IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, JUAN SANCHEZ, DAN ELLIOT, LEE MAZUR HAYS, BOB JONES, ALFREDO ROMAN, PATRICK HALL, MARQ BARTLETT, GREGORY JOSEPH NELSON, individually and on behalf of all others similarly situated, Plaintiffs, v. BRENT D. REINKE, DAVE PASKETT, LARRY WRIGHT, JAMES C. SPALDING, JOE KLAUSER, ALAN LEE BRANDT, Defendants.	Case No. CV91-299-S-LMB **MEMORANDUM DECISION AND ORDER RE: ATTORNEY'S FEES AND COSTS**

Pending before the Court in this case are Plaintiffs' Renewed Motion for Attorneys' Fees and Expenses (Docket No. 821), Plaintiffs' Renewed Motion for Costs (Docket No. 827), and Defendants' Second Renewed Motion to Allow Costs (Docket No. 826). The Court heard oral argument on the pending motions on March 19, 2008. Having considered the oral argument and written submissions of the parties, the Court enters the following Memorandum Decision and Order granting in part and denying in part the pending motions.

I.

INTRODUCTION AND PRELIMINARY ISSUES

Over 800 pleadings and papers have been docketed in this seventeen-year-old case. As might be expected, the factual and procedural history of the case is lengthy, but it is important to the issues pending before the Court. Rather than including the full history in the body of this Order, a detailed chronology of relevant events is attached as Appendix A. Therefore, only an abbreviated set of details is included in this Order when necessary. In addition, the opinion of the Ninth Circuit Court of Appeals affirming the Court's decision in this case is included as Appendix B, and the Ninth Circuit's order on attorney's fees and costs on appeal is attached as Appendix C.

In February 1989, American Civil Liberties Union (ACLU) Attorney Stephen Pevar ("Mr. Pevar") of Washington, D.C., received a letter from several inmates incarcerated in the Idaho Department of Correction ("IDOC") system that alleged various constitutional violations at the prison. Mr. Pevar began an investigation. In June 1991, Mr. Pevar and Idaho Legal Aid Services Attorney Howard Beladoff ("Mr. Beladoff") filed the Complaint in the instant case, *Gomez v. Vernon*. It contained an inmate access to court claim and an equal protection claim. In September 1992, the parties stipulated to class certification, with the class consisting of "all present and future inmates of the Idaho State Correctional Institution and the Idaho Maximum Security Institution, both present and future, during the time of their incarceration in those institutions." *Stipulation for Class Certification* (Docket No. 22).

In June 1996, the United States Supreme Court issued its landmark decision, *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174 (1996), which changed the law governing prisoner access to

court claims, requiring that a plaintiff allege facts showing an actual injury resulting from denial of access. As a result of *Lewis v. Casey*, the IDOC re-evaluated and made plans to change its access to court system.

In August 1997, National Prison Project (NPP) attorneys first entered this case on behalf of Plaintiffs. In time, several NPP attorneys worked on the case: Donna Lee, Elizabeth Alexander, Eric Balaban, Jennie Pittman, Marjorie Rifkin, and Margaret "Peggy" Winter (hereafter collectively "NPP attorneys").

In December 1997, Plaintiffs sought to amend their Complaint to add a retaliation claim when it appeared that the majority of the access to court claims did not meet the new standard of law. In January 1998, the prison adopted a new access to courts program, consisting of various fill-in-the-blank legal forms administered by IDOC-employee paralegals. Consequently, Plaintiffs filed a motion to bifurcate this case to allow the retaliation claim to proceed to trial but to hold the access to court claims in abeyance pending investigation of the legal ramifications of the new program.

On October 29, 1997, an attorney misconduct issue arose that eventually became the unfortunate focus of this case. On that date, Idaho Deputy Attorneys General representing Defendants filed a Motion to Order to Show Cause Why Plaintiffs Should Not be Held in Contempt. Defendants alleged that Plaintiffs lacked sufficient factual grounds to show actual injury and that Plaintiffs' counsel had deceived the Court on that issue. Defendants had obtained this information by confiscating and reading the attorney-client privileged correspondence that had passed between Plaintiffs and their counsel. Defendants' Motion was denied on January 12,

1998, when the Court concluded there was no evidence supporting allegations that Plaintiffs and their counsel had perpetrated a fraud upon the Court.

Beginning on February 2, 1998, a nineteen-day bench trial was held on the retaliation claims. In March 1999, the Court entered judgment granting Plaintiffs' request for declaratory relief for individual plaintiffs and denying class-wide relief because Plaintiffs failed to show that retaliation pervaded the entire class.

As a continuing consequence of the misconduct of counsel, on February 18, 1999, Plaintiffs filed a Motion for Order to Show Cause Why Deputy Attorneys General Altig and McNeese Should Not be Sanctioned for Professional Misconduct for reviewing Plaintiffs' attorney-client privileged letters. On June 29, 1999, the Court held a three-day evidentiary hearing on the sanctions issue. On September 13, 1999, the Court granted Plaintiffs' Motion, imposing sanctions of attorney's fees of $3,500 and costs of $1,000 upon Attorneys Altig and McNeese.

The undersigned federal judge (hereinafter "the Court," "this Court," or "the undersigned," depending on context) has presided over the *Gomez* case during its entire seventeen-year history. Plaintiffs requested bifurcation on January 16, 1998, and the Court granted the request. On March 23, 1999, the Court issued an order that the retaliation and access to court claim be separated into two cases, with the second amended complaint marking the beginning of the access to court case, *Garcia v. Hayden*, Case No. 99-112-S-LMB.

After *Garcia* began, Defendants filed a motion with District Court Judge Edward J. Lodge challenging the jurisdiction of the undersigned to preside over *Gomez* and *Garcia*. Judge Lodge denied the motion as to *Gomez* because that issue was on appeal, but granted the motion

as to *Garcia*. Judge Lodge decided that the undersigned should continue to preside over *Gomez* and also referred all pretrial matters in *Garcia* to the undersigned.

Judgment was entered in *Gomez* in March 1999. After that date, the Orders in *Gomez* contemplated that all of the attorney's fees and cost issues in *Gomez* and *Garcia* would be resolved at the same time: after conclusion and appeal of both matters. Eventually in *Garcia* the undersigned recommended that Defendants' Motion for Summary Judgment be granted, and Judge Lodge adopted that recommendation, entering judgment for Defendants in *Garcia*.

Defendants filed a motion for costs in both cases. In February 2001, the undersigned deferred a decision on costs and attorney's fees, again contemplating that the issues would be determined together at a later date--*Gomez* under the undersigned's authority per consent of the parties, and *Garcia* by a report and recommendation to be considered by Judge Lodge. However, Judge Lodge decided to enter an order of costs for Defendants in *Garcia* instead of proceeding by report and recommendation. As a result, the reference to the undersigned in *Garcia* was completed, and only the fees and cost issues in *Gomez* remained.

Defendants now suggest that the Court should view *Gomez* and *Garcia* as one case. After careful and thorough consideration, including an in-depth and analytical evaluation of the entire record, the Court declines to do so. This Court did not and does not preside over *Garcia*. The Court also rejects Plaintiffs' argument that the "law of the case" doctrine *requires* this Court to follow Judge Lodge's decision in *Garcia* when the undersigned decides the costs issue in *Gomez*. In a candid withdrawal, Defendants have deleted their *Garcia* cost award from their cost request here. Judge Lodge's orders do not refer to Defendants' work or expenses in *Gomez*, and Judge Lodge expressly declined to preside over *Gomez* or to review this Court's Orders in *Gomez* as a

result of the undersigned's jurisdiction by consent of the parties in that case, which was affirmed on appeal. See Appendix B. The undersigned will give due regard to Judge Lodge's decision on the costs issues in *Garcia* insofar as it may be relevant and to the extent it is appropriate in *Gomez* to avoiding duplication or contradiction.

II.

SUMMARY OF THE COURT'S DECISION

The Court's decision on attorney's fees is necessarily tied to the decision on the merits of the retaliation claims. Defendants, acting in their official capacity as a result of policy or custom, were found liable to six individual plaintiffs in several instances, but the class of over one thousand inmates could not link the incidents together in a manner that would show a pervasive, system-wide problem and thus failed to obtain class-wide declaratory or injunctive relief. The most equitable way to translate this mixed outcome into an attorney's fee and cost award is to find that in the individual cases, the six inmates were the prevailing party, and in the class action, Defendants were the prevailing party.

In the class action portion of this action, Defendants do not seek an award of attorney's fees for successful defense of that case, but only an award of costs. The Court has determined that Defendants are entitled to their deposition costs in the class action, a sum of $16,552.97.

In the individual cases, the Court agrees with Plaintiffs' self-imposed deduction of 75% of their fees for their work on Judge Lodge's *Garcia* access to court case, and those fees have not been included in their attorney billing statements. Rather, their statements reflect the time Plaintiffs' counsel spent on *all* of the retaliation claims, including class action and individual claims. The Court has reduced the amount Plaintiffs have requested by deleting or reducing

several line items and then reducing the remaining amount by 80%. The 80% reduction reflects the principle that the attorneys can recover only for work performed on behalf of the six individual Plaintiffs who won injunctive relief and cannot recover for their work on 38 other alleged incidents of retaliation presented at trial or their work on the class action upon which they did not prevail.

With these reductions, the Court awards a total of $187,893.77 in attorney's fees to the NPP attorneys and Stephen Pevar.[1] The Court also concludes that a similar reduction of 80% in costs is warranted, for a total award of $16,133.28 to the NPP attorneys and Stephen Pevar. Plaintiffs shall be permitted to submit a final "fees-on-fees" application, after which a final judgment on the fees and costs awards will be entered. Attorney Howard Beladoff's fee application showed various discrepancies in the amounts requested, and he shall be required to file a clarifying application, which the Court will consider when it considers the "fees-on-fees" request.

III.

REVIEW OF ATTORNEY'S FEES

A. Standard of Law Governing Attorney's Fees Awards

Title 42 U.S.C. § 1988 authorizes an award of attorney's fees as part of costs in civil rights actions brought under 42 U.S.C. § 1983. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*,

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[1] Stephen Pevar is an American Civil Liberties Union (ACLU) attorney. The National Prison Project (NPP) is a "project of the ACLU National Office." *See Plantiffs' Fee Application*, p. 3 (Docket No. 821). Because Mr. Pevar and the NPP attorneys have separately designated their work and the amounts of fees and costs, for purposes of clarity the Court treats them separately as well.

461 U.S. 424, 103 S.Ct. 1933 (1983) (citing H.R.Rep. No. 94-1558, p. 1 (1976)). When a fee application is filed, a court first determines the prevailing party, and then determines a reasonable fee, if applicable. *Id.*, 461 U.S. at 433, 103 S.Ct. at 1939.

Courts have "considerable discretion" over fee awards under § 1988. *Corder v. Gates*, 947 F.2d 374, 380 (9th Cir. 1991). However, courts "must clearly articulate sound reasons in support of their fee awards." *Id.* In its written decision, a court should provide "a concise but clear explanation of its reasons for the fee award." *Hensley*, 461 U.S. at 437, 109 S.Ct. at 1941.

B. Discussion of Prevailing Party Status

Both sides argue that they are the prevailing party in this case. Each has set forth a fairly compelling argument, supported by some case law. Having considered the guidance provided by the United States Supreme Court on prevailing party status, and having considered the unusual circumstances of this case, the Court finds and thus concludes that Defendants are the prevailing party in the class action portion of the case and that six Plaintiffs are the prevailing parties in the individual claimant portion of the case.

While prevailing party status once encompassed nearly any type of success resulting from a complaint, *Hensley* and later cases made it more difficult to achieve prevailing party status. In *Hensley*, the Supreme Court determined that plaintiffs are considered prevailing parties in a lawsuit if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.' " *Id.*, 461 U.S. at 433, 103 S.Ct. at1939. In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792, 109 S.Ct. 1486, 1493 (1989), the Supreme Court clarified that, in order to be deemed the "prevailing party," the plaintiff must be able to point to a resolution of the dispute which changes the legal

relationship between itself and the defendant." In this respect, a court is free to use its discretion to decide that "a purely technical or *de minimis* victory" is "so insignificant . . . as to be insufficient to support prevailing party status." *Id.*, 489 U.S. at 792, 109 S.Ct. at 1493-94.

Stated another way, where there has *not* been a material alteration in the parties' legal relationship, the degree of the plaintiff's success goes to the *availability* of the fee, not to the fee's *reasonableness*. *See id.*, 489 U.S. at 792-93, 109 S.Ct. at 1494. As a result, the Court rejects Plaintiffs' argument that a common core of legal issues and facts requires the Court to find that they are the "prevailing party" in the combined class and individual actions. *See Hensley*, 461 U.S. at 434, 103 S.Ct. at 1940 ("common core" theory applied to reduce fees for unsuccessful claims of party *after* prevailing party analysis was applied).

In the cases following *Hensley*, the United States Supreme Court reiterated that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Farrar v. Hobby*, 506 U.S. 103, 109, 113 S.Ct. 566, 572 (1992) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3104 (1985)). Stated another way, "[i]n the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees." *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S.Ct. 202, 204 (1988).

Having considered the current status of the law, this Court agrees with those lower courts that have decided that two separate "prevailing party" determinations should be made where a class action has a mixed result. *See Foster v. Board of School Commissioners of Mobile County, Alabama*, 810 F.2d 1021 (11th Cir. 1987); *Croker v. Boeing Co. (Vertol Division)*, 444 F.Supp.

890 (D.C. Pa. 1977), *vacated in part on other grounds*, 662 F.2d 975 (1981); *but cf. Rudebusch v. Arizona*, 2007 WL 2774482 (D. Ariz. 2007) (nonprisoner case). In a class action case, the plaintiffs are legally distinct and separate from one another--each named plaintiff/class representative asserts an individual action for himself; in addition, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by the [class representative]." *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Because each "plaintiff" is legally distinct, and, here, factually distinct (over one thousand inmates in the class versus six individual prevailing inmates), it is appropriate to deem Defendants the prevailing party in the class action, and the six relief-winning Plaintiffs the prevailing parties in the individual actions.

The Court rejects Plaintiffs' argument that the *class* obtained a declaratory judgment or that a "material alteration in the legal relationship" occurred between Defendants and the class consisting of over one thousand inmates. In the Findings of Fact, Conclusions of Law, Memorandum Decision and Order (Docket No. 608), the Court concluded that the following individuals produced evidence at trial to show eleven incidents of retaliatory conduct: Lee Hays (two incidents) (pp. 14 & 26), Wayne Olds (two incidents) (pp. 17 & 27), Bob Jones (p. 19), Patrick Hall (p. 23), Thomas Sanger (p. 24) , Carl Shively (p. 24), Michael McDonald (p. 28), Alfredo Roman (two incidents) (pp. 30-31). In addition, the Court found and concluded that, in the past, Defendants had reduced the number of inmate law clerks to retaliate against the law clerks (p. 21). In the Amended Judgment, the Court granted *individual* injunctive relief only to Plaintiffs Alfredo Roman (named plaintiff), Thomas Sanger (class member), Carl Shively (class member), Lee Hayes (named plaintiff), Bob Jones (named plaintiff), and Wayne Olds (class member). Importantly, the Amended Judgment specifically provided that "prospective class-

wide injunctive relief is denied because the retaliatory conduct occurring was not sufficiently pervasive to warrant relief," which amounts to a judgment for Defendants. *See Amended Judgment*, p. 2 (Docket No. 710).[2]

On appeal of this case, the Ninth Circuit recognized the distinction between class-wide victory and individual victory in an official capacity action:

> In sum, the relief granted addressed only the harm caused each individual inmate. It did not apply to the prison system as a whole, or even to classes of prisoners. At most, the injunction affects a few isolated decisions over the course of these inmates' sentences.

255 F.3d at 1130-31. That Defendants in their official capacity were found liable to Plaintiffs as a result of Defendants' policy or custom in a few limited circumstances is *not* the same as winning class-wide declaratory or injunctive relief. Here, no class-wide constitutional violation was found, and no class-wide injunctive relief was won. The class's legal relationship with Defendants was not materially altered, either by declaratory or injunctive relief.

Finally, language from the Prison Litigation Reform Act (PLRA) supports the notion that two distinct prevailing party decisions should be made to account for unsuccessful portions of a prisoner class action. Title 42 U.S.C. § 1997e(d)(1)(A) provides that attorney's fees in prisoner civil rights cases should not be awarded unless "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee

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[2] The Amended Judgment reads:

> IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs be awarded a Declaratory Judgment decreeing that Defendants have engaged in unlawful retaliation against members of the class of inmate Plaintiffs while such inmates were engaged in the pursuit of federally guaranteed rights. However, prospective class-wide injunctive relief is denied because the retaliatory conduct occurring was not sufficiently pervasive to warrant relief.

Amended Judgment, p. 2 (Docket No. 710).

may be awarded under section 1988 of this title." Under this provision, the Court has a duty to determine whether the attorney's fees sought were "directly and reasonably incurred in securing the prospective relief" obtained in the case. *Laube v. Allen*, 506 F.Supp. 2d 969 (D. Ala. 2007). As a result, Plaintiffs are not entitled to attorney's fees on the class action portion of the case, and Defendants are entitled to recover their costs. Defendants make no request for attorney's fees.[3]

Turning now to the individual cases, the Court finds and thus concludes that Plaintiffs Hays, Jones, Roman, Sanger, Shively, and Olds were prevailing parties in each of their own individual cases. They obtained individual retrospective and prospective injunctive relief, and thus the outcome of the case altered the legal relationship of the parties. *See Amended Judgment* (Docket No. 710). *See Croker*, 444 F.Supp. at 894.

Defendants next argue that because Plaintiff Hays died in 2001, his attorney's fees claim abated. The Court is not persuaded by this argument in light of the procedural posture of this case. The instant case is unlike *Anderson v. Correctional Medical Services*, 2005 WL 3263896 (D. Idaho 2005), where the plaintiff died before his claims were brought to judgment. There, this Court recognized that a cause of action under 42 U.S.C. § 1983 survives the death of the plaintiff for the benefit of his estate only where the law of the forum state creates a right of survival, *see Robertson v. Wegmann*, 436 U.S. 584 (1978), and that the Idaho Supreme Court has determined that a civil rights cause of action abates upon the death of the plaintiff, *see Evans v. Twin Falls*

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[3] A defendant may recover attorney fees under 42 U.S.C. § 1988 only if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173(1980) (citations omitted). That is not the case here.

County, 118 Idaho 210, 796 P.2d 87 (1990). In both *Anderson* and *Evans*, the plaintiff died before the complaint was prosecuted to judgment.

