied in the controlling concurrence. In both McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989) and King v. Palmer, 906 F.2d 762 (D.C. Cir. 1990), the panels ensured that, at the time the suits were brought, the Washington legal market treated contingent cases differently, as a class, than those cases in which payment was not contingent; the panels then reviewed the evidence to determine the extent of additional compensation, or enhancement, that the Washington legal market required in contingent cases. The panel decisions thus gave effect to Congress' determination that the availability and extent of risk enhancement is necessarily a function of the economic forces operating within the relevant legal market. These forces, rather than the peculiarities of a particular case, determine the financial return necessary to compensate for the risk of nonpayment, and thus establish the level of enhancement necessary to attract competent counsel to the federal claims that fee-shifting statutes were designed to promote.

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CASE SCHEDULED FOR EN BANC ORAL ARGUMENT
ON FEBRUARY 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7027
(Consolidated with 89-7028)

MABEL A. KING,
Appellant,

v.

JAMES F. PALMER, Director,
D.C. Department Of Corrections, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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CERTIFICATE OF COUNSEL
PURSUANT TO RULE 11(e)(5)

Pursuant to Rule 11(e)(5) of the Rules of the United States Court of Appeals for the District of Columbia Circuit, undersigned counsel for amicus curiae Section On Criminal Law and Individual Rights of the District of Columbia Bar ("the Section") certifies as follows:

1. The arguments of the Section as amicus curiae are expressed in the Brief of the American Bar Association As Amicus Curiae In Support Of Appellant. In the present brief, the Section adopts the brief of the American Bar Association ("ABA").

2. The Section has adopted rather than joined the ABA's brief because counsel for the Section have been informed by counsel for the ABA that the ABA's policies regarding amicus curiae briefs do not permit the Section to join the ABA's brief.

3. By adopting and not repeating the arguments of the ABA, counsel for the section believe that they are in compliance with the intent of Rule 11(e)(5) to avoid duplication of arguments by amici curiae.

Blair G. Brown

INTEREST OF AMICUS CURIAE

The Section On Criminal Law and Individual Rights of the District of Columbia Bar (hereinafter "The Section") is composed of over 800 criminal justice and civil rights practitioners, legal educators and other members of the District of Columbia Bar who have interests in criminal law and individual rights.[1/] The Section's members have a direct and substantial interest in the issue presented by this appeal -- the proper standards for awarding contingency enhancements of attorney's fees to prevailing plaintiffs in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Court's decision not only will affect the economic interests of those members of the Section who represent or wish to represent plaintiffs in federal civil rights actions, it will also have a marked effect on the availability of counsel in the District of Columbia to represent persons with meritorious claims arising under the federal civil rights laws.

The Section is dedicated to improving the public's access to legal representation in civil rights cases, which are frequently presented to attorneys by persons of very limited financial means. As the record in this appeal demonstrates, there is an insufficient number of competent counsel in the District of Columbia willing to represent plaintiffs in contingent Title VII

1/ The views expressed herein represent only those of the Section On Criminal Law and Individual Rights of the District of Columbia Bar and not those of the District of Columbia Bar or its Board of Governors.

actions, despite the large number of attorneys in this community.[2/] In the experience of the Section's members, that shortage is not limited to employment discrimination actions, but extends to claims under other federal civil rights laws as well. The award of attorney's fees in contingent federal civil rights cases in a manner consistent with the private market's treatment of contingency actions -- compensating counsel with a premium for assuming the risk of loss -- enhances the availability of counsel for members of the public who might otherwise go unrepresented.

The arguments supporting the ready availability of contingency enhancements in appropriate federal civil rights cases are well articulated in the amicus curiae brief of the American Bar Association. The adoption of the ABA's arguments by the Section, a local body, may be useful to the Court in resolving the issues of substantial local significance presented by this appeal.

[2/] See, e.g., Declaration of Anne Barker, former Director of the D.C. Bar's Public Services Activities Corporation, Joint Appendix at 86.

ARGUMENT

The Section has reviewed and adopts the Brief of the American Bar Association As Amicus Curiae In Support of Appellant.

CONCLUSION

For the reasons set forth in the Brief Of The American Bar Association As Amicus Curiae In Support of Appellant, the panel decision should be reinstated without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 1990, a copy of the foregoing Brief Of The Section On Criminal Law And Individual Rights Of The District Of Columbia Bar As Amicus Curiae In Support Of Appellant was mailed, postage prepaid, first class, to:

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BGB\CRLAWSEC\brief