

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

1990 FEB 21
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION:

JUAN FRANCISCO VENEGAS, Petitioner
v. MICHAEL R. MITCHELL

CASE NO:

88-1725

PLACE:

WASHINGTON, D.C.

DATE:

February 21, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x
3 JUAN FRANCISCO VENEGAS, :

4 Petitioner :

5 v. : No. 88-1725

6 MICHAEL R. MITCHELL :

7 - - - - -x

8 Washington, D.C.

9 Wednesday, February 21, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:07 a.m.

13 APPEARANCES:

14 RICHARD M. MOSK, ESQ., Los Angeles, California; on behalf
15 of the Petitioner.

16 CHARLES A. MILLER, ESQ., Washington, D.C.; on behalf of
17 the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

RICHARD M. MOSK, ESQ.

On behalf of the Petitioner

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CHARLES A. MILLER, ESQ.

On behalf of the Respondent

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1 completed. All of the law and motion materials, including
2 summary judgment motions, appeals and pre-trials had been
3 completed.

4 QUESTION: Well, Mr. -- there's no issue in this
5 case about what the defendant would have to pay?

6 MR. MOSK: There is no issue -- that's correct,
7 Your Honor.

8 QUESTION: The -- the lodestar amount is all
9 that he has to pay?

10 MR. MOSK: That's correct.

11 QUESTION: All right. Thank you.

12 MR. MOSK: It was a projected short trial.

13 Indeed the -- in Volume I of the transcript Mr. Mitchell
14 himself anticipated a four-day trial.

15 There was a high probability of a large
16 recovery, in that in the state court a jury had awarded a
17 million dollars, which was reversed on the basis of
18 sovereign immunity, which, of course, was a defense not
19 available in a civil rights action.

20 Mr. Mitchell had Mr. Venegas pay him a \$10,000
21 non-refundable retainer. That meant he kept it win, lose
22 or draw. And had him sign his standard contingent fee
23 contract, which provided for 40 percent of the recovery
24 for one trial only, plus he would keep any civil rights
25 award which exceeded that amount.

1 QUESTION: Do we know that that was his standard
2 form contract?

3 MR. MOSK: Well, it was a printed form contract,
4 Your Honor.

5 QUESTION: Including the one trial limitation?

6 MR. MOSK: That would be the assumption, yes.

7 QUESTION: That -- it -- it's a --

8 MR. MOSK: There's no evidence to that effect
9 other than it appears to be a printed form contract.

10 QUESTION: It -- it has been asserted that
11 that's unusual, that that particular feature is unusual in
12 contingent fee contracts.

13 MR. MOSK: Well, it is our position that it is -
14 - it is unusual. And indeed, the court of appeals when it
15 said that Mr. Venegas had the burden of showing that 40
16 percent contingency was unusual in a civil rights action,
17 never drew that distinction, that this was 40 percent for
18 one trial only.

19 And as a matter of fact, the way Petitioner
20 Venegas construed it, which was not unreasonable, was that
21 if he lost, Mr. Mitchell would not have to do the trial -
22 - do the appeal without extra consideration. But that in
23 order to effect the recovery, he had to do the appeal and
24 undertake the recovery.

25 QUESTION: Now, is -- is that the right way to

1 interpret? I wondered the same. I would interpret one
2 trial to mean, you know, if it's a hung jury, I don't do a
3 second trial. But if I win, I'll -- you know, I'll defend
4 the verdict.

5 MR. MOSK: That would be the reasonable way of
6 interpreting it, not the way Mr. Mitchell interpreted it,
7 however.

8 QUESTION: Mr. Mosk, does the Central District -
9 - that's where this case was tried, wasn't it?

10 MR. MOSK: Yes, sir.

11 QUESTION: Have any policy of regulating
12 contingent fees?

13 MR. MOSK: Well, Your Honor, the answer is no,
14 not by rule. It is our -- the Ninth Circuit has
15 indicated, and all courts have indicated that courts are
16 supposed to supervise -- there is no specific regulation.
17 And indeed, the district court in this case simply said
18 that as a matter of law a -- in a civil rights case a
19 contingent fee agreement is enforceable even if it exceeds
20 the amount of the court-awarded fee.

21 And the only other thing that the district court
22 said was -- and I quote -- "Plaintiff does not claim that
23 he did not read the agreement before signing it." And
24 that was the sum total of the district court's findings
25 and consideration of -- of this fact.

1 QUESTION: But you haven't made any independent
2 claim here that the contingent fee should have been
3 reviewed the way all contingent fees would be, regardless
4 of a civil rights case?

5 MR. MOSK: No, Your Honor, other than to say
6 that all contingent fee agreements, and especially in
7 civil rights cases, when called to the attention of the
8 court, the court has a duty to exercise supervisory power
9 over them, as they have done in -- in every court
10 throughout the nation.

11 QUESTION: Have we held that? Have we confirmed
12 that authority in the district court?

13 MR. MOSK: No, Your Honor, you have not.
14 Although, as I said, all of the cases seem to say -- and
15 including the one in the Ninth Circuit in this case -- has
16 said that contingent fee contracts are subject to the
17 supervision of the court.

18 QUESTION: And -- and does that supervision go
19 to all aspects of the contract? Its -- its validity, its
20 execution?

21 MR. MOSK: It goes to its fairness and to the
22 circumstances surrounding it.

23 Just as an example, in the Ninth Circuit in this
24 case in Footnote 7 said that a -- when there's a civil
25 rights action the plaintiff's attorney may not get both

1 the court award -- the statutory fee and the contingent
2 fee.

3 Now, there's nothing anywhere that says he
4 can't. Why not? Freedom of contract under respondent's
5 theory, but that was a rule which they laid down
6 themselves.

7 They also, in Hamner v. Rios, established
8 certain criteria and guidelines which we submit were not
9 followed at all because in this particular case the court
10 placed the burden upon Mr. Venegas to show that the
11 contract was unreasonable.

12 And secondly, it completely ignored the factors
13 related to the execution of the agreement and the great
14 disparity between the amount asked for and the amount that
15 was deemed to be reasonable.

16 And finally, didn't consider the -- how --
17 considered a contract reasonable which is manifestly
18 unenforceable both under state and Federal law by virtue
19 of the fact that the client -- that the attorney had
20 withdrawn prior to the advent of the contingency.

21 QUESTION: Did he have -- did Venegas have his
22 own counsel at that point, or was he -- in these hearings
23 in the district court?

24 That is to say, a counsel other than Mitchell to
25 represent him on this contingency fee inquiry?

1 MR. MOSK: At a -- at a point in time after Mr.
2 Mitchell, who was counsel of record, filed his lien, at
3 some point at the hearing itself another counsel had to be
4 hired and was hired and did present written argument, yes.

5 QUESTION: But apparently none of the parties
6 make any objection to the authority of the district court
7 to make this determination and whatever the determination
8 is with respect to the contingency fee contract that is
9 going to be binding on all the parties for state law
10 purposes.

11 MR. MOSK: The answer is nobody objected to the
12 -- to the determination as such. Whether it's binding or
13 not is another question. It's our --

14 QUESTION: Well, I thought the district -- I
15 thought the district court really only made -- it made
16 some remarks about it that really left it to the state
17 law.