Recognizing this distinction in *Smith v. Beauclair*, CV03-222-C-EJL, Judge Lodge recently ruled that the plaintiff's estate could recover attorney's fees for services provided to the plaintiff during his lifetime, distinguishing Smith's facts from those in *Evans* because judgment in Smith's case occurred *before* Smith's death. See *Order of July 22, 2008* in *Smith v. Beauclair,* CV03-222-C-EJL (Docket No. 144). This Court agrees. It is well established that, in general, "an action is not abated by the death of a party after the cause has reached a verdict or final judgment and while the judgment stands, even where the judgment is based on a cause of action that would not have survived had the party died before judgment." *Chopra v. General Electric Co.*, 527 F.Supp. 2d 230, 239-40 (D. Conn. 2007) (citing, among other sources, 1 AmJur. 2d Abatement, Survival and Revival § 58 (2005)).

Here, judgment was entered in 1999, prior to Plaintiff Hays's death in 2001. Therefore, his claim for fees did not abate, and his estate would normally be entitled to attorney's fees. However, because this case has "special circumstances" justifying an award of attorney's fees to be paid directly to counsel, the Court will not require Plaintiffs' counsel to have a personal representative appointed. *See Hayes v. Astrue*, 2008 WL 648563, *3 (N.D. Cal. 2008).[4]

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[4] The district court in *Hayes* cited two instances in which fees could and should be paid directly to attorneys: where the attorneys were part of a nonprofit legal services organization, *see id.* (citing *Grand Boulevard Improvement Association v. City of Chicago*, 553 F.Supp. 1154, 1169 (N.D. Ill. 1982)), and where the plaintiffs were prison inmates, *see id.* (citing *Wedra v. Thomas*, 623 F.Supp. 272, 278 (S.D.N.Y. 1985) ("it would be 'foolish if not imprudent'" to pay [attorney's] fees to prison inmates)). In *Wedra*, the court noted that direct payment to attorneys is also justified because inmates do not actually pay any out-of-pocket attorney's fees.

Defendants further argue that the three successful class members who were not named class representatives (Olds, Sanger, Shively) cannot obtain an award of attorney's fees on their claims because the class did not prevail and their claims are subsumed by the class loss. These three class members received minimal relief on their individual claims. Defendants point to a similar result in *Croker v. Boeing Co. (Vertol Division)*, 444 F.Supp. 890 (D.C. Pa. 1977), where four class representative plaintiffs were successful on their individual claims, two un-named class members were successful on their individual claims, but the class lost on its claims. *Id.* at 894. In *Croker*, the district court awarded attorney's fees to the four class representative plaintiffs but held that the two un-named class members could not obtain attorney's fees because the attorney services were provided to the class.

The Court rejects Defendants' argument that the individual class members are not entitled to an award of attorney's fees. More recent cases have clarified that federal courts have authority to determine the claims of un-named class members either in the class action or in a subsequent action, leading to the conclusion that attorney's fees on the individual actions may be awarded in either circumstance. See *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880, 104 S.Ct. 2794, 2801-02 (1984) (an unsuccessful class action binds class members and forecloses them from bringing a subsequent *class* action on the same subject matter, but it does not foreclose them from bringing subsequent *individual* claims on the same subject); *see also Edwards v. Boeing Vertol Company*, 750 F.2d 13, 15 (3d Cir. 1984) (noting that "[i]t might be inferred from language in the *Cooper* opinion, that the district court *has* discretion to adjudicate [individual claims of un-named class members] if it so desire[s]") (relying on *Cooper*, 467 U.S. at 881, 104 S.Ct. at 2802).

In the instant action, the Court resolved the unnamed individual class members' claims in a judicially efficient manner, which avoided unnecessary, duplicative litigation of their individual claims in a later action. As a result, the Court finds, and thus concludes, that awarding fees to the three un-named class members on their individual claims is both warranted and appropriate.

D. Standard of Law Re: Lodestar Amount and Reductions

To calculate a reasonable fee award, the Court is required to multiply the number of hours reasonably expended on the litigation by a reasonable hourly rate. This calculation, called the "lodestar" figure, provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Texas Teachers Ass'n*, 489 U.S. at 792-93; *see Gates v. Deukmejian*, 987 F.2d 1392, 1297 (9th Cir. 1992). The lodestar figure may be adjusted up or down based on a variety of other items factoring into the reasonableness of the fee award.

The lodestar figure is presumed to represent a reasonable fee, *Blum v. Stenson*, 465 U.S. 886, 897 (1984), but it may be adjusted in consideration of the following twelve factors (known as the *Kerr* factors in the Ninth Circuit):

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Blanchard v. Bergeron, 489 U.S. 87, 92 n.5 & 94-95, 109 S.Ct. 939, 943 n.5 & 945-46 (1989) (explaining continuing application of the twelve factors after the lodestar method was adopted); *see Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cr. 1975) (defining the method that was used to determine attorney's fees prior to the lodestar method). Many of the *Kerr* factors

will already have been considered in the initial lodestar calculation. *See Hensley*, 461 U.S. at 434, 103 S.Ct. at 1940.

The Court may also reduce the award for inadequate documentation of hours and for hours "that were not 'reasonably expended,'" including "hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 433-34, 103 S.Ct. at 1930-40. Finally, the Court may adjust the fee if only limited success was obtained, because "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." *Id.* at 440, 103 S.Ct. at 1943.

The "party opposing the fee application carries the burden of rebuttal" and must submit "evidence challenging the accuracy and reasonableness of hours charged[] or factual assertions made in affidavits submitted by the prevailing party." *Lozeau v. Lake County, Montana*, 98 F. Supp. 2d 1157, 1169 (D. Montana 2000).

E. Standard of Law and Discussion of Reasonable Hourly Fee

Prior to April 26, 1996, the enactment date of the Prison Litigation Reform Act (PLRA), attorneys in prisoner civil rights cases could charge a reasonable and customary fee. Therefore, time billed in this case prior to April 26, 1996, should be awarded according to reasonable and customary rates without applying the PLRA cap. *See Madrid*, 190 F.3d at 995. However, after that date, attorneys were on notice that their fees were subject to the restrictions of the PLRA, which "caps the maximum hourly rate" payable for attorney's fees. *See Madrid v. Gomez*, 190 F.3d 990, 994-95 (9th Cir. 1999) (relying on *Martin v. Hadix*, 517 U.S. 343, 119 S.Ct. 1998 (1999)); *Webb v. Ada County*, 285 F.3d 829, 838-39 (9th Cir. 2002).

Here, Mr. Pevar and the NPP attorneys seek the amount of $169.50 per hour for time billed before and after April 26, 1996.[5] Mr. Beladoff requests the rate of $169.50 per hour for work performed after to the PLRA enactment date,[6] but an hourly rate of $275.00 for his time billed prior to the PLRA enactment date. Mr. Beladoff shows that he was awarded $275.00 per hour for time billed between 2004 and 2007 in *Jeff D. v. Kempthorne*, CV80-4091-S-BLW, and he has produced the Affidavit of Walt Sinclair in *Jeff D.* to support his claims. Consequently, the $275.00 per hour sought by Mr. Beladoff for pre-PLRA attorney's fees is reasonable and customary.

F. Summary of Plaintiffs' Attorney's Fees Request

After making their own suggested reductions, Mr. Pevar and the NPP attorneys request a total of $501,667.15 in attorney's fees and expenses under 42 U.S.C. § 1988. Plaintiffs have separated the amount of fees on the retaliation merits and sanctions issues. Of the total amount sought, $283,961.35 relates to the retaliation issue, and $217,705.80 is for services related to the sanctions issue. Plaintiffs argue that *prior* to arriving at their total submitted, they deducted 75% of their total time to account for the time spent on the *Garcia* access to court issues, and then,

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[5] Section 803(d)(3) of the PLRA (codified at 42 U.S.C. § 1997e(d)(3)) provides: No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel. The current hourly fee rate for court-appointed counsel section under 18 U.S.C. § 3006A is $113.00 per hour. Therefore, the PLRA fee rate in this case is $169.50.

Prior to October 1, 2001, the PLRA fee rate was $112.50 per hour ($75 per hour x 150%). It is allowable for attorneys to be awarded fees at the current rate, rather than the historical rate, to compensate the plaintiff for the delay in payment. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989); *see Gates v. Deukmejian*, 987 F.2d 1392, 1406-07 (9th Cir. 1993) (applying *Jenkins*).

[6] Mr. Beladoff asks for the higher rate through December 1997, but appears that the high rate would be allowable only through April 26, 1996.

from the remaining 25%, they reduced their fees and expenses on the retaliation merits issue an additional 66% to account for partial success--winning only 12 of 50 claims presented. In other words, on the retaliation merits issue, they seek 34% of the total amount billed, but on the sanctions issues, they seek 100% of their fees because they assert that they won "100%" of the sanctions issue.

Local counsel Howard Beladoff billed his fees separately; he likewise discounted his total fees by 75% (for *Garcia*) and then 66%. Mr. Pevar's statement shows Mr. Beladoff seeking $8,815.15 in fees, while Mr. Beladoff's statement shows an amount of $19,929.75[7] in fees. The Court uses the higher number, based on Mr. Beladoff's personal declarations, and calculates his fees separate from the other counsel.

All counsel state that they have already eliminated what they consider to be redundant, duplicative, or unnecessary time. The attorneys have indicated an "N" or "N/C" for such time on the billing records.

G. The Court's Analysis of the Lodestar and Defendants' Objections

Having determined that some reductions in the requested amount of attorney's fees are appropriate, the Court has considered various methods of applying reductions. The *Hensley* Court explained that to arrive at a reduced amount, a court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." 461 U.S. at 440, 103 S.Ct. at 1943. Facing a task similar to the one at bar, the district court in *Laube v. Allen*, determined that a percentage reduction was fair and expeditious.

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[7] Mr. Beladoff's total is $17,590.65, but it appears to add up to $19,929.95.

> Given that this fee application is voluminous, as well as the complexity of this case and the lack of detail in some of the line items, the court has determined that a line-by-line excision of hours is not appropriate for this task. *See Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994). Instead, the court will make an across-the-board percentage cut to the number of hours billed. . . . In applying an across-the-board percentage cut, the court aims to simulate the effect of a line-by-line analysis while avoiding the waste of judicial resources that such an impractical approach would entail where billing records are voluminous.

506 F.Supp. 2d at 981. *See also Schwartz v. Secretary of Health & Human Services*, 73 F.3d 895, (9th Cir. 1995) (same). That will be the approach utilized by the Court in the instant case.

While Plaintiffs have suggested that their fees on the retaliation claims be reduced by 66%, Defendants suggest that the reduction should be closer to 90%. *Oral Argument Transcript*, 56:21-25 (Docket No. 848). Based on the Court's review of the record and consideration of the parties' arguments, the Court finds and concludes that an across-the-board reduction of 80% is appropriate. In so determining, the Court has considered all of the following:

1. Analysis of Attorney's Fees on the Retaliation Claims

The Court begins with the NPP attorneys' original billing calculation of 4,483.1 hours at $169.50 for a total of $759,885.45, their calculation for NPP paralegal and law clerk fees of 69.8 hours at $90.00 for a total of $6,282,[8] and Mr. Pevar's calculation of 406.36 hours at $169.50 for a total of $68,878.02. These figures make up the beginning lodestar amount of $835,045.47.[9]

Here, Defendants argue that Plaintiffs had too many lawyers, and suggest that the Court disregard the total fees of two of the five or six trial attorneys for duplicative efforts, namely,

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[8] Plaintiffs' fee application has a calculation error in the paralegal fees. It shows that 45.4 hours x $90 per hour equals $221, when the true amount is $4,086, as reflected in Paralegal Brian Jacobson's time sheets. The Court uses the higher amount.

[9] The Court calculates its lodestar amount after Plaintiffs' voluntary *Garcia* reductions, but prior to Plaintiffs' suggested 66% success-based reductions. This figure does not include Mr. Beladoff's fees, considered separately below.

NPP Attorney Jennie Pittman ("Ms. Pittman") and Mr. Beladoff. The Ninth Circuit has cautioned that "courts ought to examine with skepticism claims that several lawyers were needed to perform a task, and should deny compensation for such needless duplication as when three lawyers appear for a hearing when one would do." *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004).

Particularly, Defendants argue that NPP attorney Jennie Pittman "billed 1,276 hours, "despite never saying a word in open court or signing a pleading or even being admitted to practice in Idaho or before this Court *pro hac vice*." *Defendants' Objections to Attorney's Fees*, p. 18 (Docket No. 837). Of the total amount Ms. Pittman billed, she spent 129.7 hours taking and transcribing her notes from trial. During the same period of time, Ms. Lee billed 108.4 hours and Mr. Balaban, 70.5 hours for the same tasks. The Court agrees that Ms. Pittman's additional note-taking was duplicative of Ms. Lee and Mr. Balaban's efforts, and therefore her 129.7 hours shall be deducted from the lodestar amount.

According to Mr. Pevar, Ms. Pittman organized the trial exhibits presented in court and was deemed by her legal team as "the supervisor of all the documents." *Oral argument Transcript*, p., L. 5 (Docket No. 848). Because trial exhibit organization is a task that can be performed by a paralegal, the Court shall order that Ms. Pittman's remaining time of 1,146.30 hours be reduced to $90 per hour, a difference of $79.50 per hour.[10]

The Court does not agree that the trial time of local counsel, Mr. Beladoff, was *per se* duplicative or excessive. Mr. Beladoff billed 7.5 hours for the first day of the nineteen-day trial,

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[10] *Cf. Richlin Security Service Co. v. Chertoff*, 128 S.Ct. 2007 (2008) (Equal Access to Justice Act case allowing award of paralegal fees at prevailing market rate against the U.S. government).

which began February 1, 1998, and only 8.3 hours for the entire month of February 1998. *See Howard Beladoff Time Sheets*, p. 10 (Docket No. 828-4). The Court will not reduce Mr. Beladoff's fees for trial participation, and Defendants have not pointed to any particular items that are duplicative in his billing.

Defendants further argue that Plaintiffs' attorney's fees should be reduced because the billing statements do not show that the attorneys devoted very many hours to the twelve individual claims that resulted in the six instances of injunctive relief. This contention has merit. Plaintiffs' counter argument-- that the Court should overlook the nonspecificity of the bills because the class action claim and the unsuccessful claims had a "common core"-- is unavailing. Here, *unlike* in *Hensley*, this case *can*, in large part, "be viewed as a series of discrete claims," because Plaintiffs' case was made up of 50 separate instances of retaliation that occurred over a decade. *See* 461 U.S. at 435, 103 S.Ct. at 1940. Compensation for the extra attorney time spent in trying to link these individual instances together to show class-wide pervasiveness over this length of time should *not* be included in the attorney's fees calculation. Plaintiffs' "[c]ounsel admit that each retaliation claim involved a 'a one-time event' and that each was 'finite in scope.'" *Defendants' Objection*, p. 16 (Docket No. 837) (quoting *Plaintiffs' Declaration*, p. 4, ¶ 9, Docket No. 822).

To bolster their argument, Defendants' in-house paralegal prepared a detailed computer analysis of the billing statements. Defendants argue that the analysis shows that Mr. Pevar spent only approximately 5 % of his total hours on *all* of the retaliation claims. *Kevin Burnett Affidavit*, ¶¶ 28-29 (Docket No. 837-3). The computer analysis further shows that there are only 30 billing entries mentioning the word "retaliation" in Mr. Pevar's billing statements *Id.*, ¶ 28.

There are only 37 entries in the NPP attorneys' billing statements mentioning retaliation. *Id.*, ¶ 37. Defendants estimate that only 495 hours of total billings mention the successful plaintiffs. *Oral Argument of Attorney's Fees Application, Transcript,* p. 50, ll. 14-16 (Docket No. 848).

A court may reduce an attorney's fees award for inadequate documentation of hours in the billing statements. *Hensley*, 461 U.S. at 433-34, 103 S.Ct. at 1930-40. While an attorney is not required to keep extremely detailed records, he must produce records "identify[ing] the general subject matter of his time expenditures" to allow the Court to properly analyze the fee application in light of limited success. *Hensley*, 461 U.S. at 437 n.12, 103 S.Ct. at 1941 n.12.

The Court rejects Plaintiffs' argument that Defendants should have hired an unbiased expert to analyze the fees rather than use an in-house paralegal who was involved in the case. Thankfully, the Supreme Court has admonished that the fees portion of the case "should not result in a second major litigation." 461 U.S. at 437, 103 S.Ct. at 1941. Defendants' analysis makes economic and practical sense, and it is supported not only by the billing statements but also by references to the individuals' cases in the record. The Court takes into consideration the lack of expertise and the potentially biased nature of the analysis, but those items go to "weight, not admissibility" of the computer analysis in the Court's determination of an appropriate fee award.

Defendants also argue that the lack of specific references in Plaintiffs' attorneys' billing statements is matched by the lack of references in the record showing time spent on the successful claims. Defendants persuasively point out:

> Out of 3,959 pages of trial transcripts, 701 pages or 17% of the total, deal with the six instances of prospective relief. Of the total amount of trial transcripts devoted to specific individuals, the percentages dealing with their successful claims were: Olds, 23%; Hays, 9%; Jones, 10%; Roman, 11%; Shively, 12%; Sanger, 12%. Of a total of 4,990 pages of deposition transcripts generated in 58

> depositions, only 59 pages of testimony total [sic] relate directly to instances where the Court granted prospective relief. Plaintiffs propounded hundreds of discovery requests, of which only 26 appear to relate in any way to retaliation, only 13 to claims brought to trial and only one to a claim on which prospective relief was granted.

Defendants' Response to Plaintiffs' Attorneys' Fees Application (Docket No. 837, p. 13).

Plaintiffs' pleadings show a similar trend. Notably, the original 1991 Complaint did not state a retaliation claim. It contained only an access to court claim and an equal protection claim regarding access issues particular to Spanish-speaking inmates. Only one sentence in the Complaint contained an allegation of retaliation as one of many factual issues supporting the access to court claim. A separate retaliation claim was presented in the actual litigation six years later in December 1997, after the *Lewis v. Casey* decision *and* after the IDOC made plans to change the prison access to courts system in response to *Lewis v. Casey*. Plaintiffs themselves candidly acknowledge that "counsel had to change their trial strategy abruptly after *Lewis v. Casey* was decided in June 1996." *Motion for Attorney's Fees*, p. 19 (Docket No. 821). Thus, the court record and pleadings support the notion that of the time between 1989 and 1996, relatively little time was spent on the retaliation claims, and importantly at this stage of the case on requests for fees and costs, even less time was spent on the six successful retaliation claims, as demonstrated in the nonspecific nature of the billing statements.

In addition, the PLRA prohibits an award of fees unless "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title." 42 U.S.C. § 1997e(d)(1)(A). With all of this in mind, the Court concludes that the lodestar should be reduced to account for loss of the class action, which, in part, unnecessarily compounded the individual claims into a monolithic case. Plaintiffs should not be able to recover for attorney time spent on

general "retaliation claims" when such fees were incurred *prior* to the date when the actual prevailing clients' cases arose. One of Plaintiff Hays's claims arose in 1985, and the other in 1992, spanning the entire time attorneys worked on the case. The retaliatory firing of law clerks by Deputy Warden Miller occurred in 1988; and the claims of class member Olds arose in 1993 and 1994. Plaintiff Roman's claims, arose at the earliest on June 25, 1996, and Plaintiff Jones' claim arose no earlier than March 1997. The Court has taken into account the inception dates of these claims in arriving at its 80% reduction figure.