18 MR. MOSK: No. The district court blessed the
19 contract as reasonable, as did the Ninth Circuit. Now --

20 QUESTION: But said it was really a matter of -
21 - for state law to take care of, didn't he?

22 MR. MOSK: Well, except for what we consider is
23 that the first bastion, the first guard, is the court
24 itself in which the attorney appears, in which all the
25 facts are demonstrated. At that point, it is up to the

1 court, it seems to us, to --

2 QUESTION: You think the validity of every
3 contract -- contingent fee contract in a case that's tried
4 in Federal court -- the validity of that contract is a
5 matter of Federal law?

6 MR. MOSK: No, Your Honor. But if a contract --

7 QUESTION: Well, what is it a matter of?

8 MR. MOSK: It is a matter of the Federal court
9 determining at that stage, as they have in many, many
10 cases --

11 QUESTION: With reference to what law?

12 MR. MOSK: In reference to Federal law.

13 QUESTION: So, it is a --

14 MR. MOSK: Yes, it's a --

15 QUESTION: -- Federal law issue, the validity of
16 that contract?

17 MR. MOSK: In a Federal -- well, it's not the
18 question so much as the validity; it's the question of the
19 regulation of the attorney and the reasonableness of it.

20 It is true that if this -- if this Court
21 determines, for example, that the -- that the contract is
22 "reasonable," Mr. Venegas will still have the opportunity
23 in state court to litigate questions such as fraud.

24 But in state court the issue will not
25 necessarily arise. It may in some context as to the

1 "reasonableness." It is for the court itself to determine
2 whether or not the contract before it is legal.

3 QUESTION: Well, let's -- let's assume that this
4 contract is completely valid and enforceable in state
5 court.

6 MR. MOSK: Yeah.

7 QUESTION: And if this case had been tried in
8 state court, the contingency fee contract would have been
9 enforceable and valid. No questions about it.

10 MR. MOSK: Except for the -- the -- except for
11 the Fracasse v. Brent withdrawal aspect.

12 QUESTION: Well, that may -- that may be so.
13 But let's just assume that it would be enforceable in
14 state court. Why should the -- what basis does the
15 Federal court have, other than the policy of the civil
16 rights statute, to -- not to enforce it?

17 MR. MOSK: Because -- it's not a question of not
18 enforcing it, Your Honor. It's a question of the court
19 basically determining whether under these circumstances it
20 is reasonable or unreasonable to --

21 QUESTION: Well, I know, but if it determines
22 it's unreasonable, it won't enforce it. So it is a
23 question of enforceability.

24 MR. MOSK: Well, it is a question of
25 enforceability, yes. But by -- the flip side of that is

1 that in these Section 1988 cases the courts have in effect
2 enforced the agreements.

3 For example, in several of the cases cited by
4 the respondent, the court has said -- has required the
5 client to pay his attorney the difference between the
6 court award and the contingent fee. Therefore, part of
7 the court's function is not -- is to protect the attorney
8 and also to protect the client.

9 QUESTION: Well, I can understand the court --
10 maybe a Federal court saying, well, we've got this matter
11 before us, we might as well deal with this contingent fee
12 contract, but then saying it's a -- it's a matter of state
13 law and we'll just -- we'll find out what the state law is
14 and then -- and apply state law to it. Not some
15 independent Federal standard.

16 MR. MOSK: Well, all we're suggesting, Your
17 Honor, is that it's the first line of defense because an
18 attorney, as an officer of the court before whom he or she
19 appeared, is to determine whether or not that attorney,
20 for example, is -- is -- is taking undue advantage of his
21 client.

22 For example, if the -- if the contract had been
23 --

24 QUESTION: Well, Mr. Mosk, I thought you argued,
25 with reference to the third question raised in your

1 petition, that a Federal court in a civil rights case
2 should not uphold a contingent fee agreement which is
3 unenforceable under state law.

4 MR. MOSK: Right.

5 QUESTION: So I thought your argument was to the
6 effect that the Federal court had to look to state law for
7 enforceability.

8 Your responses to Justice White's questions
9 indicate quite the reverse this morning.

10 MR. MOSK: Our position, Your Honor, is that,
11 number one, as a matter of Federal law, the court should
12 not enforce a contract -- contingent fee contract where
13 the lawyer has withdrawn prior to the advent of the
14 contingency because that is a matter of general law.

15 Our next argument is that a Federal court should
16 not bless or deem a contract to be reasonable if it
17 violates state law, which it did here also.

18 QUESTION: But the first of those arguments
19 isn't -- isn't raised in your petition for certiorari.

20 MR. MOSK: Yes, it is, Your Honor. In the -- in
21 the second item where we deal with the question of the
22 enforceability of the agreement basically under the
23 circumstances of this case. We did not highlight each and
24 every fact situation, but in our brief certainly we raised
25 that issue.

1 QUESTION: Well, I hope you will devote some of
2 your time -- and, of course, your ability to do that
3 depends on questions from the bench as well as your own
4 schedule, I realize -- to the question of -- the first
5 question presented.

6 MR. MOSK: Yes. Yes, Your Honor.

7 The first question presented really goes to the
8 Court's ability to -- which it has done in each and every
9 case -- to basically take what's a skeletal statute and
10 carry out its purposes and intent by a number of rules,
11 which has been referred to by Judge Posner in his book on
12 Federal courts as a type of Federal common law.

13 For instance, let me give one example. There is
14 nothing in Section 1988 that provides a different
15 statutory guideline as between prevailing plaintiffs and
16 prevailing defendants. Not a word. And indeed, there are
17 a number of statutes which statutorily provide for such a
18 distinction between the standard for defendants and for
19 plaintiffs.

20 The -- the -- one of them is the Hart-Scott-
21 Rodino Antitrust Act, the Petroleum Marketing Act. A
22 number of acts have that specific distinction.
23 Nevertheless, this Court in Hughes v. Roe in 1980
24 judicially enacted that -- different standards on the
25 grounds that it carries out the purposes and the intent of

1 the statute.

2 Now, respondent has simply said, well, what
3 about all these other fee limitation statutes? Congress
4 knows how to say it or do it and, therefore, they didn't
5 do it in this case.

6 And the answer to that is that those fee
7 limitation statutes are basically dedicated toward
8 protecting a particular group of people, coal miners, for
9 example. They also -- the purpose is to protect the
10 Federal fisc because they are normally Federal statutes,
11 and in some instances to make the process less
12 adversarial.

13 Here we have a fee shifting contract which is
14 not a fee limitation at all. There is no limitation on
15 what the attorney can obtain. Basically, the only
16 limitation is what the court deems to be reasonable.

17 Now, the -- the other argument -- two other
18 arguments that defendant -- respondent has made, and that
19 is, this just involves the relationship between the
20 plaintiff and the defendant and it doesn't involve his
21 attorney.

22 That's not true. The statute deals with
23 attorney's fees. It doesn't provide that the defendant
24 shall pay plaintiff monies which he can then use to pay
25 his attorney. It deals with a reasonable attorney's fees.

1 It also -- it's clear that Congress intended
2 that the recovery not be reduced by what the plaintiff
3 must pay his -- his attorney. And that's stated in
4 Blanchard v. Bergeron.

5 I might add that if we assume that Congress is
6 rational and that they act on the basis of -- of case law
7 as it exists, back in 1948 and the Fair Labor Standards
8 case the Second Circuit, the Judges Hand and Jerome Frank
9 enunciated a proposition which was then picked up by the
10 Third Circuit. I think they said it better than I can say
11 it.

12 And it said, it seems to us too clear for
13 argument that Congress did not intend the court to fix a
14 fee sufficient to compensate the plaintiff's attorney for
15 all his services and to permit him to collect an
16 additional fee from his client under a private agreement.
17 Such an agreement -- such an arrangement would require the
18 cooperation of the court in the frustration of
19 congressional purposes.

20 Moreover, in this case the fee, by contract,
21 belongs to the attorney. He said so.

22 And finally, it seems to me that if the attorney
23 is to be a co-venturer in this project, he should have the
24 same risks, and the risk is what does the judge determine
25 as his reasonable fee. He should also have the risk,

1 parenthetically, of having to undergo the obligation which
2 the plaintiff has of paying the defendant in the event
3 that the defendant is the prevailing party.

4 QUESTION: Mr. Mosk, is -- this argument you're
5 making assume -- it seems to me it assumes that -- that a
6 reasonable attorney's fee is one single number and that
7 there couldn't be a whole bunch of reasonable attorney's
8 fees that vary enormously in amount.

9 So, one might say that the fee awarded by the
10 court here was a reasonable fee, and one might also say
11 that the -- that the 40 percent contract agreement
12 provided for a reasonable fee.

13 I mean, there's a vast range of reasonableness.
14 Why couldn't Congress have intended that it's up to the
15 court, the court will pick a reasonable fee that will be
16 awarded to -- to counsel so that plaintiff doesn't have to
17 pay it. But if -- if plaintiff has contractually
18 obligated himself to pay more, that's something Congress
19 didn't -- didn't address.

20 MR. MOSK: Well, several reasons. First of all,
21 if you look at the fee between the plaintiff and his
22 attorney and the fee between -- and the reasonable fee
23 between plaintiff and defendant, there's no rational
24 distinction between the two. They are both contingent.
25 They both have the delay factor. They're both based on

1 the loadstar or the amount of time, and basically the --

2 QUESTION: No, that's not quite right. The --
3 the contingent fee agreement with the client is not based
4 on time at all.

5 MR. MOSK: Well, except that -- that's true,
6 Your Honor. It's not based on time except for the fact
7 that I think that there has to be some -- all courts,
8 since the days of Blackstone, have regulated
9 attorney/client contracts, and they have to be reasonable.

10 QUESTION: Well, there's just no relationship
11 whatsoever in this case between the time and the amount of
12 the fee.

13 MR. MOSK: That's correct.

14 QUESTION: You've got \$2,000 or \$3,000 an hour,
15 I think.

16 MR. MOSK: I missed -- that -- I did misspeak on
17 that -- that --

18 QUESTION: Yeah.

19 MR. MOSK: -- one element. But as far as the -
20 - as far as the contingency element, which -- which some
21 have said distinguishes the two, there is still a
22 contingency factor in the 1988 fee, and there is a --

23 QUESTION: Yeah, but it's a difference between
24 being in a factor and being the standard.

25 MR. MOSK: Well --

1 QUESTION: I mean, if contingency is one factor
2 in the reasonable fee determination by the court, but it's
3 the whole ball game in this -- in the contract.

4 MR. MOSK: Well, it's the whole ball game either
5 way. I mean, unless he wins, he's -- he doesn't have any
6 --

7 QUESTION: Well, he has to win, but in -- in
8 determining the amount of the fee, contingency is the
9 entire standard under the contract. It's merely one of
10 the factors in the -- in the course determination.

11 MR. MOSK: But he's -- but -- yes, Your Honor,
12 but he's better off with the 1988 between plaintiff and
13 defendant because if it's a low amount, he gets his time
14 anyway. He is better off normal tort --

15 QUESTION: Well, in some cases yes, some cases
16 no. He's not better off in this case.

17 MR. MOSK: The only -- the -- in this case he
18 gets a windfall, a windfall which --

19 QUESTION: Well, he gets what he bargained for.

20 MR. MOSK: Well, as far as the contract aspect -
21 - and the respondent has said that, a contract's a
22 contract. But the fact is -- is between an attorney and a
23 client a contract is not a normal commercial contract. A
24 contract is between a fiduciary, between a fiduciary.

25 QUESTION: Well, sure.

1 MR. MOSK: It's a highly regulated contract. In
2 this very case, as I've pointed out in footnote 7, the
3 case itself in the Ninth Circuit says, a contract where he
4 bargains for both is unenforceable.

5 And as I said, since the days of Blackstone,
6 contracts which were deemed to be champertous or barratry,
7 or whatever, have all been deemed to be unenforceable by
8 the courts. And in --

9 QUESTION: Yes, but if that's true -- I mean,
10 this -- if this contract is unenforceable for the reasons
11 that it's -- it's really excessive, one -- one could say,
12 that has -- that would be true whether or not there was a
13 1988 out there.

14 I mean, that's -- that's an argument that's
15 really independent of your statutory argument, it seems to
16 me.

17 MR. MOSK: Well, except for the fact that the -
18 - the contract is contrary to the legislative purpose. It
19 basically violates that which Congress intended, which was
20 that the plaintiff remain whole.

21 For example, in this particular --

22 QUESTION: Well, but it also intended that the
23 plaintiff be able to get lawyers who might not otherwise
24 take the cases.

25 MR. MOSK: Yes, and by -- and the way they did

1 that was to say that in the vast majority of cases where
2 there are simply injunctive relief or declaratory relief,
3 or low recoveries, such as Mr. Blanchard in Blanchard v.
4 Bergeron, the attorney will get his full recovery.

5 But if you look at the distinction between Mr.
6 Blanchard and -- and our case, Mr. Blanchard suffers a
7 little bit of damages at the hands of a sheriff, and as a
8 result, he -- after paying his attorney, he's made whole.

9 Mr. Venegas spends two and a half years
10 wrongfully in prison and he gets -- he'll be lucky to get
11 60 percent of what he gets. In other words, it's the same
12 thing as if you had a \$1,000 hospital bill. The \$1,000
13 hospital bill is fully paid after paying your attorney.
14 If it's a \$100,000 hospital bill, you only keep 40 -- 60
15 percent of it. It doesn't make any sense.

16 QUESTION: Well, of course, that -- that -- that
17 assumes -- and you know what opposing counsel's going to
18 say -- that that assumes that he would have gotten the
19 amount regardless of hiring this attorney. But he made a
20 different judgment. He hired this attorney because he
21 thought he'd increase the amount, and he may well have
22 been right.

23 MR. MOSK: Well, he hired an attorney and he got
24 this amount, and the fact is that the other attorney --
25 you know, when we talk about the marketplace, and I know

1 Justice O'Connor in an opinion written for the Court --
2 actually, her own opinion in the Pennsylvania and
3 Delaware, referred to the marketplace.