Awarding partial fees for the successful plaintiffs and yet reducing the amount by 80% to account for the loss of the class action and the other individual claims supports the purposes of § 1988. The limited success and resultant reduction of the attorney's fees are not reflections of the skill, integrity, and work product of Plaintiffs' counsel, but rather a reflection of Plaintiffs' decision to press forward with their class action case, which proved unsuccessful.[11] On the importance of the factor of success of the claims in the litigation, the *Hensley* Court reiterated:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

461 U.S. at 436, 103 S.Ct. at 1941.

One additional issue warrants further comment. The Court rejects the additional arguments of Defendants--that Plaintiffs' counsel billed too much for post-trial briefing, that

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[11] Rather than deduct hour-by-hour amounts for the equivalent of the nine weeks of billing that Plaintiffs' attorneys spent on Plaintiffs' post-trial briefing (344.6 hours), which the Court deems excessive, the Court has accounted for a reduction by deducting an across-the-board 80% figure. *See Defendants' Objection*, p. 19 (Docket No. 837).

counsel should not have billed their "commuting time," and that fewer travel time hours should have been billed--for the reason that such arguments merely even the scales. The Court has also considered that Mr. Pevar and NPP attorneys did not request to be compensated at a higher rate prior to April 25, 1996, that taking this case prevented Plaintiffs' counsel from working on other fee-producing litigation, that prisoner litigation is generally considered to be undesirable attorney work, and that Mr. Pevar and co-counsel are respected, highly skilled, and experienced in inmate civil rights litigation. Reviewing the remaining *Kerr* factors, the Court has also considered that an individual inmate retaliation claim is not novel or complex,[12] which weighs against a large attorney's fee award, and that a class action prisoner case is more complex, which, here, weighs against a high attorney's fees award because the class action was unsuccessful. The other *Kerr* factors are not relevant.

The Court concludes that a reasonable deduction for time spent on the unsuccessful individual claims and the class-action portion of the case is 80%, calculated as follows:

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[12] The Ninth Circuit had clearly set forth the standard for a retaliation claim in 1985, explaining that a retaliation claim must allege the following: (1) that Plaintiff exercised a constitutional right; (2) that prison officials' behavior was in retaliation for Plaintiff having exercised that right; and (3) that prison officials' actions either did not advance legitimate correctional goals or were not narrowly tailored to meet those goals. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir.1985).

Biller	Hours sought	Rate	20 % of Hours	Total Amount
Paralegal Jacobson	45.4	90.00	9.08	$817.20
Ms. Lee	1008.1	169.50	201.62	$34,174.59
Ms. Alexander	162.4	169.50	32.48	$5,505.36
Mr. Balaban	657	169.50	131.4	$22,272.30
Ms. Pittman	1276.4 (1146.7 allowed)	90.00	229.34	$20,640.60
Law clerks	24.4	90.00	4.88	$439.20
Ms. Rifkin	15.9	169.50	3.18	$539.01
Ms. Winter	1363.30	169.50	272.66	$46,215.87
Mr. Pevar	406.36	169.50	81.27	$13,775.60
Total for the NPP attorneys and Mr. Pevar:				**$144,379.73**

2. Analysis of Attorney's Fees on Sanctions Issue

During the course of trial on the retaliation claims, Plaintiffs discovered that Defendants' counsel, Timothy McNeese and Stephanie Altig, were confiscating and reading Plaintiffs' attorney-client privileged letters. The correspondence related to Plaintiffs' litigation strategy and evidence. In a surprising tactical move, and one that obviously did not result in the intended consequences, Defendants' counsel attempted to use the correspondence in their clients' favor by arguing that the privileged and confidential letters showed that Plaintiffs' attorneys did not really have specific factual evidence to support the class action claims, contrary to Plaintiffs' attorneys' simultaneous assurances to the Court that such evidence existed.

After Defendants' counsel revealed that they had possession of Plaintiffs' attorney-client privileged correspondence, the Court issued an Order to Show Cause Why Defendants' Counsel

Should Not Be Sanctioned for Professional Misconduct. After Plaintiffs' counsel conducted discovery on the sanctions issue, a three-day evidentiary hearing was held. The Court found that (1) Defendants' attorneys' misconduct caused "unnecessary litigation"; (2) IDOC used the information obtained from the attorney-client privileged correspondence for "potential tactical advantage"; and (3) the acts "constituted bad fath conduct and warrant[ed] imposition of sanctions." *Findings of Fact, Conclusions of Law, Memorandum Decision and Order Relating to Plaintiffs' Motion for Sanctions of September 13, 1999,* p. 18 (Docket No. 718).

Mr. McNeese and Ms. Altig were then personally sanctioned under the Court's inherent authority and 28 U.S.C. § 1927, which provides in pertinent part:

> Any attorney or other person admitted to conduct cases in any court of the United States. . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The sanction consisted of a public reprimand, an attorney's fee award of $3,500 and costs and expenses in the amount of $1,000. The judgment was affirmed on appeal. *See Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001), *cert. denied*, 534 U.S. 1066 (2001). The Ninth Circuit Court of Appeals awarded Plaintiffs $80,952.70 for attorney's fees and $1,349.14 in costs for all aspects of the appeal, including both the retaliation claims and sanctions issue.[13]

A sanction under 28 U.S.C. § 1927 is an award against the offending attorneys personally, while attorney's fees under 42 U.S.C. § 1988 is an award against the clients or parties. Plaintiffs now seek from Defendants $245,797.24 in attorney's fees and costs under § 1988. At issue is whether *Defendants* now must pay additional attorney's fees and costs over and above the

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[13] Plaintiffs's fees were reduced from the total requested amount of $95,444.95 in attorney's fees (577.34 hours) and $1,349.14 in expenses. *See* Appendix C.

amount Defendants' *counsel* paid to Plaintiffs. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455 (1980), the United States Supreme Court addressed the interplay between § 1927 and § 1988. There, the Supreme Court was called upon to address whether § 1927 allowed an award of attorney's fees as part of the sanction. It ultimately determined that federal courts could not award attorney's fees because the former version of § 1927 did not specifically allow it and because § 1988 did not provide for liability of *an attorney* for the opposing party's attorney's fees. 447 U.S. at 760-61, 100 S.Ct. at 2461.[14] Importantly, the Supreme Court noted:

> Section 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes. Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants.

447 U.S. at 762, 100 S.Ct. at 2462. In short, § 1988 is a prevailing party fee-shifting statute where fees are assessed to the losing party *and* are tied to the merits of the claim, and § 1927 is a bad faith abusive-practice statute assessed to the offending attorneys *and* not linked to the merits. *See also Footman v. Cheung*, 341 F.Supp.2d 1218 (M.D. Fla. 2004) ("The purpose of § 1927 is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs bear them.").

A number of additional courts have noted that § 1927 should be applied "with restraint lest the prospect thereof chill the ardor of proper and forceful advocacy on behalf of his client." *Carrasquillo v. City of Troy*, 2006 WL 304031 (N.D.N.Y. 2006) (internal citation omitted) ; *see*

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[14] *Roadway Express* was decided in June 1980. It did not allow attorney's fees as a result of the language of the statute. In September 1980, Congress the statue to allow for attorney's fees as part of the sanction. *See* Pub. L. No. 96-349 § 390, 94 Stat 1154 (1980).

also Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123, 2132 (1991).[15] In *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521 (5th Cir. 1996), the court emphasized the same concept, stating:

> Punishment under this statute [§ 1927] is sparingly applied, and except when the entire course of proceedings were unwarranted and should neither have been commenced nor persisted in, an award under 28 U.S.C. § 1927 may not shift the entire financial burden of an action's defense.

Id. at 535 (citation omitted).

The Court granted Plaintiffs' request for § 1927 sanctions, which included attorney's fees and costs for Defendants' attorneys' conduct. The sum was the result of considerable thought and appropriate judicial restraint. Defendants' counsel were personally responsible for the conduct, and therefore were personally responsible for the sanction under § 1927. However, now that the Court is considering only § 1988 fees and costs for which Defendants will be responsible, the Court cannot disregard the merits of the case. Plaintiffs had limited success on the merits of the claims, and, as a result, the Court will consider the sanctions fees and costs a part of the overall case and award fees using a calculation of approximately 20% of fees requested. After careful study and thoughtful, measured deliberation, the Court specifically rejects Plaintiffs' argument that they are entitled to 100% of their fees on the sanctions issue because they were 100% successful on that issue, a result that would shift a major portion of the burden of litigation onto Defendants in "punishment" for Defendants' attorneys' errors. The Court also declines to do as Plaintiffs suggest and adopt the position that the sanctions issued

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[15] In *Chalmers*, the Court expressed: "Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." 501 U.S. at 44-45, 111 S.Ct. at 2132.33.

"materially altered the relationship" of the class to Defendants and constituted class-wide relief. The sanctions issue was not a claim, it was not a constitutional issue, and it did not concern Defendants' own conduct or the merits of their defenses.

As a result, the Court will award attorney's fees for work on the sanction issue as follows:

Biller	**Hours sought**	**Rate**	**20% of Hours**	**Total Amount**
Ms. Lee	101.2	169.50	20.24	$3,430.68
Ms. Alexander	57.1	169.50	11.42	$1,935.69
Mr. Balaban	102.5	169.50	20.50	$3,474.75
Ms. Pittman	63.9	169.50	12.78	$2,166.21
Ms. Winter	586.3	169.50	117.26	$19,875.57
Mr. Pevar	372.6	169.50	74.52	$12,631.14
Total:				**$43,514.04**

3. Analysis of Mr. Beladoff's Attorney's Fees

The fee application of Howard Beladoff, local counsel for Plaintiffs, is unclear. Mr. Pevar shows that Mr. Beladoff's request is $8,815.15 (Docket No. 821, p. 22); Mr. Beladoff's own summary requests $17,590.65 (Docket No. 828, p. 4); however, Mr. Beladoff's summary contains a mathematical error, because the subtotals add up to $19,929.75. In addition, Mr. Beladoff has requested $275 per hour through December 1997, rather than through April 26, 1996. Further, the total amounts sought for each year's work as shown on the hourly billing statements for the retaliation claims do not seem to reflect a 66% reduction as stated, and so it is unclear whether he has made other reductions or errors. The Court shall deny Mr. Beladoff's fee

request without prejudice and allow him to resubmit a clarifying application that enables the Court to make the adjustments set forth above.[16]

IV.

ADDITIONAL "FEES-ON-FEES" REQUEST

Plaintiffs are entitled to file a request for an award of attorney's fees for submitting the fee application. Plaintiffs' request shall be filed within thirty (30) days. Defendants may file a brief response no longer than 20 pages to Plaintiffs' fee request within fourteen (14) days after service. No reply shall be filed by Plantiffs.

V.

REVIEW OF COSTS

A. Standard of Law

Federal Rule of Civil Procedure 54(d) generally provides for an award of costs to the prevailing party. A Rule 54(d)(1) award includes taxable costs, and a Rule 54(d)(2) award of attorney's fees may include "nontaxable expenses." In deciding whether to exercise discretion in favor of a cost award in a civil rights case, the district court should consider the amount of the costs and the financial resources of the plaintiff, including indigency status. *Stanley v. University of Southern California*, 178 F.3d 1069, 1079 (9th Cir. 1999) (internal citations omitted). The Ninth Circuit has held that "Rule 54(d)(1) creates a presumption in favor of awarding costs to a prevailing party, but the district court may refuse to award costs within its discretion."

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[16] Consistent with the findings and conclusions above, the Court shall reduce Mr. Beladoff's requested fees to 20% of the total to account for the limited success of the individual claimants. As set forth above, the Court finds that the $275 per hour fee is appropriate and applicable prior to April 26, 1996, the enactment date of the PLRA, but Mr. Beladoff's fees will be reduced to $169.00 per hour after that date.

Champion Produce, Inc., v. Ruby Robinson Co., Inc., 342 F.3d 1016, 1022 (9th Cir. 2003). Reducing costs by the same percentage by which the attorney's fees were reduced is appropriate where the prevailing party was not successful on all claims. *See Betancourt v. Giuliani*, 325 F.Supp. 2d 330, 336 (S.D.N.Y. 2004).

When reviewing *taxable* costs, "courts do not have discretion under Fed.R.Civ.P. 54(d) to tax whatever costs seem appropriate; rather, courts may tax only costs defined in 28 U.S.C. § 1920." *Alflex Corp. v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 176 (9th Cir. 1990). Local Rule 54.1 further defines the types of taxable costs available under Federal Rule 54(d)(1). *See* D.Id.L.Civ.R. 54.1. Courts have generally held that where a local rule is non-exhaustive in defining the recoverable costs, then the court "may in its discretion, allow other costs," as more generally defined in Federal Rule of Civil Procedure 54(d)(2). *In re Turn-Key-Tech Matters*, 2002 WL 32521815, at *2 (C.D. Cal. 2002); *see Automotive Products PLC v. Tilton Engineering, Inc.*, 1994 WL 219912, at *3 (C.D. Cal. 1994). In other words, if a certain cost is included within a category of Rule 54 and is not "affirmatively precluded" by local rule, that cost may be recoverable. *See V-Formation, Inc. v. Benetton Group SPA*, 2003 WL 21403326, at *3 (S.D.N.Y. 2003). In this case, Local Rule 54.1 specifically, and in some categories exhaustively, defines taxable costs, but it also provides that "[o]ther items may be taxed with prior Court approval." *See* D.Id.L.Civ.R. 54.1(c)(1) to (8). "Fair estimates" of "nontaxable expenses" allowed by Rule 54(d)(2)(B) are those for which counsel provides a reasonable basis for the estimate. *See Raniola v. Bratton*, 2003 WL 1907865, at *8 (S.D.N.Y. 2003).

B. Defendants' Request for Costs in the Class-Action Portion of *Gomez*

At the conclusion of *Garcia*, Defendants filed the same bill of costs in *Garcia* and *Gomez*. (Docket No. 751 in *Gomez*; Docket No. 120 in *Garcia*). Defendants explained that they

did so "[o]ut of caution, because the cases were related and "the issue of taxing of costs appear[ed] to be ripe in both cases." *Memorandum by Defendant in Support of Motion for Costs*, p.4 (Docket No. 122 in *Garcia*).

In *Gomez*, Defendants seek $31,913.50 in costs. They have deleted the travel costs for Mr. McNeese, *Defendants' Bill of Costs* (Docket No. 751, pp. 2-3, section I.A.), and the costs incurred in *Garcia v. Hayden*, *Defendants' Bill of Costs* (Docket No. 751, pp. 8-9, section II). Their itemized categories of costs are as follows:

I.	Trial transcript, trial, and hearing costs:	$7,885.40
II.	Deposition Costs	$16,552.97
III.	Photocopying	$2,544.30
IV.	Witness Fees	$4,930.83.

In *Garcia*, Judge Lodge limited Defendants' award of costs for the following reasons: "(1) the record demonstrates that the Plaintiffs' resources are limited; (2) the award of full costs may result in a 'chilling effect on future potential civil rights litigants'; and (3) the case involves issues of substantial public importance." *Order* (Docket No. 139 in *Garcia*). Judge Lodge reduced the costs from a request of $9,589.80, to an amount of $2,531.05, representing only Defendants' deposition costs. Here, the same considerations apply, as well as the fact that Defendants lost a number of the individual claims. As a result, of the total costs of $31,913.50 sought, the Court shall award Defendants their deposition costs of $16,552.97. The Court rejects Plaintiffs' argument that some of the depositions should be disallowed because they were extraneous and not used at trial because Local Rule 54(c)(3) allows for the cost of depositions "used for any purpose in connection with the case."

C. Plaintiffs' Request for Costs for the Successful Individual Claims in *Gomez*

Plaintiffs seeks their costs for the successful individual claims. The Court agrees that the vast majority of Plaintiffs' copies are not permitted by Local Rule 54.1(c)(5), which allows only for "[t]he cost of an exhibit necessarily attached to a document (or made part of a deposition transcript) required to be filed and served." Because Plaintiffs have not delineated which costs fit the Local Rule standard, the Court shall estimate an appropriate reduction and deduct 90% of Plaintiffs' copy charges, reducing the NPP attorneys' request for copying charges from $18,981.99 to $1,898.20, and Mr. Pevar's request for copying charges from $4,618.00 to $461.80.

The Court has authority under Local Rule 54.1(c)(8) to allow other costs, and will allow the following costs based on that section because the costs are not otherwise specifically prohibited by more specific provisions of the local rule, and such costs are allowable as nontaxable expenses under Rule 54(d)(2). Many of Plaintiffs' attorneys' extra expenses resulted from their out-of-state status. Because Plaintiffs could not find Idaho counsel with expertise, time, or desire to take this non-frivolous civil rights case, the Court shall allow the other costs to which Defendants object, such as long-distance telephone calls, facsimile and Federal Express charges, postage, and travel expenses. *See* Local Rule 54.1(c)8).

After deducting 90% of copying charges from the total costs requested,[17] the Court will award costs to the NPP attorneys in the amount of $9,047.58, and the sum of $7,085.70 for Mr. Pevar. Finally, the Court notes that Mr. Pevar asked for costs of $106.59 on behalf of Mr. Beladoff, but the Court will require Mr. Beladoff to address his own request for costs in his clarifying application.

VI.

REVIEW OF INTEREST ISSUE

Plaintiffs argue that Defendants should be ordered to pay interest on the fee award under 28 U.S.C. § 1961(a) from the date of February 12, 2002, until the fee award is paid. Defendants persuasively argue that § 1961(a) interest is allowed only on "money judgments." Here, no "money judgment" was entered in the case in 2002. Post-judgment interest begins to accrue on a judgment for attorneys fees on the date the fees were "meaningfully ascertained and included in a final appealable judgment." *See MidAmerica Federal Savings & Loan Assoc. v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1476 (10th Cir. 1992); *Perkins v. Standard Oil Co. of Ca.*, 487 F.2d 672, 675 (9th Cir. 1973) ("claims for 'reasonable' attorneys' fees, being unliquidated until they are determined by a court, are not entitled to pre-judgment interest as would be certain liquidated claims").

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[17] The NPP Attorneys requested total costs of $62,321,70. The Court deducts 90% of copying charges, $17,083.80, reducing the total to $45,237.90, and then calculates a final reduction of 80% to account for the limited success, to reach a result of $9,047.58. Mr. Pevar requested total costs of $39,584.70. The Court deducts 90% of copying charges, $4,156.20, reducing the total to $35,428.50, and then calculates a final reduction of 80%, to reach a result of $7,085.70.