4 The market -- marketplace, with all due respect,
5 is a fiction. The marketplace is based upon a monopoly of
6 attorneys. And contingent fee agreements are basically
7 standard form contracts of adhesion. There is no broker
8 out there that directs you to the appropriate lawyer at
9 the cheapest fee. There is no real competition. Forty -

10 -

11 QUESTION: These lawyers are just -- that --
12 that you see advertised on television and in the
13 newspapers, they're just throwing their money away?

14 MR. MOSK: Well, they're trying to --

15 QUESTION: Is that right?

16 MR. MOSK: -- to get clients. But the fact
17 that --

18 QUESTION: Oh. Which suggests that there is a
19 market, doesn't it?

20 MR. MOSK: There's a lot of lawyers out there.
21 But the fact is that, as the respondent has pointed out,
22 you look at all the cases and they all say 40 percent.
23 And the fact is that in this case what is so egregious is
24 it was 40 percent after everything had been completed.
25 And the trial -- you know, it was not at the beginning

1 when he walks in the door. It's 40 percent after all the
2 discovery, after all law and motion, after --

3 QUESTION: If that's true, it's true for
4 everybody, I mean, and I -- and I suppose we shouldn't
5 allow any contingent fees and should award all reasonable
6 fees.

7 Why should we think that Congress believes that
8 somehow 1988 plaintiffs are some particularly dull-witted
9 class that they alone among all litigants have to be
10 protected from hiring what they think is a better lawyer
11 and agreeing to give him more than the statute would
12 otherwise provide?

13 MR. MOSK: They don't have to do that, Your
14 Honor. What they've -- what they've provided and what
15 they've said in the legislative history is the purpose of
16 it is that a plaintiff in a -- in a civil rights act is a
17 private attorney general; he's enforcing the law. As
18 Senator Kennedy, the sponsor of the bill says, "You don't
19 make a policeman pay to enforce the law."

20 We view Mr. Venegas as a private attorney
21 general. Sure, he's trying to be made whole. But the
22 fact is it's different than a tort case, as you've -- as
23 was said in Rivera -- Riverside v. Rivera. And, as a
24 result, the whole object was that he didn't have to pay
25 for it. It was the defendant that had to pay for it.

1 And what the court has done is saying, all
2 right, we're not going to make the defendant pay anything
3 that a plaintiff's attorney asks for. We're not going to
4 shift whatever he says. Now, there's only other -- one
5 other way of making sure that Plaintiff Venegas is made
6 whole, and that is to say that the attorney can only
7 charge a reasonable fee.

8 I might add that --

9 QUESTION: Well, then you're saying that
10 Congress virtually forbid contingent fees if you're saying
11 that the plaintiff must always be made whole.

12 MR. MOSK: What we've -- that's a possibility,
13 but I would like to --

14 QUESTION: Well, but where -- where on earth do
15 you find that in the -- in Section 1988, or in anything
16 that Congress said at that time?

17 MR. MOSK: Because -- well, many of the quotes
18 which we've said -- which we've laid out in our brief and
19 which -- and in this Court. This Court itself
20 specifically said that the purpose of the statute -- in
21 *Blanchard v. Bergeron* -- the purpose of the statute was to
22 ensure that the plaintiff was made whole and did not have
23 to disgorge a portion of his earnings to his -- to his
24 counsel.

25 And that's what Jerome Frank and the Third

1 Circuit said with the FS -- F -- Fair Labor Standard Act
2 legislation and --

3 QUESTION: Are -- are you referring to the
4 language where we said, "Thus it is that a plaintiff's
5 recovery will not be reduced by what he must pay his
6 counsel"

7 MR. MOSK: Yes.

8 QUESTION: But the word there is "must." You -
9 - it is not required that you must have a contingency fee
10 contract. You must pay him a reasonable fee.

11 MR. MOSK: Well, presumably it's an enforceable
12 -- must, it seemed to me, to be an enforceable contract.

13 In other words, I don't know that a contract --

14 QUESTION: Well, the word must means you must
15 hire an attorney, but you -- it's not -- it doesn't follow
16 from that that you must execute a contingency fee
17 contract.

18 MR. MOSK: Well, I think --

19 QUESTION: That's the whole point.

20 MR. MOSK: I think respondent's position is that
21 -- that Venegas must pay him. I mean, that's what --
22 that's what he's asking.

23 And what we are suggesting is that whatever he
24 must pay him, it shouldn't -- his -- his amount should not
25 be reduced by that amount.

1 QUESTION: Well, we've never -- we've never held
2 that contingency -- recognition of the contingent nature
3 of the -- of the recovery is not a legitimate factor in
4 calculating a reasonable fee.

5 We've said a lot of things about it, but we've
6 never said that 1988 forbids in all cases the recognition
7 of the contingency nature of the --

8 MR. MOSK: We don't have --

9 QUESTION: And in this very case, I understand
10 the reasonable fee that was calculated included a
11 contingency factor.

12 MR. MOSK: That's correct, Your Honor. And it
13 seems to me -- it seems to us that -- that that -- once
14 having determined that that's reasonable, a plaintiff's
15 attorney should not be able to ask for what is
16 unreasonable.

17 Now, it's true there are other -- there's a
18 whole range. I mean, for example, it could have been one-
19 seventeen or one -- by the way, the extra \$15,000 went to
20 a prior attorney who is now suing for six times that
21 amount in state court. So that the attorneys,
22 unfortunately, are not satisfied with whatever the judges
23 are pronouncing.

24 And what happens is -- is that, unless this
25 Court sets down some standard, it seems to me that we are

1 going to have more of this collateral litigation between
2 unfortunate civil rights plaintiffs and their attorneys.

3 And finally, in connection with what the court
4 did below, they placed the burden on Venegas, which is
5 wrong; they ignored the circumstances at the time, which
6 was an inadequate disclosure of the availability of
7 Section 1988; they ignored the disparity; and they deemed
8 reasonable a contract with is manifestly unenforceable
9 under state and Federal law.

10 So, for all these reasons we believe that,
11 number one, the Court should adopt the rule that Section
12 1988 precludes the attorney from receiving more than the
13 court-awarded fee, and if it doesn't emanate from Section
14 1988, it emanates from what this Court -- or at least the
15 dissent said in the Mallard case, and the -- and the
16 majority opinion did not indicate to the contrary -- that
17 the Court has an inherent power to regulate the attorney,
18 a special relationship regardless of whatever a statute
19 says.

20 QUESTION: Didn't the Ninth Circuit send back to
21 the district court the question of whether this fee was
22 valid under California law?

23 MR. MOSK: No, Your Honor. The only thing that
24 they sent back was to determine whether or not they could
25 have a lien basically. In other words, whether or not

1 there was an intention to have a statutory lien.

2 QUESTION: They didn't leave open the validity
3 of the fee under California law?

4 MR. MOSK: Well, that is probably -- could be
5 litigated in state court. But we believe that the court -
6 - the first step should be question of reasonableness, and
7 that is for the Court. If the Court decides that it is -
8 - it can't decide that, or it doesn't decide that it's
9 unreasonable, then Mr. Venegas has all of his other
10 options.

11 Thank you.

12 QUESTION: Thank you, Mr. Mosk.

13 Mr. Miller, we'll hear from you.

14 ORAL ARGUMENT OF CHARLES A. MILLER, ESQ.

15 ON BEHALF OF THE RESPONDENT

16 MR. MILLER: Mr. Chief Justice, and may it
17 please the Court:

18 As the questions from the Court indicate, the
19 central question in this case is whether Congress, in
20 passing Section 1988, intended to restrict or limit in any
21 way the amount that an attorney could charge his client in
22 a civil rights case and specifically whether Congress
23 intended that the reasonable fee awarded to the prevailing
24 party is the limit on what an attorney can charge that
25 prevailing party pursuant to its own fee agreement.

1 The position that the petitioner argues in this
2 case would prevent an attorney from enforcing any type of
3 contract -- a contingency fee contract, as in this case, a
4 fixed-fee contract and a contract based on an hourly rate
5 basis -- any kind of contract that would yield a fee
6 higher than the amount set by the court under Section
7 1988.

8 Did Congress intend that result by this statute?
9 I think the answer to that has to be no. Nothing on the
10 face of the statute indicates that Congress intended any
11 such intention or that it even addressed the question, for
12 Section 1988 does not address the question of what a
13 prevailing party may voluntarily pay to his lawyer in a
14 civil rights case.

15 Section 1988 deals with what a losing party must
16 pay by order of the court to the prevailing party as a
17 reasonable attorney's fee in a civil rights case, not --
18 it is not what may -- what parties voluntarily contract
19 before a case is decided to pay for legal services.
20 Rather, it is how much a losing party involuntarily may be
21 taxed by the court as an additional recovery to the
22 prevailing party, in this case the plaintiff, to assist in
23 covering the attorney's fee or costs of the case to the
24 prevailing party.

25 QUESTION: Mr. Miller, could you help me on the

1 facts here. I am a little fuzzy on them.

2 Did the amount of the reasonable fee that was
3 charged against the defendant -- I guess \$75,000 on
4 account of your client's services -- did that enhance the
5 total amount against which the 40 percent contingency was
6 computed?

7 MR. MILLER: It did not, Your Honor. I would
8 like --

9 QUESTION: Why not?

10 MR. MILLER: I would like to clarify --

11 QUESTION: Yeah.

12 MR. MILLER: -- three things about that.

13 QUESTION: Yeah.

14 MR. MILLER: First of all, contrary to what
15 petitioner says -- and I don't know why he says it -- Mr.
16 Mitchell, the attorney here, did ask the court for an
17 enhancement of his fee. He set forth his hours. The
18 lodestar figure was \$37,000, and he asked the court for a
19 multiplier of two. And the court gave him a multiplier of
20 two. So he got \$75,000.

21 QUESTION: And did he disclose the contingent
22 arrangement at that time?

23 MR. MILLER: He did. His -- his fee application
24 disclosed that he had taken the case on a contingency. It
25 stated that he had received a small retainer. He did not

1 indicate the percentage in this contingency agreement.

2 But the -- the lawyer for the City of Long Beach
3 indicated in his response that typically contingency fee
4 contracts of this kind provided for a contingency of 25 to
5 40 percent. He happened to say that to the court. The
6 court, if -- he thought it was interested, could well have
7 asked Mr. Mitchell and I'm sure he would have told them.
8 But he told them it was a contingent arrangement.

9 The -- the contract that Mr. Mitchell had with
10 his client specifically stated that any recovery under
11 Section 1988 that Mitchell got would be offset the amount
12 of the contingency fee. So that in no event, under this
13 agreement, could Mr. Mitchell receive more than 40
14 percent. And the \$10,000 retainer was also credited
15 against the 40 percent.

16 So, that's the most he could have received and
17 would receive if this contract is enforced.

18 QUESTION: But 40 percent of what? 40 percent
19 of --

20 MR. MILLER: Of the gross amount of the --

21 QUESTION: -- the amount including the
22 attorney's fees that were awarded?

23 MR. MILLER: That question hasn't been litigated
24 in this case, but I believe Mr. Mitchell's understanding
25 would be yes, it would be 40 percent of the gross amount

1 recovered by the plaintiff in this case. He's only --

2 QUESTION: I just want to make sure I heard it
3 right. Including the reasonable attorney's fee?

4 MR. MILLER: That would be correct, Your Honor.
5 That's right. It would be 40 percent of the gross amount
6 recovered by the plaintiff. It would also include, had it
7 not been waived by the --

8 QUESTION: Who do you think is entitled to the
9 statutory attorney's fee? The client or the lawyer?

10 MR. MILLER: Your Honor, I think the answer is
11 that the client is entitled to the attorney's fees and I
12 think that's what this Court held in Evans v. Jeff D.

13 That holding has -- is very pertinent to this
14 case because it makes the -- the need for an enforceable
15 fee contract all that much more important to lawyers who
16 are going to represent civil rights plaintiffs.

17 QUESTION: Yes, but it also shows that your
18 contract, to the extent that it seeks to shave away 40
19 percent of that, as you've just said it does, contravenes
20 the policy of the statute, which is to give the client the
21 full amount of reasonable attorney's fees. And you're
22 saying he won't get that; he'll lose 40 percent of it
23 through my fee agreement.

24 MR. MILLER: I don't think that. I don't think
25 the policy of the statute is that the lawyer wouldn't

1 share in the attorney's fee payment. I think the
2 understanding of the statute and the contemplation is that
3 in the normal case the attorney will get the attorney's
4 fee awarded by the court, depending on what his agreement
5 is with the -- his client.

6 QUESTION: Wow.

7 QUESTION: Well, your position certainly
8 prevents the plaintiff from being fully compensated, which
9 has to be one of the goals of the Civil Rights Act.

10 MR. MILLER: Well, Your Honor, I'd like to
11 answer that in two parts. First of all, the goal of the
12 Civil Rights Act, as stated by this Court in the Blanchard
13 case, was to make -- Section 1988 -- was to make sure that
14 competent counsel are available to handle civil rights
15 plaintiffs' cases. And that's been said by this Court
16 repeatedly.

17 QUESTION: To what end?

18 MR. MILLER: Pardon me?

19 QUESTION: To what end?

20 MR. MILLER: To the end that these clients --

21 QUESTION: To compensate a plaintiff who has
22 been injured.

23 MR. MILLER: Correct. And to allow these
24 people, most of whom, according to legislative history,
25 have cases that are not high-money cases, to obtain the

1 kind of counsel that plaintiffs in other situations are
2 able to get.

3 It was an effort to equate the civil rights
4 plaintiffs and to give them the wherewithal to pursue
5 their cases in court, even though those cases didn't --
6 normally didn't have large monetary prospects.

7 QUESTION: Mr. Miller, supposing that we had the
8 kind of contingent fee contract that your client had here
9 and there had been an award of \$20,000 damages and a
10 hundred -- and the court says, we'll give you \$100,000
11 attorney's fees under Section 1988.

12 Now, how would that amount -- you're getting a
13 total of \$120,000 from the defendant. How would that be
14 divided between the attorney and the client under this
15 contract?