Accordingly, Plaintiffs' interest on their attorney's fees and costs award, and Defendants' interest on their costs award, shall begin to run from the date judgment for the award of attorney's fees is entered after the final fee requests are determined.

VII.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED:

A. Plaintiffs's Renewed Motion for Attorneys' Fees and Expenses (Docket No. 821) is GRANTED in part and DENIED in part. Defendants shall pay the sum of $144,379.73 in attorney's fees to the National Prison Project attorneys and attorney Stephen Pevar for work performed on the retaliation claims. Defendants shall pay the sum of $43,514.04 in attorney's fees to the National Prison Project attorneys and Stephen Pevar for work performed on the sanctions issue.

B. Howard Beladoff's fees and costs application is temporarily DENIED without prejudice, and he is allowed to submit a new application as described herein above within thirty (30) days.

C. Plaintiffs' Renewed Motion for Costs (Docket No. 827) is GRANTED in part and DENIED in part. Defendants shall pay the sum of $9,047.58 in costs to the National Prison Project attorneys. Defendants shall pay the sum of $7,085.70 in costs to Steven Pevar.

D. Defendants' Second Renewed Motion to Allow Costs (Docket No. 826) is GRANTED in part and DENIED in part. Plaintiffs owe the sum of $16,552.97 to Defendants as costs in the class action case. Defendants may offset the their

award of costs against Plaintiffs' award of fees as follows: 70% from NPP attorneys (5 lawyers), 15% from Stephen Pevar, and 15% from Howard Beladoff.

E. Plaintiffs are entitled to request an additional award of attorney's fees for their work in preparing the attorney's fees and costs applications. Plaintiffs' request shall be filed within thirty (30) days. Defendants may file a brief response to the fee request within fourteen (14) days thereafter. No reply shall be filed by Plantiffs.

F. Plaintiffs' interest on their attorney's fees and costs award and Defendants' interest on their costs award shall begin to run from the date judgment for the award of attorney's fees is entered after the final fee requests are determined.

DATED: **August 7, 2008.**

Honorable Larry M. Boyle
Chief U. S. Magistrate Judge

Appendix A

Chronology of Events in CV91-299-S-LMB (Gomez v. Vernon) and CV 99-112 (Garcia v. Hayden)[1]

Date	Event
February 1989	American Civil Liberties Union (ACLU) Attorney Stephen Pevar, whose office is in Washington, D.C., receives a letter from three Idaho Department of Correction inmate law clerks housed at State Correctional Institution (ISCI). They allege that prison officials persistently denied inmates the right of access to the courts and retaliated against inmate law clerks who helped other inmates. Pevar investigates the allegations and meets with prison officials, but is unable to resolve the issues.
June 21, 1991	Mr. Pevar and local counsel Howard Beladoff file the original civil rights Complaint on behalf of four inmates, Noel Puente Gomez, Juan Sanchez, Dan Elliot, and Lee Hayes. Plaintiffs seek class certification in the Complaint. The Complaint alleges access to court and equal protection violations at two Idaho Department of Correction (IDOC) facilities: the Idaho Maximum Security Institution (IMSI) and the Idaho State Correctional Institution (ISCI). The Complaint includes allegations that one of the reasons the access to court program was inadequate was that law clerks were routinely harassed, punished, fired, or transferred in retaliation for their legal work. (Docket No. 1 in *Gomez*). There is no independent retaliation claim included. The case is assigned to District Judge Lodge.
September 24, 1992	The parties stipulate to class certification (Docket No. 22 in *Gomez;* Judge Lodge signs the order granting class certification on October 2, 1992 (Docket No. 23 in *Gomez*).
October 6, 1992	*Gomez* case is reassigned to Magistrate Judge Boyle based on consent of the parties (Docket No. 25 in *Gomez*).

[1] All Orders referred to in the Appendix were entered by the undersigned, except where it is indicated that an Order was entered by Judge Lodge.

December 16, 1993	In the Order dated December 16, 1993, Plaintiff's Motion for Summary Judgment is granted. The Order finds that IDOC policy limiting inmates to in-cell storage of three cubic feet of legal files is *not* unconstitutional, but the policy preventing them from storing larger legal files elsewhere at the IDOC *is* an unconstitutional restriction of an inmate's right to access the courts.
April 15, 1994	*Gomez* is administratively terminated pending disposition of *Lindquist v. Idaho State Board of Corrections*, CV78-1021, and pending the appeal in *Cornett v. Donvan*, CV91-231, because these cases might moot the issues in *Gomez*.
August 14, 1995	Plaintiffs file a Motion to Reopen Case in *Gomez*, alleging that the IDOC has made improvements to the access to court system, but discovery was necessary to determine whether the changes were extensive enough to remedy the access issues alleged in the Complaint (Docket No. 101 in *Gomez*).
Sept. 19, 1995	Plaintiffs file a Motion for Preliminary Injunction alleging that they had admissions-type evidence that the access to the court system was inadequate (Docket No. 107 in *Gomez*).
January 8, 1996	Plaintiffs file Motion for Preliminary Injunction re: Inadequate Training of Law Clerks (Docket No. 116 in *Gomez*).
February 2, 1996	The *Gomez* case is reopened, and the Motion for Preliminary Injunction (Docket No. 107 in *Gomez*) and the Motion for Preliminary Injunction re: Inadequate Training of Law Clerks (Docket No. 116) are denied. The Order relies on *Bounds v. Smith*, 430 U.S. 817 (1977), and *Sands v. Lewis*, 886 F.2d 1166 (9th Cir. 1989) (Docket No. 120 in *Gomez*).
June 24, 1996	The law governing inmate access to court rights changes dramatically when the United States Supreme Court issues its decision in *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174 (1996). *Lewis v. Casey* held that prisons had to provide only minimal assistance to inmates to meet the constitutional standard for accessing the courts, and it held that an access to court violation required a showing of actual injury. Plaintiffs later state that "*Lewis* rendered superfluous most of the evidence on the access claims that Mr. Pevar had been gathering in this litigation for the previous five years." *Plaintiffs' Renewed Motion for Fees*, p. 3 (Docket No. 821 in *Gomez*).

February 26, 1997	Defendants' Motion to De-Certify Class and Motion to Dismiss in light of the changes in the law in *Lewis v. Casey* are denied. The Order mentions that Plaintiffs allege that the access to the courts program ignores the needs of Hispanic inmates; that inmate law librarians are not properly trained to work in the law library; and that inmate law librarians have been routinely harassed, punished, fired, or transferred in retaliation for their legal work (Docket No. 166 in *Gomez*).
August 1997	First date that National Prison Project (NPP) attorneys enter the case on behalf of Plaintiffs. (Over the entire case, the following NPP attorneys worked on the case: Donna Lee, Elizabeth Alexander, Eric Balaban, Jennie Pittman, Marjorie Rifkin, and Margaret "Peggy" Winter. In addition, NPP paralegal Brian Jacobson and several law clerks worked on the case.)
October 14, 1997	Plaintiffs file a Motion to Amend Complaint to add named plaintiffs Larry Brad Sanchez, Bob Jones, Marq Bartlett, Gregory Nelson and Marvin Hedger, alleging that they "have suffered, and could suffer in the future, irreparable injury due to defendants' retaliation against them and/or denying them meaningful access to the courts." (Docket No. 231 in *Gomez*).
October 29, 1997	Defendants file a Motion for an Order to Show Cause Why Plaintiffs Should not be Held in Contempt. As a result of reading Plaintiffs' attorney-client privileged correspondence, Defendants' counsel believed that they could show that Plaintiffs did not have "actual injury" evidence to support their claims after *Lewis v. Casey*, and Defendants' counsel asserted that Plaintiffs' counsel had misrepresented the viability of Plaintiffs' case to the Court. Defendants ask for Plaintiffs' counsel to be held in contempt of court for perpetrating a fraud upon the Court. (Docket Nos. 258 & 259 in *Gomez*).
November 17, 1997	Plaintiffs file a Motion to Withdraw the Motion to Amend and a Request to Extend Time to File a New Motion to Amend (Docket No. 282 in *Gomez*).
December 8, 1997	Plaintiffs seek leave to amend their Complaint to include for the first time (1) alleged actual injury as to specific Plaintiffs in the access to court claim; (2) retaliation claims, rather than include retaliation as an issue supporting the access to court claim; and (3) a claim that Defendants' counsel intercepted and read their attorney-client-privileged correspondence (Docket No. 310 in *Gomez*).

January 5, 1998	National Prison Project (NPP) attorney Eric Balaban enters the case for Plaintiffs (Docket No. 365 in *Gomez*).
January 12, 1998	An Order denying in part and granting in part Plaintiffs' Motion to Amend is entered (Docket No. 310 in *Gomez*). The question of adding new plaintiffs is deferred, the request to change the defendants to the current persons who hold the official titles is granted, and the request to add a civil rights claim regarding Defendants' review of Plaintiffs' attorney-client privileged documents is denied because of the age of the case; Plaintiffs have the option of filing the claim in a new action. (Docket No. 384 in *Gomez*). The Court also denies Defendants' Motion for Order to Show Cause Why Plaintiffs Should Not be Held in Contempt (Docket No. 258 in *Gomez*), concluding that no intentional fraud has been perpetrated upon the Court.
January 14, 1998	Plaintiffs file a motion to bifurcate the access to court claims from the retaliation claims (Docket No. 387 in *Gomez*).
January 16, 1998	Plaintiff's Motion to Bifurcate Trial and Reopen Discovery is granted in part and denied in part. The portion of the trial scheduled to commence on February 2, 1998 on the access to court claims is vacated because a new paralegal assistance program policy was scheduled to be implemented by Defendants on January 19, 1998, which directly affected the access to the courts issue. The Court reasoned: "It would be improvident to proceed with the access to court and other claims based upon challenges to a system which is no longer in place at this time." The trial on retaliation claims was allowed to proceed to trial. (Docket No. 398 in *Gomez*).
January 29, 1998	The deferred portion of Plaintiff's Motion to Amend is decided (Docket No. 310 in *Gomez*). The Order allows individual Plaintiffs to be added to complaint by amendment (Docket No. 449 in *Gomez*). It is also made clear that the individually-named plaintiffs will be able to proceed on individual claims for their own relief. On January 30, 1998, Plaintiffs' Motion for Reconsideration of One Portion of Order is granted. The Order determines that while the originally-cited instances of retaliation were rendered moot by the new access to court system, claims of retaliation alleged under both systems should go forward to trial (Docket Nos. 446 & 451 in *Gomez*).
February 2, 1998	A nineteen-day trial on the class action and individual retaliation claims began on February 2, 1998 (Docket Nos. 458 & 546 in *Gomez*).

June 11, 1998	As a result of the Orders of January 12, 1998, and January 29, 1998, Plaintiffs file a First Amended Class Action Complaint in June 1998, adding plaintiffs Bob Jones, Alfredo Roman, Patrick Hall, Marq Bartlett, and Gregory Nelson (Docket No. 537).
July 20, 1998	Plaintiff Hays files a Motion to File Supplement Complaint (Docket No. 543 in *Gomez*).
February 18, 1999	Plaintiffs file a Motion for Order to Show Cause Why Deputy Attorney General Altig and McNeese Should not be Sanctioned for Professional Misconduct for reviewing Plaintiffs' attorney-client privileged communications (Docket No. 594 in *Gomez*).
March 16, 1999	The Findings of Fact, Conclusions of Law, Memorandum Decision and Order on the retaliation claims trial are issued (Docket No. 608 in *Gomez*).
March 22, 1999	Judgment is entered granting Plaintiffs' request for declaratory relief for individual plaintiffs and denying class-wide relief because Plaintiffs failed to show that retaliation pervaded the entire class (Docket No. 609 in *Gomez*).
March 23, 1999	The Court issues an order that the retaliation and access to court claim shall be bifurcated, and the second amended complaint shall constitute a separate action as Case No. 99-112-S-LMB, *Garcia v. Hayden*. The Court also issued an order to show cause re: sanctions against Altig and McNeese (Docket No. 610 in *Gomez*).
March 30, 1999	Plaintiffs file a Motion to Alter or Amend Findings of Fact, Conclusions of Law, and Judgment (Docket No. 612 in *Gomez*).
April 16, 1999	Plaintiffs file a Supplemental Second Amended Complaint in Case No. 99-112-S-LMB (Docket No. 627 in *Gomez*; Docket No. 8 in *Garcia*).
June 29, 1999	A three-day evidentiary hearing on the sanctions for professional misconduct regarding Attorneys McNeese and Altig is held.
August 17, 1999	Plaintiffs' Motion to Alter or Amend is granted. An Amended Judgment is entered adding *injunctive* relief to previously-granted declaratory relief for six individual inmates (Docket Nos. 680 & 710 in *Gomez*).

August 25, 1999	Defendants move the Court to certify the judgment and orders in *Gomez* as final under Rule 54(b) (Docket No. 713 in *Gomez*).
Sept. 13, 1999	Plaintiffs' Motion for Sanctions is granted. The Order awards Plaintiffs sanctions of attorney's fees in the amount of $3,500 and costs and expenses in the amount of $1,000 (Docket No. 718 in *Gomez*).
September 16, 1999	Defendants' Motion for Certification of Issues for Appeal is denied. The Order finds that while the retaliation claims in *Gomez* had been resolved, the remainder of the bifurcated action (*Garcia*) had not yet been adjudicated, and piecemeal litigation should be avoided (Docket No. 722 in *Gomez*).
September 30, 1999	Defendants file a Notice of Appeal in *Gomez* (Docket No. 721 in *Gomez*). Plaintiffs file a Motion for Attorney's Fees (Docket No. 723 in *Gomez*).
October 20, 1999	Plaintiff's Motion for Attorney's Fees is denied. The Court refers to its Order dated September 16, 1999, where the Court concluded that piecemeal appeals are not appropriate in a bifurcated action. Likewise, consistent with that prior ruling, the Court also concludes that piecemeal determination of motions for attorneys' fees and costs should not be undertaken considering the bifurcated nature and procedural status of this action, the pending appeals by the respective parties, and especially in light of the fact that the *Garcia* portion of this action remains to be adjudicated. The Court also moots the parties' bills of costs (Docket No. 735 in *Gomez*).
October 29, 1999	Plaintiffs file a Motion to Amend Complaint seeking to add four new plaintiffs in the access to court case (Docket No. 33 in *Garcia*).
January 14, 2000	Plaintiffs' Motion to Amend is granted (Docket No. 48 in *Garcia*).
January 26, 2000	Defendants move Judge Lodge to vacate the Order of Reassignment to Magistrate, arguing that *Gomez* or *Garcia* should be reassigned from Judge Boyle to Judge Lodge (Docket No. 56 in *Garcia*).
January 31, 2000	Plaintiffs file a Motion to Stay Proceedings in *Garcia* because they plan to file a cross-motion to dismiss the access to court claims in *Garcia,* and Plaintiffs state that they believe that Defendants have raised a colorable issue as to magistrate jurisdiction over *Garcia* (Docket No. 64 in *Garcia*).

January 21, 2000	Defendants file a Motion for Summary Judgment on the merits of the access to court claims (Docket No. 61 in *Garcia*).
February 11, 2000	Instead of responding to the Motion for Summary Judgment, Plaintiffs file a Motion to Amend for the purpose of dismissing all of the access to court claims (Docket No. 74 in *Garcia*).
February 16, 2000	Defendants file a Renewed Motion for Summary Judgment and Response to Motion to Amend for Purpose of Dismissing All Access to Court Claims (Docket No. 75 in *Garcia*).
May 30, 2000	Judge Lodge denies the motion to vacate reference of the *Gomez* and *Garcia* cases to Judge Boyle. In so doing, Judge Lodge opines: "The jurisdictional challenge which forms the basis for Defendants' motion is also an issue presently being considered by the Ninth Circuit Court of Appeals (*See Gomez v. Vernon*, No. 91-CV-299-S-LMB (D. Idaho 1998), appeal docketed (Sept. 17, 1999)). As such, the Court will refrain from ruling on a matter that in due course will be determined by the Ninth Circuit. In the meantime, this case properly remains before Judge Boyle, and he may consider the Plaintiffs' Motion to Stay Proceedings in light of the procedural posture of this case." (Docket No. 87 in *Garcia*).
July 16, 2000	Plaintiff's Motion for Reconsideration of Order Denying Attorney's Fees is denied (Docket No. 738 in *Gomez*). The Order cites the trial findings that several instances of retaliation were proven, but no institution-wide violations were found, and a majority of the claims and requests for injunctive relief were denied. The Court determines that "under these circumstances, the status of prevailing party is in dispute among the parties, and that issue certainly has not been resolved by the Court at this time. In light of the legitimate issue of which party prevailed at trial in the *Gomez* portion of the action, and consistent with the Court's prior ruling to avoid piecemeal determinations of motions for attorney fees and costs, the Court is of the opinion that making a decision at this time as to which party is entitled to the prevailing party status would be inappropriate." *Order*, p. 2. (Docket No. 749 in *Gomez*).
July 21, 2000	*Garcia* is reassigned to Judge Lodge as the presiding judge and then referred to this Magistrate Court for all pretrial matters (Docket No. 93 in *Garcia*).

August 30, 2000	A Report and Recommendation that Defendants' Motion for Summary Judgment be granted and the matter be dismissed in its entirety is issued (Docket No. 101 in *Garcia*).
Sept. 29, 2000	In *Garcia*, Judge Lodge adopts the Report and Recommendation, and enters Judgment in favor of Defendants, dismissing the case. Also in *Garcia*, Judge Lodge states that he will not consider an objection to the Memorandum Decision dated March 23, 1999, that was made in the *Gomez* case, reasoning: > The Court's Order of July 22, 2000, expressly limited this Court's review to "any prior *Garcia* ruling." Judge Boyle's Memorandum Decision of March 29, 1999 does not fit within that category. As the caption of that decision indicates it is a ruling from *Gomez v. Spalding*, No. CV-91-299, and, as the docket indicates, it was filed in the *Garcia* case for reference purposes only. *Order*, p. 5 (Docket No. 118, in *Garcia*).
September 29, 2000	The judgment in *Garcia* is entered: "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing from Defendants and the case is DISMISSED IN ITS ENTIRETY." (Docket No. 119 in *Garcia*).
October 13, 2000	At conclusion of *Garcia*, Defendants file a cost bill in both actions. (Docket No. 751 in *Gomez*; Docket No. 120 in *Garcia*). Defendants' Memorandum explains: > Out of caution, Defendants are filing this memorandum and the motion it supports in both the above-captioned Garcia case and in Gomez v. Spalding, CV91-0299-S-LMB, the companion case to Garcia, since the cases are related, Defendants' Cost Bill involves costs incurred in both cases, and the issue of taxing of costs appears to be ripe in both cases at this time. *Memorandum by Defendant in support of Motion for Costs*, p.4 (Docket No. 122 in *Garcia*).
October 27, 2000	Defendants file a Notice of Appeal (Docket No. 757 in *Gomez*; Docket No. 126 in *Garcia*).

February 6, 2001	In *Garcia*, Judge Lodge grants in part and denies in part Defendants' Motion to Allow Costs (Docket No. 139 in *Garcia*). Judge Lodge allows costs in the amount of $2,531.05, representing Defendants' deposition costs. He finds that the amount of the award should be substantially reduced based on consideration of the following factors: (1) the record demonstrates that the Plaintiffs' resources are limited; (2) the award of full costs may result in a chilling effect on future potential civil rights litigants; and (3) the case involves issues of substantial public importance." *Order* (Docket No. 139 in *Garcia*).
February 7, 2001	In *Gomez*, the Court again states that piecemeal determinations of costs and fees should not be undertaken considering the bifurcated nature and procedural status of this action and the pending appeal. The Court denies Defendants' Motion to Allow Costs (Docket No. 752) without prejudice; it can be renewed and reinstated after the Ninth Circuit Court of Appeals issues its opinion and ruling. The Court determines that, until then, it would not be appropriate to award or deny the requested costs sought by both parties to this action. (Docket No. 772 in *Gomez*).
June 21, 2001	The parties stipulate to vacate the portions of the 1993 Order that granted Plaintiffs' summary judgment motion on Defendants' constitutional violation regarding Plaintiffs' right to store legal files beyond three cubic feet at the IDOC. This Stipulation resolved and rendered moot Defendants' notice of appeal of this order (Docket No. 773 in *Gomez*).
June 23, 2001	The Court vacates the portion of its December 16, 1993 Order (Docket No. 98), and orders that that portion of the order shall have no further force or effect (Docket No. 774 in *Gomez*). The Court of Appeals dismisses the appeal on this issue on August 21, 2001 (Docket No. 775 in *Gomez*).
July 10, 2001	On appeal, the Ninth Circuit Court of Appeals affirms the decisions on the merits of *Gomez* and the sanctions against Attorneys Altig and McNeese. *See Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001).
December 26, 2001	Plaintiffs file a Renewed Motion for Attorney's Fees and Costs in *Gomez*, pursuant to the Court's order of October 20, 1999 (Docket No. 779 in *Gomez*).
January 10, 2002	Plaintiffs file a Motion to Stay Consideration of Motion for Attorney's Fees pending the Ninth Circuit's Decision on Attorney's Fees (Docket No. 783 in *Gomez*).

May 14, 2002	The Motion to Stay Consideration of Attorney's Fees is granted and the parties' Motions for Attorney's Fees and Costs are denied (Docket Nos. 776, 779, & 807 in *Gomez*).
May 26, 2007	The Ninth Circuit Court of Appeals awards Plaintiffs attorney's fees of $80,952,70 and expenses of $1,349,14, to cover all aspects of the appeal.

Appendix B

> upon the jury's decision.... The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764–65, 66 S.Ct. 1239; *Whelchel v. Washington*, 232 F.3d 1197, 1206 (9th Cir. 2000).[3] The *Brecht* standard looks to the effect of the error on the minds of the jurors during their deliberations, rather than to the effect of the error on the outcome of those deliberations. *See Kotteakos*, 328 U.S. at 764, 66 S.Ct. 1239 ("The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.").

In addition to being different in kind, the Supreme Court has specifically characterized the *Kotteakos/Brecht* harmlessness standard as lower in quantum of required proof than the *Strickland* prejudice standard. In *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court noted that the test for prejudice under *Strickland* "would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*."

Applying this standard, it is impossible to say that the lesser included instructions would not have had a substantial effect on the jury's deliberation and ultimate decision. The jury deliberated seven days before returning the guilty verdicts. The jury's deliberative process might well have been significantly affected if it had been permitted to consider convicting Cooper of the lesser offense. As suggested above, the evidence of premeditation and deliberation was not so conclusive that the jury could not have found that the state failed to prove prior planning and motive beyond a reasonable doubt. At the very least, it cannot be said "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir.2000) (*citing Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239). Accordingly, I believe we should grant Cooper relief on this claim.

Noel Puente GOMEZ; Lee Mazur Hays; Bob Jones; Alfredo Roman; Patrick Hall; Marq Bartlett; Gregory Joseph Nelson, Plaintiffs–Appellees,

v.

Richard A. VERNON, Director, Idaho Department Of Corrections; Dave Paskett, Warden, Idaho State Correctional Institution; James C. Spalding, Director, IDOC; Joe Klauser, Warden, ISCI; Defendants–Appellants,

3. The concurrence ignores the distinction between the harmlessness inquiries under *Strickland* and *Brecht* and thus focuses improperly, I believe, on the question of whether the death penalty would nevertheless have been imposed had Cooper's jury been instructed on second degree murder. The proper question is not whether second degree instructions might have altered the outcome of Cooper's trial with respect to the necessity of the penalty phase and the eventual imposition of the death penalty, but whether the failure to give lesser included instructions had a substantial or injurious effect on the jury's deliberative process and verdict.

Alan Lee Brandt, Defendant–Intervenor–Appellant,

v.

Eugene Starr; Richard Carl; Bobby Rowell; Alfredo Esparza, Plaintiffs–Intervenors–Appellees.

No. 99–35930.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 14, 2001

Filed July 10, 2001

Inmates brought action against prison officials alleging retaliation for exercise of their right of access to courts. The United States District Court for the District of Idaho, Larry M. Boyle, United States Magistrate Judge, found in favor of inmates, granted injunctive relief, and imposed sanctions. Officials appealed. The Court of Appeals, McKeown, Circuit Judge, held that: (1) warden consented to proceed before magistrate judge; (2) officials had policy or custom of retaliating against inmates who exercised, or assisted others in exercise of, their right of access to courts; (3) order granting relief was appropriately tailored; and (4) imposition of sanctions was warranted.

Affirmed.

Gould, Circuit Judge, concurred in result, and filed opinion.

1. Constitutional Law ⇐272(2)

Inmates enjoy access to law libraries, and assistance of inmate law clerks, as guarantee of their due process right to access to courts. U.S.C.A. Const.Amend. 5, 14.

2. United States Magistrates ⇐13

Written consent authorizes magistrate judge to enter judgment. 28 U.S.C.A. § 636(c)(1).

3. United States Magistrates ⇐13

Absent written consent, magistrate judge lacks jurisdiction, and any judgment entered is nullity. 28 U.S.C.A. § 636(c)(1).

4. United States Magistrates ⇐13

Warden of state prison consented to proceed before magistrate judge in prisoners' action, where original complaint named state department of corrections and warden in his official capacity, new warden was properly substituted for former warden, and counsel for department declared in pretrial statement that parties had agreed to trial of case before magistrate judge. 28 U.S.C.A. § 636(c)(1).

5. Officers and Public Employees ⇐114

Suit against governmental officer in his official capacity is equivalent to suit against governmental entity itself, and thus official is liable in his official capacity only if policy or custom played part in violation of federal law.

6. Officers and Public Employees ⇐114

Where government official's retaliatory acts are traceable to custom or policy, it is unnecessary to demonstrate that decision-making official directly ordered each act carried out under his edict in order to hold official liable in his official capacity.

7. Prisons ⇐10

Policymaker's pronouncement that he has not or will not discipline officers that retaliated against prison litigators is sufficient evidence of policy or custom to subject policymaker to liability in his official capacity.

8. Constitutional Law ⇐272(2)
Prisons ⇐10

State prison officials had policy or custom of retaliating against inmates who exercised, or assisted others in exercise of, their right of access to courts, and thereby violated inmates' First Amendment rights,

even if warden did not directly order retaliation, where top administrators failed to investigate retaliation complaints, there was no reprimand or discipline for officers involved even when their supervisors were aware of complaints, and investigation was delegated to officers involved in grievances. U.S.C.A. Const.Amend. 1.

9. Prisons ⇐4(5)

Inmate's retaliation claim against prison officials may assert injury no more tangible than chilling effect on First Amendment rights. U.S.C.A. Const. Amend. 1.

10. Prisons ⇐4(5)

Prison officials' threats to transfer inmate from his job at law library because of his complaints about administration of library were sufficient to constitute retaliation in violation of his First Amendment rights, even if inmate quit job before he was transferred, where it was chilling effect of threats that forced inmate to quit his job, not generalized harassment claim. U.S.C.A. Const.Amend. 1.

11. Injunction ⇐74, 189

Although Prison Litigation Reform Act (PLRA) significantly affects type of prospective injunctive relief that may be awarded, it has not substantially changed threshold findings and standards required to justify injunction. 18 U.S.C.A. § 3626.

12. Civil Rights ⇐265

Inmates at state prison suffered irreparable harm, for purposes of determining their right to injunctive relief, as result of custom or policy of state department of correction to retaliate against inmates who exercised their constitutional right to access to courts or who assisted others in exercising that right, despite department's claim that its employees would not retaliate again, where department had retaliated against inmates on number of occasions spanning one decade, and no policy or mechanism was in place to back up department's claim.

13. Civil Rights ⇐265

Order granting prospective and retrospective relief to six inmates in suit against state department of corrections alleging official custom or policy of retaliating against them for exercising, or helping others exercise, their constitutional right of access to courts was appropriately tailored, and was least intrusive means to correct violation; court denied inmates' request for class-wide injunctive relief, retrospective relief was limited to correcting prison's retaliatory acts, and prospective relief focused specifically on those few actions necessary to correct violations of individual inmates' rights.

14. Witnesses ⇐198(1)

Federal common law recognizes privilege for communications between client and attorney for purpose of obtaining legal advice, provided such communications were intended to be confidential.

15. Witnesses ⇐201(2)

Attorney-client privilege does not extend to communications in furtherance of crime or fraud.

16. Witnesses ⇐219(3)

Federal attorney-client privilege may be waived by client either implicitly, by placing privileged matters in controversy, or explicitly, by turning over privileged documents.

17. Witnesses ⇐219(3)

When there has been involuntary disclosure of confidential material, attorney-client privilege will be preserved if privilege holder has made efforts reasonably designed to protect privilege, but will be deemed to be waived if privilege holder fails to pursue all reasonable means of

preserving confidentiality of privileged matter.

18. Witnesses ⇐204(2)

Letters from outside counsel to inmates relating to their suit against prison officials for retaliation in violation of their right to access to courts were protected from disclosure by attorney-client privilege; letters were on legal letterhead easily identifiable as that of opposing counsel, one letter to inmate specified that it was "for your eyes only," and letters contained summary of inmates' counsel's analysis of strengths of some of inmates' claims, settlement prospects and prospects for recovery at trial.

19. Witnesses ⇐219(3)

Inmates did not waive attorney-client privilege with respect to letters from outside counsel relating to litigation against prison officials by placing them in binders marked with name of case and storing them in prison law library, where inmates required sign-out procedure for use of file, and could not have done anything more to secure confidentiality of documents because there were no areas in prison that were accessible only to inmates.

20. Federal Civil Procedure ⇐2757

Court has inherent power to sanction party or its lawyers if it acts in willful disobedience of court order or when losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, as well as for willful abuse of judicial processes.

21. Federal Civil Procedure ⇐2769

Award of sanctions under court's inherent authority must be preceded by finding of bad faith, or conduct tantamount to bad faith.

22. Federal Civil Procedure ⇐2795

State prison officials and their attorneys acted in bad faith in inmates' retaliation suit, and thus were subject to sanctions under court's inherent power, due to their collection, reading, and retention of inmates' communications with their outside counsel, where communications were obviously privileged, prison officials obtained letters from restricted area of prison law library, and attorneys continued to collect and read documents after being advised by state bar to send documents to court.

23. Federal Civil Procedure ⇐2769

Statute authorizing sanctions for unreasonable and vexatious multiplication of proceedings requires finding of recklessness or bad faith. 28 U.S.C.A. § 1927.

24. Federal Civil Procedure ⇐2774(1)

State prison officials and their attorneys were subject to sanctions under statute authorizing sanctions for unreasonable and vexatious multiplication of proceedings due to their filing of contempt motion against inmates and their attorney in retaliation action, where motion was based on confidential documents that officials had collected, read, and retained in violation of attorney-client privilege, despite being advised by state bar to send documents to court. 28 U.S.C.A. § 1927.

Timothy D. Wilson, Office of Attorney General, State of Idaho, Boise, Idaho for the defendants-appellants.

Stephen L. Pevar (argued), American Civil Liberties Union, Denver, Colorado; Margaret Winter, Donna H. Lee, and Eric Balaban, National Prison Project of the ACLU Foundation Inc., Washington, D.C.; Howard Belodoff, Boise, Idaho, for the plaintiffs-appellees.

Appeal from the United States District Court for the District of Idaho; Larry M. Boyle, Magistrate, Presiding. D.C. No. CV-91-00299-LMB.

Before: M. Margaret McKeown, Kim McLane Wardlaw, and Ronald M. Gould, Circuit Judges.

McKEOWN, Circuit Judge:

This case exemplifies antagonism toward prisoner litigation at the cost of constitutional rights and legal ethics. While all may be fair in war,[1] such is not the case in the judicial arena—the courtroom is not a battlefield. After a nineteen-day trial, the district court, Magistrate Judge Boyle presiding, found that the Idaho Department of Corrections, two of its penal institutions, and several officials (collectively the "Department") retaliated against inmates who filed lawsuits or availed themselves of grievance procedures. The conclusion that the Department violated the inmates' constitutional rights is not challenged on appeal. Rather, we are called upon to address whether, for purposes of jurisdiction, the parties consented to appear before the magistrate judge; whether the grant of injunctive relief was an appropriate remedy for the retaliation; and whether a court may impose sanctions under its inherent power and 28 U.S.C. § 1927 when counsel[2] for the state improperly acquired and used privileged and confidential litigation materials belonging to inmate litigants. We answer these questions in the affirmative, and we affirm.

Background

Factual Background.[3]

[1] The Department, like many prison systems, employs inmates as law clerks in its prison libraries to help other inmates file legal papers, such as habeas corpus petitions or civil rights claims, and to prepare grievances or other administrative complaints. Inmates enjoy access to the law libraries, and the assistance of the inmate law clerks, as a guarantee of their due process right to access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (holding that " 'the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law' ").

In the Idaho prison system, however, access to the assistance of law clerks and the libraries was not necessarily a risk-free proposition. For example, inmate preparation of legal documents and prosecution of legal activities became a basis for retaliation against inmate clerks. In 1985, Lee Hays worked as an inmate law clerk at the Idaho Correctional Institute–Orofino (ICI–O). In that role, he assisted fellow male inmates in filing habeas corpus petitions and civil rights claims against the prison and various prison personnel. This attracted the attention of the prison staff, who, in the presence of the warden, instructed Hays to stop. After Hays filed more suits, the warden arranged for him to be transferred to the Idaho State Correctional Institution (ISCI) in Boise. Although Hays was supposedly transferred for a rule infraction—interacting with female inmates—that reason was pretextual. He trained female law clerks as part of his law clerk duties and did so only on instruc-

1. "All's fair in love and war." Francis Smedly, Frank Fairleigh (1850); "The rules of fair play do not apply in love and war." John Lyly, Euphues (1578).

2. Counsel representing the Department on appeal was not involved in the misconduct or sanctions at issue in this appeal.

3. This factual summary is drawn from the district court's extensive findings of fact, which are not challenged on appeal, and which accompany the Memorandum Decision and Order and the Memorandum Decision and Order Relating to Plaintiffs' Motion for Sanctions.

tions and under supervision of a corrections lieutenant.

Similar consequences befell other inmates who took legal action. In 1987, inmate Patrick Hall filed multiple civil rights claims against the Department on behalf of other inmates. Hall subsequently lost his job in the ISCI law library, purportedly because he only offered legal help in exchange for a share of any damages award—a charge that was unsubstantiated. In 1993, an ISCI Disciplinary Hearing Officer threatened to confine and discipline another inmate, Wayne Olds, if in line with his standard duties as a law clerk, he helped an inmate prepare for a disciplinary hearing. Olds was later transferred from ISCI to ICI–O in retaliation for the number of "concern forms" and grievances he filed, together with his persistence in prosecuting a federal civil rights case. Two years later, inmates Thomas Sanger and Carl Shively were fired from their janitorial jobs in retaliation for signing affidavits used in litigation against the Department. And Idaho Maximum Security Institution (IMSI) officials intimidated inmate Michael McDonald for filing a grievance against an officer, forcing him to withdraw his grievance and to plead guilty to a disciplinary infraction. This series of retaliatory acts all stemmed from the inmates' constitutionally protected efforts to access the courts and the grievance process.

The operation and condition of the inmate law libraries and related complaints also became an issue in the Idaho prison system. Inmate Alfredo Roman, who worked as a law clerk in the IMSI library, kept a logbook documenting what he perceived as operational problems. One such problem was a corrections officer's habit of reading the inmates' legal documents. Roman took his concerns and his logbook to the law library supervisor, Corrections Officer Michelle Nelson. Ms. Nelson responded by removing Roman from his library job and placing him under investigation for keeping his logbook (which she considered "non-legal materials") in the law library. He eventually received two disciplinary citations.

Similarly, in 1997, inmate Bob Jones, a law clerk at the ISCI law library, confronted Nelson with his concerns about management of the law library. As a result, Nelson repeatedly attempted to have Jones transferred, first to ICI–O, and then to a prison facility in Louisiana. Finally, Jones resigned his job at the law library to avoid a transfer.

Deputy Warden George Miller took over supervision of the ISCI law library in November 1998. Although he was aware that the library needed at least six inmate law clerks to facilitate minimal access to the court system, he reduced the staff to four and at times allowed it to drop to two. Miller knew that the number of law clerks working in the library fell below what was minimally adequate. The district court found that the reduction in law clerks "was substantially motivated by a desire to prevent inmates' access to the court system."

No officer or employee of the Department was ever investigated or disciplined for retaliatory action, despite the wardens' knowledge of the complaints.

Plaintiff-appellees, inmates in the Idaho corrections system, brought this suit for damages and injunctive relief as a class action on behalf of themselves and other inmates. They worked on the case themselves, and were represented by outside counsel, with whom they corresponded in writing. As it turned out, the confidentiality of that correspondence was somewhat illusory. The inmates kept their written materials, including notes, research, and correspondence with their attorney, in two three-ring binders marked "*Gomez*"—the name of this lawsuit. In order to protect

those materials and to maintain their confidentiality, the inmates stored the binders in a restricted-access section of the ISCI law library. If an inmate who worked on the case needed to read or use the file, a request would be made to the librarian, who would retrieve the file and check it out to that individual. The district court found that "the inmates could not have done anything more to secure the confidentiality of these documents because there are no areas in the prison that are accessible only to inmates."