16 MR. MILLER: I -- I believe under this contract
17 that the attorney would have been entitled to 40 percent.

18 QUESTION: 40 percent of \$120,000?

19 MR. MILLER: Yeah -- 48 -- four times -- \$48,000
20 in that case.

21 QUESTION: And so --

22 MR. MILLER: He would not be entitled to the
23 entire amount of the attorney's fees --

24 QUESTION: So that the -- the attorney would not
25 have been entitled to keep the \$100,000?

1 MR. MILLER: That's absolutely correct, Your
2 Honor.

3 Now, I -- and I'm saying -- I'm catching myself
4 here because I can imagine the next question. You could
5 have a contract, I suppose, in which an attorney provided
6 that I'll get 40 percent or the court-awarded fee,
7 whichever is greater.

8 QUESTION: Yeah.

9 MR. MILLER: I could imagine such a contract.
10 And then the answer to your question, under the contract
11 would be different.

12 QUESTION: And if there was no arrangement for
13 attorney's fees at all and you have the same recover --
14 recovery, \$20,000 damages, \$100,000 attorney's fees, then
15 the attorney gets the \$100,000?

16 QUESTION: Exactly.

17 MR. MILLER: Well, I -- I don't think that's
18 clear at all, Your Honor. To me this Court's holding in
19 the Blanchard case, together with the holding in the Jeff
20 D. case, indicates that the award of attorney's fees goes
21 to the client, it's his entitlement under the statute.

22 Now, it's normally anticipated that that award
23 is for the purpose of compensating an attorney. But, if,
24 for example, the attorney has a fee contract with his
25 client that would yield him less than the amount

1 established by the court, I don't think it follows that
2 the attorney is entitled to that amount.

3 QUESTION: Well, but then -- but then our whole
4 -- we -- we have held under -- under this statute that
5 even though the -- the attorney's agreement provides for
6 less than what the court determines to be a reasonable
7 fee, a reasonable fee will still be awarded -- more than
8 what the contract says.

9 MR. MILLER: That is correct, Your Honor. To --

10 QUESTION: And you're saying that -- that what
11 happens to that excess over the contract amount does not
12 go to the lawyer?

13 MR. MILLER: Absolutely if the contract doesn't
14 provide for it. And I don't know why it should. And this
15 Court has made very clear --

16 QUESTION: A very strange holding we made then.
17 I -- I thought -- I thought when we said that, that the
18 money was going to go to the lawyer.

19 MR. MILLER: Not necessarily. I don't think the
20 Court said that and I don't think --

21 QUESTION: Well --

22 MR. MILLER: -- it necessarily follows in there

23 --

24 MR. MILLER: But, gee, it was the lawyer that
25 was suing in the case as I --

1 MR. MILLER: No. You've -- you've held that the
2 court may award attorney's fees to the prevailing
3 plaintiff in the situation where there is no obligation by
4 the prevailing party to pay anything to his lawyer.
5 That's the Blum case, where the public interest firm
6 brought the case.

7 QUESTION: But with no understanding whatever
8 between a private plaintiff and a private lawyer, an award
9 of \$100,000 attorney's fees does not presumptively or
10 automatically go to the lawyer?

11 MR. MILLER: Well, now -- I mean, you say
12 presumptively. I think that most courts presume or
13 anticipate that the amount will be paid to a lawyer.

14 QUESTION: Well, I would think so when they call
15 it attorney's fees.

16 MR. MILLER: Well, the statute uses the word
17 attorney's fees, but it says --

18 QUESTION: Just out of good will -- they assume
19 out of good will it's going to be paid over, you mean.

20 MR. MILLER: Judge Kelleher spoke to this in
21 fact in his own opinion in this case and said how -- this
22 is a vexing issue. He was about to attend a seminar at
23 that time being given by some Second Circuit judges to
24 discuss this issue: what happens to attorney's fees when
25 they're awarded; do they go to the lawyers?

1 But I think that the position that we've
2 advocated here is, and consistent with this Court's
3 holdings, is that the statute provides attorney's fees to
4 the plaintiff. If the plaintiff has a fee arrangement
5 with his lawyer under which the lawyer will be compensated
6 in some different manner than provided for through the
7 award from the court -- higher or lower -- that's what the
8 attorney gets.

9 And that doesn't seem to me to be unreasonable
10 or unfair to either party.

11 QUESTION: Counsel, did the Petitioner argue in
12 the courts below that the contingent fee agreement was
13 unenforceable as a matter of state law?

14 MR. MILLER: He did, Your Honor. He presented a
15 state law ground for not enforcing this agreement and it
16 was dealt with in Judge Kelleher's opinion, and Judge
17 Kelleher considered it and rejected it. And it's in his
18 opinion that's in the -- attached as the appendix to the
19 cert. petition.

20 QUESTION: But what -- what was left open with
21 respect to the lien? Is that --

22 MR. MILLER: That -- Your Honor, in fact, it was
23 those questions that were left open. The questions as to
24 whether the attorney in this case, Mr. Mitchell, was
25 entitled to a lien for his claim.

1 That issue has since become moot, and it's
2 become moot because subsequent to the decision of the
3 court of appeals on the merits of the case the plaintiff,
4 Mr. Venegas, entered into a settlement agreement and that
5 settlement agreement established an escrow account for the
6 amount of fee in dispute here and it sits in escrow
7 awaiting the final judgment as to who's entitled to the
8 attorney's fees.

9 So, it made the issue of lien moot, and all
10 parties have agreed to that. So those -- there will be no
11 need to remand those issues to the state court for
12 consideration.

13 QUESTION: Did the settlement agreement also
14 contemplate that there will be no further state law issues
15 raised in any state proceeding?

16 MR. MILLER: I don't think the settlement
17 agreement spoke to that, Your Honor. But we have serious
18 doubts as to whether there are any state law issues that
19 can appropriately be raised at this point if this Court
20 affirms the decision below.

21 In the district court the plaintiff, Mr.
22 Venegas, represented by Mr. Bromberg as his counsel -- and
23 I should say how he got to Mr. Bromberg by the way. He
24 got to Mr. Bromberg because Mr. Mitchell, when he proposed
25 to take the appeal, said to his client, "You should seek

1 independent counsel on my proposal for handling your
2 appeal."

3 Mr. Venegas did so. He consulted Mr. Bromberg.
4 They concluded that they should not accept Mr. Mitchell's
5 proposal for handling the appeal and instead Mr. Bromberg
6 agreed to handle it himself. And he, thereafter,
7 represented Mr. Venegas and he represented Mr. Venegas in
8 the trial court on the question of the enforceability of
9 the contingent fee contract. And he made -- advanced a
10 number of arguments why it shouldn't be enforced. It's
11 unreasonable, it's excessive, it violates state law.

12 They were all considered by Judge Kelleher
13 pursuant to the Ninth Circuit's decision in a case called
14 Hamner v. Rios. And that court sets forth a rather broad
15 standard for lower courts to follow in assessing the
16 reasonableness of attorney's private fee arrangements in
17 civil rights cases.

18 And Judge Kelleher cited that case, referred to
19 the standards, indicated that he had a broad discretion to
20 apply, then considered the arguments that had been
21 advanced by the -- Mr. Venegas, including the claim that
22 it was a windfall. And Judge Kelleher, who had seen the
23 trial -- he saw the job that the attorney, Mr. Mitchell,
24 had done and knew the facts of the case -- concluded that
25 this was a reasonable agreement and ought to be enforced.