The clearly-marked file, at some point, attracted the attention of a prison employee, who in February 1997 made a copy of a letter from the inmates' counsel to nine inmates. The employee, who found the letter lying face-up on the law library desk of an inmate law librarian, gave the copy to the Department's lead counsel in this case, a Deputy Attorney General for the State of Idaho. The letter contained a summary of the strengths of the inmates' claims. Department's lead counsel kept the letter, and did not notify opposing counsel, the court, or her superiors that it was in her possession. It remained in her desk "in-box" for the next eight months.

That was only the beginning of the trail of documents from the prison library to Department's lead counsel's office. Four months later, another ISCI employee who worked in the law library noticed, as he checked the *Gomez* binders out to an inmate, that the binders contained documents related to this litigation. He understood the significance of the case because he had previously worked on this very lawsuit as a paralegal for the Department, and recognized documents in the binder he had worked on in that capacity. The official contacted the Department's lead counsel and told her that some documents indicated that the inmates' outside counsel may have misled the magistrate judge during an earlier hearing with regard to whether inmates had suffered physical injury in retaliation for litigation. The Department's lead counsel told the prison official to copy the documents and deliver them to her, which he did. Counsel did not inform the court, the inmates, or their attorney about the document disclosure.

The Department's lead counsel reviewed the materials, dividing them into four categories, one of which consisted of documents she suspected were privileged.[4] The next day she contacted her co-counsel, who was also her supervisor, and they read several of the documents. In their view, some of the letters demonstrated that the inmates' lawyer was defrauding the court. Believing that they had come across evidence of fraud or contempt of court, lead counsel continued to acquire other documents from the inmates' *Gomez* file. Neither she nor her co-counsel informed opposing counsel that they had seen the correspondence or other documents. Over the course of the next five months, Department counsel received ten additional copies of documents from prison employees.

Some four months after speaking to lead counsel about the letters, and eight months after lead counsel had first acquired documents, co-counsel decided to seek advice. He consulted with his supervisor, who in turn approached an official at the Idaho State Bar. The bar official and the supervisor advised co-counsel not to read any more documents and to turn over to the court those documents that were in his possession. Nonetheless, both the lead counsel and her co-counsel, Idaho Deputy Attorneys General, continued to receive

4. Despite her recognition that privilege might apply, she reasoned that any privilege was waived by virtue of the documents' location—a section of the law library easily accessible to prison employees.

and read case-related documents given to them by the prison employee, justifying the continued receipt of documents on the ground that the materials were "similar to what had already been given to [them]."

Subsequently, the Department filed a motion for an order to show cause why inmates' counsel should not be held in contempt of court, based on copies of the correspondence between the inmates and their lawyer. The documents purportedly showed that physical injury to inmates was not as extensive as inmates' counsel had represented to the court in an earlier hearing. The court denied that motion, concluding that the representations of inmates' counsel were well within the realm of acceptable argument and did not constitute a fraud.

Trial and Findings.

After a nineteen-day bench trial, followed by a lengthy series of evidentiary rulings, hearings, and various motions over the next several months, the district court issued findings of fact and conclusions of law in the underlying case. The court found the facts summarized above, including repeated instances of retaliatory conduct. Significantly, the court found that

> an investigation to determine whether illegal retaliation had occurred was not conducted even though prison administrators were faced with allegations clearly indicating that correctional officers had violated IDOC [Idaho Department of Corrections] policy and conducted reprisals against an inmate who attempted to seek relief through established ... procedures.

The court granted a declaratory judgment that the inmates were subjected to instances of unlawful retaliation but denied classwide prospective injunctive relief. The court granted individual injunctive relief to six specified inmates.

Sanctions Order.

The inmates moved for an order to show cause why Department counsel should not be sanctioned for their conduct in reading, using, and failing to disclose their access to the *Gomez* files. After a three-day hearing, the court awarded sanctions of $4,500 ($3,500 in attorneys' fees and $1,000 for costs and expenses) under the court's inherent power and 28 U.S.C. § 1927. The court found that Department counsel had acquired materials that are confidential and protected by the attorney-client privilege. In addition, the court found that counsel had implicitly authorized and encouraged prison employees "to secretly search for, inspect, examine, read, copy and then deliver ... confidential attorney-client correspondence or documents" over a nine-month period. The court held that Department counsel completely disregarded the attorney-client privilege and ignored their individual ethical duty to submit the materials to the court. The court found, as a factual matter, that counsel's actions in acquiring and using the materials and in moving for contempt created unnecessary litigation. Finally, the court concluded that the state attorneys' "breach[ ][of] the attorney-client privilege, as well as compromising the confidential communications flowing from the legal representatives ... constituted bad faith conduct and warrants the imposition of sanctions."

Analysis

I. Consent to Appear Before the Magistrate Judge

We first address the threshold jurisdictional question of whether all parties consented to trial before the magistrate judge. Specifically, the Department argues that the magistrate judge was without authority to order judgment because IMSI Warden Dave Paskett had not consented, in his

official capacity, to appear before the magistrate.

A magistrate judge may conduct civil proceedings and order the entry of judgment only if the magistrate judge has been "specially designated to exercise such jurisdiction by the district court," 28 U.S.C. § 636(c)(1), and all parties clearly and unambiguously consent, Fed.R.Civ.P. 73(b); *Hajek v. Burlington N. R.R.*, 186 F.3d 1105, 1108 (9th Cir.1999). Because the district court designated the magistrate judge to hear this case, the issue we must resolve is whether Warden Paskett consented. The consent of the other parties is not at issue.

[2, 3] Section 636(c) "does not specify the precise form or timing of the parties' consent." *Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (9th Cir.2001). It is well settled that written consent authorizes a magistrate judge to enter judgment. *See Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir.1999). Absent such consent, however, the magistrate judge lacks jurisdiction, and any judgment entered is a nullity, which we have no jurisdiction to review. *See Aldrich v. Bowen*, 130 F.3d 1364, 1365 (9th Cir.1997) (noting that the "record contain[ed] no written evidence"); *Estate of Conners v. O'Connor*, 6 F.3d 656, 658 (9th Cir.1993) (holding that a magistrate judge's judgment without consent is a nullity).

[4] Review of the record before us leaves little doubt that all parties consented to proceed before the magistrate judge. The original complaint named not only the Department but Paskett in his capacity as warden of ISCI. All counsel filed a written "Consent to Proceed Before a United States Magistrate." During the course of the litigation, Paskett became warden of IMSI and Joe Klauser succeeded him as warden of ISCI. Before trial, the inmates' counsel sought to amend their complaint to, among other things, substitute the appropriate defendants. In a pretrial statement, counsel for the Department declared that the Department did not object to the substitution: "Defendants do stipulate to charging the named Defendants." In that same document, the Department stated: "[the] parties have already agreed to trial of this case before United States Magistrate Judge Larry M. Boyle." Read together, these clear and unambiguous stipulations in the pretrial statement constitute consent to proceed before the magistrate judge. *See, e.g., General Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1495 (11th Cir.1997) (consent to trial before magistrate was clearly expressed, even though the stipulation did not list all defendants, but all defendants were present at the status conference and their attorney signed the stipulation). Accordingly, the magistrate judge had jurisdiction to enter judgment, and we have jurisdiction to entertain this appeal.

II. Retaliation

A. Causal Nexus

The district court's 36–page order, which includes extensive findings of fact, is a model of clarity and detail. The Department does not challenge the factual findings; nor, with the exception of Jones, *infra* section II.B, does it dispute the district court's legal conclusion that the inmates suffered retaliation for the exercise of their First Amendment rights. Rather, the Department argues, as a matter of law, that the findings do not establish a causal link between the official policy or custom of the prison administrators and the retaliatory acts of the individual prison officials.

[5] A suit, like this one, against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself. *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir.1986). Thus,

the Department administrators are liable in their official capacities only if policy or custom played a part in the violation of federal law. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991); *McRorie*, 795 F.2d at 783.

A policy or custom may be found either in an affirmative proclamation of policy or in the failure of an official "to take any remedial steps after the violations." *Larez*, 946 F.2d at 647; *see also McRorie*, 795 F.2d at 784 (custom inferred from failure to reprimand or discharge); *Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 171 (5th Cir.1985) ("[S]ubsequent acceptance of dangerous recklessness by policymaker tends to prove his preexisting disposition and policy."). For example, in *Larez*, we held that the Chief of Police would be liable if "it was almost impossible for a police officer to suffer discipline as a result of a complaint lodged by a citizen." *Larez*, 946 F.2d at 647 (internal citation omitted).

[6, 7] The Department argues that the policy-making official is liable only if he directly ordered the retaliation in question. Where the retaliatory acts are traceable to a custom or policy, however, it is unnecessary to demonstrate that the decision-making official directly ordered each act carried out under his edict. A custom or policy establishes a general rule of behavior, which is to be followed in a variety of circumstances, and even in the absence of the policy-maker. *See Larez*, 946 F.2d at 647. Moreover, a policy-maker's pronouncement that he has not or will not discipline officers that retaliated against prison litigators is sufficient evidence of a policy or custom: those statements can "be[ ] considered to represent [the prison's] policy or custom of condonation of, and acquiescence in, [retaliation] by its offic[ials]." *Id.*

[8] The findings of fact detail the top administrators' failure to investigate the retaliation complaints, the lack of reprimand or discipline for the officers involved even when their supervisors were aware of the complaints, and the delegation of investigation to officers involved in the grievances. This turn a-blind-eye approach does not insulate the Department. On the contrary, the findings are more than sufficient to support the conclusion that the retaliatory acts were condoned by the officials, sufficient to "ma[k]e clear to officers that ... they could get away with anything." *Id.* The Department's failure to investigate or correct constitutional violations supports the district court's finding that there was a policy or custom that led to violation of the inmates' rights.

B. Harm to Bob Jones

[9, 10] The Department also contends that the repeated but ultimately unsuccessful attempts to transfer inmate Jones are not retaliatory as a matter of law because the transfers never took place. The reality is that in the face of repeated threats of transfer because of his complaints about the administration of the library, Jones eventually quit his law library job. According to the findings, Jones' complaints—protected by the First Amendment—related to "how [the law library] was affecting the inmates' right to access the courts." As we observed in *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), a retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights. *Id.* at 269 (noting that "this court has reaffirmed that prisoners may still base retaliation claims on harms that would not raise due process concerns"); *cf. Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir.2000) (without alleging a chilling effect, a retaliation claim without allegation of other harm is not actionable). It is the chilling effect that forced Jones to quit his job, not a generalized harassment claim. Therefore, the district court did not err in finding, as a matter of law, that the Department retali-

ated against Jones, in violation of his First Amendment rights.

III. Injunctive Relief

The injunctive relief entered in this case was very narrow and targeted at six specific individuals. Class-wide prospective injunctive relief was denied. The district court went to great lengths to discuss the legal parameters for injunctive relief, the constitutional limitations on court decrees directed to prison administrators, the requirements of the Prison Litigation Reform Act, and the importance of remedying unconstitutional conduct. As the court explained,

> in determining the appropriateness of relief in the instant action, the Court has considered when relief is appropriate, how relief must be tailored when conditions of prison confinement are challenged and the Court's role in protecting and preserving federally guaranteed rights.

Despite this careful tailoring, the Department argues that the injunctive relief was granted in error because the district court misapplied the standard for irreparable injury and failed to properly limit the injunction's scope.

In general, injunctive relief is "to be used sparingly, and only in a clear and plain case." *See Rizzo v. Goode*, 423 U.S. 362, 378, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (internal quotation omitted). "A district court's grant of permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal standards." *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027 (9th Cir.1999) (citing *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir.1996)). When a government agency is involved, we must, in addition, observe the requirement that the government be granted the "widest latitude in the dispatch of its own internal affairs." *Rizzo*, 423 U.S. at 378–79, 96 S.Ct. 598 (citations omitted); *see also Lewis v. Casey*, 518 U.S. 343, 349, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."). When a state agency is involved, these considerations are, if anything, strengthened because of federalism concerns. *See O'Shea v. Littleton*, 414 U.S. 488, 499, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) ("proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers"). Accordingly, injunctive relief is appropriate only when "irreparable injury" is threatened, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), and any injunctive relief awarded must avoid unnecessary disruption to the state agency's "normal course of proceeding," *O'Shea*, 414 U.S. at 501, 94 S.Ct. 669.

This well-established standard for injunctive relief must also be viewed in conjunction with the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA").[5] Under the PLRA, the

5. The PLRA provides, in relevant part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). Because this is a "civil proceeding arising under Federal law with respect to ... the effects of actions by

court must find that the prospective relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right," before granting injunctive relief. 18 U.S.C. § 3626(a)(1). Accordingly, "before granting prospective injunctive relief, the trial court must make the findings mandated by the PLRA [and must] give 'substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.'" *See Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir.1998) (quoting 18 U.S.C. § 3626(a)(1)) (holding that Congress explicitly prescribed section 3626's reach to include pending cases).

[11] Although the PLRA significantly affects the type of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards required to justify an injunction. To this extent, we agree with the Sixth Circuit that "the [PLRA] merely codifies existing law and does not change the standards for determining whether to grant an injunction." *Smith v. Ark. Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir.1996).

A. Irreparable Injury

To satisfy the requirement of irreparable injury, a plaintiff must demonstrate a "real or immediate threat that the[y] will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660 (quoting *O'Shea*, 414 U.S. at 502, 94 S.Ct. 669); *see also Lewis*, 518 U.S. at 349, 116 S.Ct. 2174 (courts limited to "provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). "A state law enforcement agency may be enjoined from committing constitutional violations where there is proof that officers within the agency have engaged in a persistent pattern of misconduct." *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir.1992). *See also Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir.1998) ("Injunctive relief is appropriate in cases involving challenges to government policies resulting in a pattern of constitutional violations.").

[12] The record demonstrates that continued retaliation for inmates' exercise of their constitutional rights is a real threat. As found by the district court, the inmates have proven that the Department retaliated against them for exercising their right to access the courts on a number of occasions spanning a decade, and that the retaliation was pursuant to a custom or policy. Despite supervisors' knowledge of this pattern, no investigation, no discipline, and no corrective action followed. Now the Department claims that its employees will not retaliate again. The district court, however, found little comfort in that proclamation because no policy or mechanism is in place to back up that promise.[6] *Cf. United States v. Odessa Union Warehouse Co–op*, 833 F.2d 172, 176 (9th Cir.1987) ("Courts must beware of attempts to forestall injunctions through remedial efforts and promises of reform that seem timed to anticipate legal action, especially when there is the likelihood of recurrence."). The court concluded that some relief is necessary to prevent future retaliatory transfers and to expunge the records of

government officials on the lives of persons confined in prison," it is a prison conditions case for purposes of the PLRA. 18 U.S.C. § 3626(g)(2).

6. The district court noted "that [Department] officials testified at trial that they have not created a rule which prohibits individual officers from improperly asserting influence upon a transfer coordinator in order to include a burdensome and litigious inmate on the list of inmates that are to be transferred."

references based on retaliatory action. Implicit in these rulings is a determination that, absent the injunction, the likely harm would be irreparable.

B. Scope of Injunction

[13] Having concluded that the circumstances justify injunctive relief, we must next determine whether the relief granted was properly tailored. *See Lewis,* 518 U.S. at 360, 116 S.Ct. 2174 ("The scope of injunctive relief is dictated by the extent of the violation established") (internal quotation omitted). Accordingly, we must consider whether the court's "exercise of equitable discretion ... heel[s] close to the identified violation and respect[s] the interests of state and local authorities in managing their own affairs, consistent with the Constitution," *Gilmore v. People of the State of California,* 220 F.3d 987, 1005 (9th Cir.2000) (citation and internal quotation marks omitted), and, in the language of the PLRA, whether it "extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). We hold that the relief was appropriately tailored, and is the least intrusive means to correct the violation. Thus, the district court did not abuse its discretion.

The district court properly limited its injunction to a combination of prospective and retrospective relief granted to just six inmates, denying class-wide injunctive relief. Three inmates received retrospective relief—certain references were expunged from Roman's Disciplinary Offense Report; and Sanger and Shively were restored to janitorial employment at their pre-retaliation pay level, and all retaliatory disciplinary references were cleared from their institutional files. Because the retrospective relief does not raise the same federalism concerns as a court's ongoing supervision in a prison's affairs, and because it was limited to remedying the prison's retaliatory acts, such relief passes constitutional muster. *See Lewis,* 518 U.S. at 357, 116 S.Ct. 2174.

Five inmates received prospective relief. The district court enjoined the Department from adversely affecting Sanger's and Shively's pay level and employment because of this lawsuit. The judge also required the Department to ensure that any decision to transfer inmates Hays, Jones, and Olds satisfied objective criteria, was not influenced by individual officers who might be the subject of a lawsuit or grievance, and was not taken as a result of the inmates' exercise of their federally guaranteed rights. None of these remedies requires the continuous supervision of the court, nor do they require judicial interference in the running of the prison system. *Cf. Rizzo,* 423 U.S. at 369, 96 S.Ct. 598; *O'Shea,* 414 U.S. at 493, 94 S.Ct. 669 (reversing injunction requiring district court to scrutinize county's criminal justice system to ensure state court officials did not deprive the plaintiff class of their constitutional rights); *Lyons,* 461 U.S. at 100, 103 S.Ct. 1660 (reversing city-wide injunction preventing police use of choke-holds, and requiring regular officer training and record keeping). Indeed, the magistrate judge declared that he had "no intention of overseeing prison inmate transfer operations to the extent requested by Plaintiffs." And, as required by the PLRA, the prospective relief focused specifically on those few actions necessary to correct violations of individual inmates' rights.

In sum, the relief granted addressed only the harm caused each individual inmate. It did not apply to the prison system as a whole, or even to classes of prisoners. At most, the injunction affects a few isolated decisions over the course of these inmates' sentences. In the face of

page after page of findings with regard to violation of the inmates' constitutional rights, the narrow injunction can only be characterized as minimal and virtually non-intrusive. Accordingly, the court did not abuse its discretion in granting such narrowly drawn injunctive relief.

IV. Sanctions

This case presents the remarkable circumstance where counsel for the state received, read, and used bootlegged copies of legal correspondence between inmates and their lawyer. The district court imposed sanctions against defense counsel—under both its inherent power and its statutory authority pursuant to 28 U.S.C. § 1927—for this misconduct. At issue are, as the court put it, sanctions for counsel's "secretly acquiring, reading, retaining, sharing [privileged] information ... and using information for potential tactical advantage ...." Although this is strong language, the record amply supports the court's findings and conclusions that the documents were privileged, that counsel violated the privilege and their ethical duty, and that sanctions were justified.

We address first the question of privilege, and next whether sanctions were warranted under the court's inherent power and 28 U.S.C. § 1927.

A. Attorney–Client Privilege

[14] Federal common law recognizes a privilege for communications between client and attorney for the purpose of obtaining legal advice, provided such communications were intended to be confidential. *See generally* WEINSTEIN'S FEDERAL EVIDENCE, Chp. 503. The attorney-client privilege has been recognized as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Practicing attorneys recognize the importance of the privilege and the safe harbor that it provides to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Id.*

[15] Both the Supreme Court and this court have underscored the importance of the privilege, even where an attorney seeks to invoke the crime-fraud exception: [7]

> [U]nder *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), the district court could not consider the contents of a privileged letter in assessing the government's prima facie case until the government had, as a threshold matter, presented nonprivileged evidence "sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."

United States v. de la Jara, 973 F.2d 746, 748 (9th Cir.1992).

[16, 17] The privilege, however, is not absolute. The privilege may be waived by the client either implicitly, by placing privileged matters in controversy, or explicitly, by turning over privileged documents. Inadvertent disclosure can also result in a waiver of the privilege. *See Weil v. Investment/Indicators*, 647 F.2d 18, 24 n. 11 (9th Cir.1981). But, as we have held, when there has been an involuntary disclosure, the privilege will be "preserved if the privilege holder has made efforts 'reasonably

7. The attorney-client privilege does not extend to communications in furtherance of a crime or fraud. *See United States v. Zolin*, 491 U.S. 554, 562–63, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). The district court explicitly rejected the argument and the Department does not argue before this court, as it did before the district court, that the materials fall under this exception. Rather, they rely on their argument that the privilege was waived.

designed' to protect the privilege.... Conversely ... the privilege [will be deemed] to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter." *de la Jara*, 973 F.2d at 750 (internal citation omitted). *See also* Moore's Federal Practice 3d § 26.47[5].

The pitfalls of inadvertent disclosure and the dilemma posed for counsel who are in receipt of such materials has prompted the American Bar Association Standing Committee on Ethics and Professional Responsibility to issue two formal opinions on the subject. These opinions reflect some of the same principles articulated in *Zolin*. In November 1992, the Committee issued an opinion, based upon the Model Rules of Professional Conduct, relating to the inadvertent disclosure of confidential materials. The opinion provides:

> A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 368 (1992). Two years later, the Committee issued another formal opinion, this one regarding the unsolicited receipt of privileged or confidential materials. The committee stated:

> A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 382 (1994).

In the present case, the district court found that counsel implicitly authorized and encouraged department employees to search for and photocopy letters from opposing counsel that were kept in the inmates' legal files related to this case. This happened not once, or twice, but several times over the course of over nine months. The confidential status of the letters was facially evident—they were on legal letterhead easily identifiable as that of opposing counsel. One letter to an inmate even specified that it was "for your eyes only." But if that was not enough, the contents of the letters remove all doubt. They contained, in the words of the district court, a "summary of [plaintiffs' counsel's] analysis of the strengths of some of Plaintiffs' claims, settlement prospects and prospects for recovery at trial"—this at the same time that the parties were conducting settlement negotiations. The letters reviewed litigation strategy, theories of the case, and other sensitive issues. Further correspondence discussed the evidence available regarding "actual injuries resulting from [the Department's] alleged failure to provide constitutionally required access to the courts." In short, these documents were of the most sensitive kind—the kind that any trial lawyer would recognize as privileged, highly valuable, very confidential, and potentially devastating in the wrong hands.

[18] Thus, there can be no serious question that the material in the present case was privileged. *See In re Grand*

Jury Investigation, 974 F.2d 1068, 1070–71 (9th Cir.1992). In sorting the materials into categories, including documents that might be privileged, the Department's counsel demonstrated that they understood the legal import of this treasure trove of documents. In fact, the significance was explained to them more directly by an official from the Idaho State Bar. Eight months after the first documents were acquired, co-counsel went to his superior, who sought advice from the state bar. The bar official and the supervisor advised co-counsel not to read any more documents and to turn over to the court those already in their possession. But, even with the advice of the Bar, counsel for the State plowed ahead, receiving and reading more documents. Finally, in a remarkable display of chutzpah, counsel did go to the court—but with a motion for contempt, premised on the inmates' privileged documents.

[19] Counsel for the state reasoned at the time, and the Department continues to argue to this court, that the inmates waived any applicable privilege by storing the "*Gomez*" binders in a section of the library accessible to prison employees. The Department's argument that the privilege was waived is without merit. Given the significance of the documents, the inmates of course took steps to maintain their confidentiality. As the district court found, by marking the binders with the name of the case, placing it on a restricted-access shelf, and requiring a sign-out procedure for use of the file, "the inmates could not have done anything more to secure the confidentiality of these documents because there are no areas in the prison that are accessible only to inmates."

Thus, the inmates' actions to preserve the confidentiality of the materials were not only reasonable, but were found, as a question of fact, to be the best possible in the prison context. The prison setting poses unique challenges to the privilege issue because of security and physical layout considerations. And the prison, of course, has a penological interest in curtailing the prisoner's privacy rights. *See Hudson v. Palmer*, 468 U.S. 517, 530, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (inmates have no expectation of privacy in their living quarters); *Bell v. Wolfish*, 441 U.S. 520, 537, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (prisoner's privacy rights curtailed by prison's security interests). The Department, however, does not urge us to conclude that the reduced privacy required by penological necessity renders it impossible for inmates to keep privileged documents confidential. To so conclude would undermine a critical component of the right of access to the courts, namely, the opportunity to receive privileged communications from counsel. As the Supreme Court has held, the inmates' First Amendment and other rights pertaining to privileged correspondence are "not inconsistent with [their] status as . . . prisoners or with the legitimate penological objectives of the correctional system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

The district court found that the Department had in place reasonable policies providing precautions that were intended to protect and preserve the confidential nature of attorney-client correspondence. We conclude that the district court did not clearly err when it found that the inmates did all they could to secure the documents' confidentiality and that they did not waive the privilege.

B. Inherent Power

[20] A court has the inherent power to sanction a party or its lawyers if it acts in "willful disobedience of a court order . . . or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppres-

sive reasons," as well as for "willful[ ] abuse [of the] judicial processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (internal citations and quotations omitted); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (where litigant "engaged in bad faith or willful disobedience of a court's order," inherent power "extends to a full range of litigation abuses"). We review a court's imposition of sanctions for abuse of discretion. *See Chambers*, 501 U.S. at 55, 111 S.Ct. 2123 (inherent power).

[21] We recently addressed the appropriate basis for an award of sanctions under a court's inherent authority in *Fink v. Gomez*, 239 F.3d 989 (9th Cir.2001). We held that *Roadway* and *Chambers* require that inherent-power sanctions be preceded by a finding of bad faith, or conduct tantamount to bad faith. *Id.* at 993. Under this standard, although recklessness, of itself, does not justify the imposition of sanctions, sanctions are available when recklessness is "combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Id.* at 994. Sanctions, then, are justified "when a party acts *for an improper purpose*—even if the act consists of making a truthful statement or a non-frivolous argument or objection." *Id.* at 992 (emphasis in original).

[22] We conclude that the district court did not clearly err in finding conduct tantamount to bad faith here. *See Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000) (district court's finding as to bad faith is reviewed for clear error). The notion that receipt of privileged communications imposes a duty on counsel to take some reasonable remedial action is hardly a novel concept. It stems from common sense, ethical rules and the origins of the privilege. Of course, had Department counsel entertained any doubt that they possessed the materials improperly, the opinion of the Idaho State Bar representative should have dispelled it. Yet—and this is particularly troubling for us, as it was for the trial court—the attorneys continued to collect and read documents after being advised by the state bar to send the documents to the court. As the district court concluded, counsel "each had an individual ethical and professional duty to immediately seal and submit to the Court both the initial correspondence and the correspondence subsequently received from [Department] personnel as soon as they became aware that the correspondence involved confidential communications between [inmates' counsel] and the inmate plaintiffs."

Department counsel's actions in this case do not pass even the most lenient ethical "smell test." They knowingly disregarded advice from the bar counsel and bypassed questions of ethics in an effort to gain advantage in this litigation. Despite their roles as officers of the court, they failed to inform the court of their possession of the privileged materials until eight months after the first acquisition. In view of the circumstances surrounding the acquisition and use of the privileged documents, we conclude that the district court did not abuse its discretion in finding that the attorneys acted in bad faith and in imposing sanctions under the court's inherent power.

C. Section 1927

[23, 24] The court also based its sanctions decision on § 1927, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously...." 28 U.S.C. § 1927. Section 1927 requires a finding of recklessness or bad faith. *In re Keegan Mgmt. Co.*, 78 F.3d 431, 436 (9th Cir.1996).

Sanctions are available under § 1927, however, only if the attorney "unreasonably and vexatiously" multiplies proceedings. 28 U.S.C. § 1927. In the present case, the Department's contempt motion resulted in a hearing on that motion plus a three-day evidentiary hearing on the follow-on sanctions motion, in effect adding an extra "trial" to the declaratory and injunctive relief action. The court found, as a question of fact, that "[u]nnecessary litigation was created by the series of events of secretly acquiring, reading, retaining, sharing information with representatives of [the Department], and using the information for potential tactical advantage instead of promptly notifying opposing counsel and/or submitting the documents to the Court...." In the face of this finding, the court did not abuse its discretion in awarding sanctions under § 1927.

In closing, the district court noted that the sanctions were no more than necessary "in order to preserve the time-honored principles involved or to maintain public trust in the legal profession." We agree. The result here does not set up an impractical or insurmountable hurdle for counsel facing an ethical dilemma concerning privileged documents. The path to ethical resolution is simple: when in doubt, ask the court.

AFFIRMED.

RONALD M. GOULD, Circuit Judge, concurring in the judgment:

I concur in parts I, II, III, IV.A, and IV.C of the majority opinion and in the judgment affirming the district court. The sanctions properly can be affirmed pursuant to 28 U.S.C. § 1927 because the conduct of counsel for the state was so unjustified as to be in reckless disregard of the inmates' rights. *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir.1983) ("imposition of sanctions under section 1927 requires a finding that counsel acted recklessly or in bad faith, while those imposed under the court's inherent power require a finding that counsel's conduct constituted or was tantamount to bad faith") (internal quotation marks and citations omitted). I would, however, stop short of holding that counsel for the state acted in bad faith and I do not concur in part IV.B of the majority opinion.

Counsel for the state made serious errors of judgment. The record does not establish intentional acts of subjective bad faith, however, because the record as a whole supports that counsel proceeded under the mistaken assumption that the attorney-client privilege was waived and advanced a mistaken theory that inmates' counsel was committing a fraud on the court. I conclude that counsel for the state were seriously wrong in their assessment on both these issues, but I do not conclude that counsel acted with any intentional ill motive. Nor would I sustain a finding of fact that government counsel acted in bad faith; this determination rests on an issue of degree affecting the possible waiver of privilege that was debatable before the district court's finding that inmates took reasonable steps to protect confidential materials. In any event, bad judgment is not tantamount to bad faith.

It is unfortunate that the important issues of inmates' rights and legitimate penological concerns of the government to a degree were obscured by distracting disputes between counsel about their professional ethics. Initially, counsel for the state challenged inmates' counsel asserting fraud on the court and asking for a contempt determination. Later, inmates' counsel accused counsel for the state of acting in bad faith, asking for a sanctions determination. The ethics dispute necessarily focused attention on the lawyers and off the issues at stake between inmates and corrections officials.

Based on the district court's findings, I would affirm the imposition of sanctions without finding subjective bad faith on the part of counsel for the state.

Ron BIRD, individually and on behalf of Glacier Construction, Inc.; Herb Gilham, individually and on behalf of Glacier Construction, Inc.; and Scott Sherburne, individually and on behalf of Glacier Construction, Inc., Plaintiffs–Counter-defendants–Appellees,

v.

GLACIER ELECTRIC COOPERATIVE, INC., Defendant–Counterclaimant–Appellant.

No. 99–35162.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 18, 2000

Filed July 10, 2001

Owners of construction corporation, who were enrolled members of Blackfeet Tribe, sued electric cooperative seeking recognition and enforcement of judgment owners had obtained against cooperative in Blackfeet Tribal Court on contract, defamation, and other claims. The United States District Court for the District of Montana, Paul G. Hatfield, J., entered summary judgment for owners, and cooperative appealed. The Court of Appeals, Ronald M. Gould, Circuit Judge, held that: (1) question whether owners' closing argument in Tribal Court violated due process would be reviewed for plain or fundamental order where cooperative failed to object in Tribal Court to closing argument or to move for new trial, and (2) construction corporation's closing argument in Tribal Court offended fundamental fairness and violated due process by appealing to racial bias, and thus precluded grant of comity to Tribal Court judgment.

Reversed and remanded with instructions.

1. Judgment ⇐830.1

The decision to recognize a foreign judgment is discretionary, not mandatory.

2. Federal Courts ⇐776

Claims of due process violations are reviewed de novo. U.S.C.A. Const.Amend. 5.

3. Judgment ⇐830.1

If a tribal court violates due process, then a district court has no discretion to recognize the tribal court's judgment.

4. Federal Courts ⇐776

De novo review is required when reviewing a district court's summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

5. Federal Courts ⇐776

De novo review would be applied to question whether alleged due process violations of tribal court precluded district court's grant, on motion for summary judgment, of comity to tribal court judgment. U.S.C.A. Const.Amend. 5; Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

6. Courts ⇐96(3)

The Court of Appeals is bound by the Supreme Court's declarations of general principles of comity.

7. Judgment ⇐830.1

The importance of tribal courts and the dignity accorded their decisions by the Court of Appeals will weigh in favor of comity in any case where the Court of Appeals has discretion to recognize and enforce a tribal court judgment.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON,

Plaintiffs-Appellees,

v.

RICHARD A. VERNON, Director, IDAHO DEPARTMENT OF CORRECTIONS; DAVE PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, Warden, ISCI;,

Defendants-Appellants,

ALAN LEE BRANDT,

Defendant-Intervenor-Appellant,

v.

EUGENE STARR; RICHARD CARL; BOBBY ROWELL; ALFREDO ESPARZA,

Plaintiffs-Intervenors-Appellees.

No. 99-35930

D.C. No. CV-91-299-LMB
Idaho (Boise)

ORDER

Before: Peter L. Shaw, Appellate Commissioner

No. 99-35930

I
Background

Appellees, Idaho state prison inmates, brought a class action pursuant to 42 U.S.C. § 1983 alleging that appellants, Idaho prison officials, unconstitutionally retaliated against inmates for filing lawsuits or availing themselves of prison grievance procedures. The district court granted a declaratory judgment finding that appellees had been subjected to unconstitutional retaliation, but denied class-wide prospective relief. The court granted injunctive relief to six of the appellees. Appellees then moved for sanctions against appellants for reading, using, and failing to disclose their access to legal materials possessed by the appellees during the litigation.

The district court found that the materials were confidential and protected by the attorney-client privilege, and that by acquiring, reading, and using the legal materials, appellants had engaged in bad faith conduct and caused unnecessary litigation. The district court awarded appellees $3,500 in attorneys' fees and $1,000 in costs and expenses against appellants as a sanction under the court's inherent power and 28 U.S.C. § 1927. *See Gomez v. Vernon*, 255 F.3d 1118, 1125 (9th Cir. 2001), *cert. denied*, 534 U.S. 1066 (2001).

No. 99-35930

Appellants challenged the district court's judgment regarding both the section 1983 determination and the sanctions order. This court affirmed the district court's judgment in all respects. *Id.* at 1130-31, 1135.

Appellees filed a motion and a supplemental motion for attorneys' fees pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 1927, and the court's inherent authority. Appellants filed two oppositions to the motions, and appellees filed three replies. The panel granted appellees' motions for attorneys' fees and referred the determination of a reasonable amount to the Appellate Commissioner. The court ordered the parties to submit supplemental briefing that summarized all arguments concerning the appropriate amount of fees to be awarded and addressed the court's decision in *Webb v. Ada County*, 285 F.3d 829 (9th Cir. 2002). Appellees complied with the order by submitting a supplemental motion for attorneys' fees, appellants have opposed the motion, and appellees have filed a reply.

II

Entitlement to Fees for Defending Sanctions Award

Appellants contend that appellees are not entitled to attorneys' fees on appeal for defending the portion of the appeal pertaining to the district court's sanction order under 42 U.S.C. § 1988, 28 U.S.C. § 1927, or the court's inherent powers. Appellees contend that the panel has decided that they are entitled to

attorneys' fees on appeal for all aspects of the appeal, and that the only determination for the Appellate Commissioner to make is the reasonable amount of the award.

Appellants argued in opposition to the fee request that appellees were not entitled to fees for work on the sanctions issue. The panel's February 19, 2002 order states that "[a]ppellees' request for attorneys' fees is GRANTED." Appellants did not seek clarification or reconsideration of the February 19, 2002 order. The panel's order is unqualified; it does not limit the award of fees to the retaliation issue. Moreover, the order referred the matter to the Appellate Commissioner for a "determination of the reasonable amount of the fees," not for a determination of entitlement to fees for part or all of the appeal. The apparent intent of the order is that appellees are awarded fees for all aspects of the appeal. Appellees are thus entitled to attorneys' fees for all aspects of the appeal.[1]

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[1] After the merits panel awarded fees and referred the determination of a reasonable amount to the Appellate Commissioner, the Appellate Commissioner issued an order requiring appellees to catagorize separately the hours spent on the retaliation and sanctions issues. This allocation requirement was based on a cursory review of the fee briefing; on further review, it appears that the separate allocation is unnecessary because, as noted above, the panel awarded fees as to both issues. Appellees' allocation documentation, however, clarified the original fee documentation and addressed appellants' objections that the original fee documentation was deficient, as discussed below.

III
Amount of Reasonable Fees

A. Standards of Law

The starting point for determining the amount of a reasonable fee award under 42 U.S.C. § 1988 is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This lodestar figure is presumed to represent an appropriate fee, but the court may adjust the figure upward or downward to take into account special factors. *See Blum v. Stenson*, 465 U.S. 886, 897 (1984).

A fee applicant has the burden of documenting the appropriate hours expended in the appeal and must submit evidence in support of the claimed hours. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). "The party opposing the fee application has the burden of rebuttal that requires submission of evidence" to the court challenging the accuracy and reasonableness of the hours charged or the facts asserted in the fee applicant's affidavits. *Id.* at 1397-98.

The court may reduce the hours claimed where the documentation of the hours is inadequate, the case is overstaffed and the hours are duplicated, or the hours are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 434; *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). The

reasonable hourly rate is determined by considering the attorney's experience, skill, and reputation and the prevailing rate in the community for similar work performed by attorneys with comparable experience, skill, and reputation. *See Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1996). To arrive at a reasonable number of hours or a reasonable hourly rate, the court may consider certain factors approved by this court in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975). *See Davis v. City & County of San Francisco*, 976 F.2d 1536, 1546 (9th Cir. 1992) *amended by* 984 F.2d 345 (9th Cir. 1993).