1 And the Ninth Circuit sustained that.

2 So we don't see that there's anything left to be
3 decided on the issue of the enforceability of the contract
4 if this Court affirms the decision below. If that occurs,
5 Mr. Mitchell is entitled to the sum that his contract
6 provides him.

7 QUESTION: Would you mind -- just so I
8 understand it -- I'm really kind of dense, I think. Would
9 you go through the arithmetic of how the fee was computed
10 in this case? First, tell me what the gross amount
11 recovered was in dollars.

12 MR. MILLER: I think it was \$2,080,000, Your
13 Honor.

14 QUESTION: And is that exclusive of the
15 attorney's fees?

16 MR. MILLER: That was exclusive of the
17 attorney's fees.

18 QUESTION: And then how much is added to that
19 for the attorney's fee?

20 MR. MILLER: Well, the attorney fee award was
21 \$117,000.

22 QUESTION: Is that all done or just a share
23 that's attributable to --

24 MR. MILLER: That's the total amount awarded.
25 And I will say to you, Your Honor, at this point that,

1 although I answered your questions to the best of my
2 ability, Mr. Mitchell has not in fact claimed more than 40
3 percent of \$2,080,000. But I answered your questions as
4 to his entitlement of the contract.

5 But he's only claimed at this point, and only
6 will claim, 40 percent of \$2,080,000 for himself and his
7 colleague, Mr. Cochran.

8 QUESTION: In other words, he's getting 40
9 percent of half of that because his client got --

10 MR. MILLER: Yes --

11 QUESTION: -- his other lawyer got another --
12 the other half.

13 MR. MILLER: That's right. Mr. Mitchell would
14 receive -- I can't do this -- it's slightly over \$400,000,
15 minus the retainer he's already received. Then the
16 balance is what he would -- he's entitled to under this
17 contract.

18 QUESTION: Would you agree -- I don't know
19 whether it's open in this case or not -- that it would be
20 within the power of a district judge to look at these
21 facts and say, I think this fee is so far above what the
22 reasonable fee computed was that I will hold it at least
23 partially unenforceable?

24 MR. MILLER: Yes, Your Honor. I think he had
25 that power and I think that power was invoked and Judge

1 Kelleher thought about that issue and decided that it
2 shouldn't be reduced. But he did have the power to do it.
3 I think that is more or less inherent in the power of a
4 Federal court and any -- I agree with Mr. Mosk on that
5 point. That's an inherent power of a court in a
6 supervisory role over attorneys.

7 QUESTION: What if -- and in -- in exercising it
8 that's purely a Federal power? Does -- does the district
9 judge have to say, well, a state court would allow it, and
10 therefore I must.

11 MR. MILLER: I think --

12 QUESTION: Or, could he say --

13 MR. MILLER: I think, Your Honor, that's a
14 tricky question. I think the answer is basically it
15 should be the enforcement of state law. He should apply
16 the state ethical standards applicable, in this case, in
17 California.

18 QUESTION: Because otherwise you're going to
19 have to write in the contract whether you're proposing to
20 sue in Federal court or state court.

21 MR. MILLER: Agreed.

22 QUESTION: Right?

23 MR. MILLER: The only qualification I'll make to
24 this is that in the Ninth Circuit decision Hamner v. Rios
25 which told the district courts to make this broad inquiry,

1 one of the factors to be taken into account was whether
2 enforcement of the lawyer's contract would be consistent
3 with the policies of the Federal civil rights laws.

4 That strikes me as a kind of a Federal question
5 over and above the normal state law ethical questions.
6 Perhaps it's embodied in California state law, but I say
7 it's -- that's why it's a tricky question.

8 To that extent, in a civil rights case the
9 determination by the district judge may be more than a
10 purely state law ethics question.

11 QUESTION: Well, the state -- the state would
12 have to take that into account as well.

13 MR. MILLER: As I said, I think you would read
14 the state law as to embrace such a concept --

15 QUESTION: To embrace --

16 MR. MILLER: -- in the appropriate case. And if
17 so, then I think you can say in all aspects he is applying
18 the same approach that would be applied by a superior
19 court judge in a state law proceeding.

20 QUESTION: And that would be true in a Federal
21 Fair Labor Standards Act attorney's fee, every other kind
22 of statutory attorney's fee, too?

23 MR. MILLER: Absolutely. There's no question
24 about that.

25 But may I say, Mr. Chief Justice, on that issue,

1 because the issue of the Fair Labor Standards Act cases
2 was raised for the first time in the reply brief, and I
3 hadn't had occasion to consider those before. We did some
4 research on those because it didn't sound right, what I
5 saw in the brief.

6 And sure enough, what we found is -- and I won't
7 belabor this -- that those cases themselves, and the later
8 cases that have discussed them, stand for the proposition
9 which we advance. And that is that it's inappropriate in
10 a case -- in that instance, the Fair Labor Standards
11 situation -- for an attorney to recover both the statutory
12 fee and his contingent fee under his contract and that an
13 attorney should be satisfied with a single fee.

14 And I'll just cite to the Court the two cases
15 that the Court may wish to review on this issue. Houser
16 v. Matson, 447 F.2nd 860, and Hayden v. Bowen, a Fifth
17 Circuit case, 404 F.2nd 682, and cert. was denied in that
18 case.

19 QUESTION: You could apply the statutory fee
20 against the contingent fee if it were -- if the statutory
21 fee were smaller, I suppose?

22 MR. MILLER: That's correct, Your Honor. And I
23 think what these cases stand for is that an attorney must
24 apply the statutory fee against his contractual
25 arrangement. That is what Mr. Mitchell's contract

1 provides, by the way.

2 I think Mr. Mitchell felt that California ethics
3 law would require that. Most of the appellate court cases
4 that have dealt with this subject have said this, that
5 ought to be the rule. The lawyer can't get both. And
6 we're not seeking both in this case, and don't advocate
7 that anyone is entitled to both.

8 But we are advocating that the lawyer is
9 entitled to the benefit of his contract if he carries out
10 his bargain and wins the case and secures the result
11 sought by the plaintiff when he entered into a --

12 QUESTION: Well, do you accept the notion that
13 the -- that in setting the fee in this case that the
14 defendant had to pay that the district court was -- was
15 indicating that this is the kind of -- if I award this
16 kind of a fee, it is the kind of a fee that would enable
17 the plaintiff in this kind of a case to get decent
18 counsel?

19 MR. MILLER: I'm not -- I -- I'm not sure how to
20 answer the question, Your Honor, because I'm not sure I
21 followed the gist of it. The -- the --

22 QUESTION: Well, I suppose a reasonable fee that
23 district courts are supposed to award are fees that
24 respond to the marketplace and that would enable civil
25 rights plaintiffs to get decent counsel.

1 Now, I suppose that this fee that the district
2 court awarded was that kind of a fee in his mind.

3 MR. MILLER: I think that's right.

4 QUESTION: And he nevertheless went ahead and
5 said the -- but nevertheless even though -- even though a
6 fee of this kind would have been plenty enough -- good
7 enough to get a -- get counsel, this contract means that
8 the lawyer is entitled to something more.