B. Fee Request

Appellees request attorneys' fees of $95,444.95 and expenses of $1,349.14, representing 577.45 hours of work by its attorneys and other timekeepers at hourly rates of $60, $125, $160, and $169.50. Appellees claim the hours were spent as follows:

Description of Services	Hours
Interviews & Conferences:	43.25
Obtaining & Reviewing Records:	21.60
Legal Research:	91.10
Preparing Briefs:	161.60
Preparing for & Attending Oral Argument:	72.00
Other	187.90
Total:	577.45

Appellees claim fees and expenses for filing a 57-page appellees' brief and excerpts of record, submitting a letter to the court regarding a related appeal, preparing for and attending oral argument, filing a bill of costs and a reply to appellants' objection to the bill of costs, filing a motion for attorneys' fees, filing a reply to appellants' objection to the motion for attorneys' fees, filing a supplemental motion for attorneys' fees, filing a reply to appellants' opposition to the supplemental motion for attorneys' fees, filing a second supplemental motion for attorneys' fees, and filing an opposition to appellants' petition for writ of certiorari.

C. Reasonable Hours

Appellants object to the number of hours claimed by appellees on the basis that the fee documentation is inadequate; that the requested hours are unnecessary, duplicative, or excessive; and that appellants seek compensation for clerical work and work done by interns and paralegals.

1. Deficient Documentation

Appellants contend that appellees did not allocate the hours between the sanctions issue and the 42 U.S.C. § 1983 issue on their original time records, and do not explain how they made the allocations on the summary charts later

submitted. Appellants contend that these facts mean that either the time records originally submitted "are not the contemporaneous records they purport to be" or the allocations on the summary charts "are pulled out of a hat." Appellants also suggest that attorney Stephen Pevar's time records are not contemporaneous because Pevar stated that he proofread them.

Appellants' objections to the deficiencies in appellees' records are without merit. First, after this court ordered appellees to allocate their time between the sanctions and section 1983 issues, appellees did so and explained the method by which they arrived at the allocation of hours. Appellants have not rebutted any of appellees' evidence. Moreover, although contemporaneous records are preferable, this court does not require them. *See Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000). In any event, appellees submitted numerous declarations by their attorneys stating that they indeed submitted contemporaneous records. Finally, the fact that Pevar proofread his time records does not lead to any conclusion concerning whether the records are contemporaneous, and appellants do not explain the logic behind their conclusion.

2. Unnecessary, Duplicative, or Excessive Hours

a. Overstaffing

Appellants argue that, in general, the appeal was overstaffed, with eight attorneys working on various aspects of the appeal. They contend that any work by attorneys other than Pevar, Donna Lee, Eric Balaban, and Margaret Winter should be deducted as unnecessary.

"[T]he time spent by all lawyers on a litigation can be billed so long as the hours claimed are not duplicative." *Davis*, 976 F.2d at 1544. Moreover, the party opposing the fee application has the burden of providing specific evidence to support a claim that the hours are excessive due to overstaffing, duplication of effort, or the inclusion of hours billed to other cases. *McGrath v. County of Nevada*, 67 F.3d 248, 255 (9th Cir. 1994).

Appellees presented their attorneys' declarations as evidence of the attorneys' time, tasks performed, need for using additional attorneys, and deductions for excessive, redundant, or unnecessary hours. Appellants rely on no evidence to support their objection that appellees claim excessive hours based on overstaffing. Additionally, the evidence shows that attorneys charging a lower hourly rate were used to reduce the number of hours charged by attorneys charging

a higher rate. The appellants' overstaffing objection lacks merit. *See McGrath*, 67 F.3d at 155; *Gates*, 987 F.2d at 1397-98.

b. Briefing and Research

Appellants argue that the claimed hours related to the appeal are unreasonable and excessive. Appellees respond that they did not charge for 110.35 hours of work, and eliminated redundant, excessive, and duplicative hours.

In particular, appellants contend that the 218.15 hours claimed for preparing the answering brief were excessive. According to appellees' documentation, however, appellees's attorneys claim no more than 187.4 hours on legal research for and preparation of the brief, as follows: Pevar -- 65.4 hours, Lee -- 93.2 hours, Elizabeth Alexander -- 9.7 hours, Balaban -- 18.2 hours, and Winter -- 0.9 hours.

A review of the brief, the record, and the billing records leads to the conclusion that even the 187.4 hours claimed are excessive. The appeal involved whether the district court abused its discretion by sanctioning appellants for violating the appellees' attorney-client privilege or erred by determining that appellants had unconstitutionally retaliated against appellees under 42 U.S.C. § 1983. Included in the analysis of the section 1983 issue were several sub-issues pertaining to the parties' consent to proceed before a magistrate judge, the

appropriateness of the relief awarded, and the sufficiency of the evidence proving supervisory liability and retaliation against appellee Bob Jones. Appellees presented the complex issues and facts in a concise and pertinent brief.

Taking into account the difficulty of the issues, the labor and skill required to perform the legal services properly, the fact that the same attorneys represented appellees in the district court and on appeal, the results of the appeal, and appeals of comparable complexity in this court, the following hours are awarded for legal research and brief preparation: (1) all hours claimed by attorneys Alexander, Balaban, and Winter; (2) 50 hours for Pevar; and (3) 80 hours for Lee. *See Chalmers*, 796 F.2d at 1213-14 (determining reasonable number of hours by independently reviewing fee application and considering *Kerr* factors, including the issues, counsel's familiarity with issues, and counsel's experience).

Appellants contend that the hours claimed for preparing the briefing on the fee application are "disproportionate." Appellants provide no specific reasons to reduce the hours claimed for the fee application and supplemental fee briefing, and they do not support their contention with any evidence that the claimed hours are unreasonable, excessive, or disproportionate. Appellees, on the other hand, presented declarations and other evidence showing that the hours claimed are

reasonable. Appellants' contention that appellees claim a disproportionate amount of hours for the fee application and supplemental briefing lacks merit. *See McGrath*, 67 F.3d at 155; *Gates*, 987 F.2d at 1397-98.

c. Other Hours

Appellants also contend that appellees claim an excessive amount of time -- 90.9 hours -- to prepare for and present oral argument. Appellees' records show, however, that they claim only 72 hours for this task, 50.6 for Pevar, 8.6 for Balaban, and 12.8 for Winter. Again, even these hours are excessive, considering the issues, counsel's familiarity with the case, and the experience of counsel and the skill required. *See Chalmers*, 796 F.2d at 1213-14. Accordingly, the following hours are awarded for oral argument: 24 for Pevar, 4 for Balaban, and 4 for Winter.

Appellants contend that Balaban and Pevar's claimed hours for conferences, telephone calls, and other correspondence are excessive. Appellants identify 22.3 hours that Balaban claimed for these tasks. Appellees correctly note, however, that Balaban claimed only 14.4 of the 22.3 identified hours. Appellees' attorneys' time records show that Pevar claimed 30.5 hours for communications tasks. Appellants' contention that the identified hours are excessive for the task

nonetheless has merit. Balaban will be awarded 10 hours and Pevar will be awarded 20 hours each for these tasks. Appellants do not challenge the hours of the other attorneys for this task, which total 11.55 hours, so the total hours award for conferences, telephone calls, and correspondence is 41.55 hours.

3. Clerical Work

Appellants object to approximately 28 hours claimed by attorneys Winter, Balaban, Pevar, David Fathi, and Lee on the ground that the tasks involved clerical work. Appellees contend that the objections lack merit because Pevar works in an office with a part-time secretary and no paralegal assistance, and the other attorneys are members of an office that employs one secretary and no paralegals or clerks. Most of appellants' objections lack merit because the time does not involve clerical activities or appellees have not claimed compensation for the time. A few discrete objections, however, do have merit.

"A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market . . . ." *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989); *Davis*, 976 F.2d at 1543. Generally, clerical work may not be claimed as attorneys' fees because the typical market practice is not to charge clients separately for this work. *See Davis*, 976 F.2d at 1543, 1548.

Compensation for secretarial work may be appropriate if the practice of the relevant market is to bill clients for such work. *See Jenkins*, 491 U.S. at 288 (holding that compensation for paralegal work at market rates is reasonable if the practice of relevant market is to bill for such services); *Davis*, 976 F.2d at 1543. A court may compensate a sole practitioner for clerical or secretarial tasks, but at a lower rate than the attorney's hourly rate. *See Davis*, 976 F.2d at 1543 (clerical or secretarial tasks should not be billed at paralegal's or attorney's rate).

A review of appellants' objections, the billing records, and appellees' response to the objections reveals four instances where appellees seek compensation for tasks that could have been performed by a secretary: 0.6 hours on March 7, 2000 (Lee -- preparation of excerpts of record cover and format), 0.8 hours on November 5, 2001 (Winter -- conference with printer and preparation of brief's table of authorities, table of contents, and cover), 0.2 hours on October 4, 2001 (Pevar -- supervision of printing, copying, and mailing brief to court), and 0.4 hours on December 21, 2001 (Pevar -- supervision of copying and mailing documents to court).

Appellees presented no evidence that the prevailing practice in the relevant market is to charge fee-paying clients for the work of secretaries. Furthermore,

appellees presented no evidence that they were *unable* to assign the clerical tasks on the above dates to a secretary, only that they did not do so. Because it was unreasonable to claim time for tasks that could have been performed by a secretary, the 2 hours spent on clerical tasks are disallowed.

4. Intern or Paralegal Work

Appellants contend that appellees are improperly seeking compensation for the work of law school interns, because the work is duplicative or the interns worked for no pay and any compensation would be a windfall to appellees. This contention fails.

First, appellants presented no evidence showing that the interns' work was duplicative. Appellants therefore failed to rebut appellees' evidence that the intern's work was reasonably necessary and that appellees excluded hours that appeared to be duplicative. *See McGrath*, 67 F.3d at 255. Second, appellees presented evidence that the prevailing practice among Washington, D.C. law firms is to bill clients for the work of law student work and paralegals. Appellants did not rebut this evidence, and their objection therefore lacks merit. *See Jenkins*, 491 U.S. at 288; *United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 407-08 (9th Cir. 1990); *see also Gates*, 987 F.2d at 1397.

D. Reasonable Hourly Rates

1. PLRA Hourly Rate Cap

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA") limits the amount of an attorneys' fee award authorized under 42 U.S.C. § 1988 in an action brought by a prisoner. Under 42 U.S.C. § 1997e(d)(3) of the PLRA, a court may not award an hourly rate "greater than 150 percent of the hourly rate established under [18 U.S.C. § 3006A] for payment of court-appointed counsel." Title 18 U.S.C. § 3006A(d)(1) of the Criminal Justice Act ("CJA") in turn authorizes the Judicial Conference to determine the maximum hourly rates to be paid to court-appointed counsel. This Circuit has held that the maximum hourly rate to be paid to counsel under the PLRA is based on the maximum rate authorized by the Judicial Conference pursuant to 18 U.S.C. § 3006A(d)(1). *See Webb*, 285 F.3d at 838-39. Effective fiscal year 2002, which began on October 1, 2001, the Judicial Conference raised the maximum authorized CJA hourly rate from $75 to $113. *See* Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* (Sept. 19, 2000) at 44-45, 50; H.R. Rep. No. 107-139, at 92-93 (2001) *adopted by* H.R.

Conf. Rep. No. 107-278, at 142-143 (2001), *reprinted in* 2002 U.S.C.C.A.N. 793, 856.

Appellees argue that, because the maximum hourly rate for CJA attorneys was increased to $113 effective October 1, 2001, the court should award attorneys' fees under the PLRA based on a maximum hourly rate of 150 percent of $113, or $169.50. *See* 42 U.S.C. § 1997e(d)(3). Appellees contend that the higher rate is appropriate to compensate counsel for the delay in receiving fees and to provide a reasonable fee. Appellants counter that the court should award fees under the PLRA based on 150 percent of $75, which was the maximum CJA hourly rate in effect during the time that most of the fees in this case were earned. Appellants argue that compensation under the PLRA based on the current maximum CJA hourly rates are unjustified and would constitute a "windfall."

No court of appeals has addressed the specific question whether the court should apply the current maximum CJA hourly rate or the maximum CJA hourly rate that was in effect at the time the fees were incurred under 42 U.S.C. § 1997e(d)(3). In a similar context, the Supreme Court held that an appropriate factor to consider in determining a reasonable attorneys' fee is the delay in payment in complex civil rights cases. The Court held that a court may use

current, rather than historic, hourly rates to compensate the prevailing party for the delay in payment. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989); *see Gates*, 987 F.3d at 1406-07 (applying *Jenkins*).

One district court has applied *Jenkins*'s reasoning in the context of 42 U.S.C. § 1997e(d)(3) and awarded attorneys' fees based on the maximum CJA hourly rate in effect when the fee amount was determined. The court held that the language of the PLRA does not indicate any intent to change the policy that the hourly rate at which compensation is awarded should reflect rates in effect at the time the fee is determined by the court, rather than the rates in effect at the time services were performed. *See Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1283 (D. Wyo. 2004).

In the circumstances presented here, it is fair to award the $169.50 hourly rate. That rate will partly compensate appellees' counsel for the exceptional delay in resolving this fee matter.

2. Availability of Local Counsel

Appellants contend that the hourly rates claimed by appellees' attorneys, whose offices are in Washington, D.C. and Hartford, Connecticut, are excessive because local Idaho attorneys could have represented appellees on appeal.

Appellants assert that the prevailing hourly rate for local counsel is less than the rate requested by appellees' attorneys and the PLRA maximum hourly rate, and therefore conclude that the requested hourly rate should be reduced. Appellees counter that no local Idaho attorneys were willing or able to represent appellees on appeal.

A court should calculate the reasonable hourly rate "according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. In reviewing *district court* fee awards for proceedings before those courts, the Ninth Circuit has stated that "the general rule is that the rates of attorneys practicing in the forum district . . . are used." *Gates*, 987 F.2d at 1405; *see also Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997) ("Generally, the relevant community is the forum in which the district court sits."). If local counsel is unavailable, due to an unwillingness or inability to provide the representation because of lack of experience, expertise, or specialization required for the case, the court may consider the market rates in the community where the prevailing party's attorneys practice. *See Barjon*, 132 F.3d at 501-02.

Appellees have provided evidence that no local, Idaho attorney was willing or able to serve as counsel in this appeal. Appellants provided no evidence

contradicting appellees' showing. Accordingly, the court may determine a reasonable hourly rate based on the prevailing rates in the communities where appellees' counsel typically practice. *See Gates*, 987 F.2d at 1405-06 (awarding hourly rates based on market rates in San Francisco, where appellate counsel practices, where no attorneys were available from forum district).

3. Reasonable Hourly Rate

Appellants concede, and the record reveals, that the reasonable hourly rates for appellees' attorneys Alexander, Winter, and Pevar exceed the maximum hourly rate under the PLRA. Accordingly, the hourly rate of $169.50 applies to the reasonable hours worked by those attorneys.

Appellants contend that appellees' attorney Amy Fettig is not entitled to claim an hourly rate at the maximum hourly rate under the PLRA. Appellees claim compensation for her at a rate of $125 per hour, however, below the maximum PLRA rate. Appellees' evidence supports their contention that Fettig's claimed rate is comparable to the prevailing rate for attorneys with her background and experience in Washington, D.C., where Fettig primarily practices. Appellants provide no contrary evidence. Accordingly, Fettig is entitled to compensation at $125 per hour. *See Barjon*, 132 F.3d at 501-02.

Appellants next contend that appellees failed to provide any evidence to support the hourly rates of $169.50 and $160.00 claimed, respectively, for Fathi and Craig Cowie. State bar records show that Fathi was admitted to the Washington State Bar in 1995, and Cowie was admitted to the State Bar of California in May 2001. Both attorneys are staff attorneys with the American Civil Liberties Union's National Prison Project, according to news releases and publicly available information. Appellees assert that Fathi and Cowie performed various tasks associated with this appeal and that their claimed hourly rates were established based on the rates of attorneys with comparable skills and experience in the Washington D.C. area. Appellees' evidence and the other information available to the court sufficiently establish that the hourly rates claimed by Fathi and Cowie are in line with those of attorneys with similar experience working on comparable cases. *See id.*

Appellants argue that the reasonable hourly rates for attorneys Balaban and Lee are less than the maximum hourly rate under the PLRA. Appellees submitted declarations and other evidence setting forth the credentials of Balaban and Lee and showing that the Washington D.C. rates of attorneys with similar experience working on similar civil rights cases are comparable. Appellants have submitted

no evidence that these hourly rates are unreasonable or not the prevailing rates for similar work in Washington, D.C. Based on appellees' evidence, Balaban's claimed hourly rate of $205 and Lee's claimed rate of $190 are reasonable. Because Balaban and Lee's reasonable hourly rates are greater than the PLRA maximum rate, the PLRA maximum hourly rate of $169.50 should be used to determine the attorneys' fee award.

IV
Expenses

Appellants challenge appellees' copying expenses, contending that the documentation does not show that the copies were reasonable and necessary and, in the alternative, that the amount per page of the copies should be reduced from 25 cents to 20 cents pursuant to Ninth Circuit Rule 39-1.3. Appellants also object to the claimed expenditures for *all* telephone calls, packages sent by overnight express, and faxes. The objections lack merit.

In general, appellees may recover as part of the attorneys' fees award under section 1988 those expenses that would normally be charged to a fee-paying client. *See Trustees of Const. v. Redlands Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006); *Davis*, 976 F.2d at 1556. Ninth Circuit Rule 39-1.3 addresses the Clerk's authority to tax photocopies as costs; it does not bar compensation for photocopies

as part of an attorney's fee award. Attorneys' fees under section 1988 include those expenses that the court cannot tax as "costs" under 28 U.S.C. § 1920. *Trustees*, 460 F.3d at 1257.

Appellees have submitted evidence that the copying expenses were for photocopies of documents in this appeal and that the copies were reasonably necessary for defending this appeal. Appellees have also presented evidence that copying costs are typically charged to paying clients at 25 cents a page. Because the expenses claimed are those normally charged to paying clients, appellees may recover them under section 1988. *See id.*; *Harris v. Marhoefer*, 24 F.3d 16, 19-20 (9th Cir. 1994) (holding that 28 U.S.C. § 1920 does not limit award of expenses for photocopies incurred in litigation).

Similarly, appellees have presented evidence that the telephone, fax, and Federal Express expenses were reasonably necessary and that such expenses are typically charged to fee-paying clients. Appellants produced no evidence in opposition. Accordingly, appellants' objections lack merit. *See Trustees*, 460 F.3d at 1257; *Davis*, 976 F.2d at 1556.

V
Conclusion

Appellees are entitled to attorneys' fees as follows: 440.6 hours at $169.50 per hour for the work of Pevar, Balaban, Lee, Winter, Fathi, and Alexander; 24.75 hours at $160.00 per hour for Cowie's work; 11 hours at $125.00 per hour for Fettig's work; and 15.6 hours at $60.00 per hour for work performed by legal interns. Appellees' are awarded attorneys' fees of $80,952.70 and expenses of $1,349.14 for a total award of $82,301.84.

Peter L. Shaw

Ninth Circuit Rule 39-1.9