9 MR. MILLER: Correct, Your Honor. And if a
10 civil rights lawyer felt confident and knew that in taking
11 one of these cases -- not necessarily one that would have
12 this much damages, but any civil rights case -- that he -
13 - that if his client prevailed, he would receive a
14 statutory fee from the court, that he would -- might be
15 satisfied.

16 But unfortunately that's not the situation
17 today. Because of this Court's decision in Evans v. Jeff
18 D. most civil rights plaintiffs' lawyers in most cases are
19 at grave risk of receiving no fee whatsoever, despite
20 their efforts on the clients' behalf and successful
21 efforts.

22 And that's because the vast majority of civil
23 rights cases settle, as the vast majority of all cases do.
24 And cities and municipalities who are usually the
25 defendants, have caught on to the way -- the fact that the

1 way you settle these cases is to get the plaintiff to
2 waive attorney's fees under the statute, particularly a
3 case that's been complex and long-standing and where the
4 fees promise to be fairly substantial.

5 So an attorney, in a civil rights context, is at
6 great risk now, as Mitch -- and Mr. Mitchell has been the
7 victim of this on several occasions, as our brief shows,
8 doing a lot of work, achieving the essential results
9 sought by the plaintiff, or his client, and then having a
10 settlement made in which a condition of settlement is that
11 his fee is waived.

12 Of course, in that situation, particularly where
13 the defendant offers the client essentially the relief
14 sought, subject only to fee-waiver, an ethical lawyer like
15 Mr. Mitchell is in a tough bind. He can't tell his lawyer
16 not to accept the settlement just because he's not being
17 paid his fee. So he counsels acceptance of a settlement
18 that achieves the law -- the client's basic objectives and
19 in the process talks himself out of his statutory based
20 fee.

21 Now, unless he's got some protection under a
22 lawyer's fee contract, he's going to be out in the cold,
23 and that's why civil rights plaintiffs' lawyers are going
24 to be discouraged from taking these cases unless the right
25 to contract, as in this case, is sustained.

1 QUESTION: Well, should the Court in reviewing -
2 - suppose we think the statute doesn't set a cap but that
3 the district court does have an obligation to review the
4 reasonableness of the fee agreement, should the Court not
5 take into consideration the fact that this case didn't
6 settle, that a reasonable fee was paid, and that a 40
7 percent contingency above that on these circumstances
8 seems unwarranted because it reduces the recovery of the
9 plaintiff to such an extent?

10 Now, does anything prevent the district court
11 from considering those things and reducing the so-called
12 contingent fee?

13 MR. MILLER: Well, I'd like to answer the
14 question this way, Justice O'Connor. Nothing prevents the
15 district court from considering that. That's an
16 appropriate consideration.

17 In this case, consideration of that would be as
18 follows, I think, because fortunately as -- unlike other
19 cases, we have sort of a benchmark here as to what the
20 client's loss was. And the petitioner himself has said he
21 had a state court antecedent proceeding in which he was
22 awarded damages of a million dollars, which was reversed
23 on state law grounds. And says the petitioner, this case
24 was easy. He already knew he had a million dollar suit
25 here, and all Mr. Mitchell had to do was try it and

1 collect a million dollars.

2 In this case -- it wasn't that easy, by the way,
3 for reasons I'll come to. But in this case Mr. Mitchell
4 secured a judgment of \$2 million. Venegas went out and
5 got the best he could find, and it produced a result twice
6 what the so-called benchmark was.

7 So, even after you deduct the 40 percent Mr.
8 Mitchell and his colleague are entitled under -- to under
9 their contract, the client here has been made more than
10 whole by any sort of generalized benchmark standard one
11 can look at.

12 So, on the facts of this case, which is what the
13 plaintiff has tendered here, certainly it's not
14 unreasonable to enforce the contract. He got the benefit
15 of his bargain.

16 QUESTION: Did the district court here even talk
17 about anything with regard to the reasonableness of the
18 fees, or did the district court just say, well, that was
19 the agreement the plaintiff signed?

20 MR. MILLER: No. The district court addressed
21 the issue presented to them as to whether the recovery to
22 the lawyers would constitute a windfall -- he used that
23 term in his opinion -- and he said it would not be.

24 Now, he didn't write a 12-page opinion on the
25 subject, but he saw the trial, he knew the background,

1 he's an experienced judge. And he concluded that it was a
2 fair -- he knew about the state court judgment, I'm sure,
3 before. Obviously he knew about that. And he --

4 QUESTION: It seems to me your --

5 MR. MILLER: -- (inaudible) a windfall.

6 QUESTION: -- answer to Justice O'Connor
7 suggests that the damages really should have only been a
8 million dollars. Here we -- he recovered \$2 million. I
9 think we have to assume that was the correct measure of
10 his injury.

11 MR. MILLER: Well, I think, Your Honor, what --
12 what this tells you is that in cases like this where the
13 special damages were very small and the entire --
14 virtually the entire judgment was general damages - is
15 that there is a wide range of what's appropriate recovery
16 in cases like this.

17 And how much a plaintiff is going to recover in
18 a case of this kind is highly dependent on the skill of
19 his lawyer. In this case, Mr. Venegas went for the best.
20 He got the best. He got the -- he got the result that one
21 hopes -- no guarantee, but he hopes for when he goes for
22 the best.

23 And now that he got the result he wanted and he
24 got the full benefit of that bargain, he wants to renege
25 on it as far as paying the fellow who did it for him.

1 QUESTION: Well, of course, that's often true.
2 That in a bargain -- contingent fee cases there's not
3 exactly precise equality of bargaining power when the
4 contract is made. There's no doubt about that.

5 Let me ask you another question. You argued
6 earlier about the FLSA cases that say you can't have both
7 the statutory award and the contractual award. But here
8 your contract in effect gave you the -- the statutory
9 award -- I mean, the contractual award plus 40 percent of
10 the statutory award.

11 So you did get -- you didn't get just one. You
12 got one and -- one and four-tenths.

13 MR. MILLER: Up to now Mr. Mitchell has never
14 sought that.

15 QUESTION: I know you've never sought it, but
16 that's what the contract says.

17 MR. MILLER: You asked about that and I tried to
18 answer it fairly as to what how I thought the contract
19 could be interpreted. The contract says the gross amount
20 recovered.

21 QUESTION: Yeah. But I'm just suggesting there
22 is some tension between the contract in this case and that
23 principle that you could get one or the other.

24 MR. MILLER: To a -- to that slight degree, yes.

25 QUESTION: Yes. To a slight degree. Yeah.

1 MR. MILLER: The -- my time is about up, but I'd
2 just like to come back to the basic point that started
3 this dispute and which is the principal issue presented in
4 the cert. petition. And that is did Congress provide, as
5 it could have, that there should be limitations on the
6 enforceability of fee contracts when they exceed the
7 amount awarded under the 1988 provision?

8 Congress has shown its ability to do that in a
9 variety of situations when it has wanted to do so. But I
10 would like to leave with the sort of the fountainhead case
11 in this area that started all of this to begin with, the
12 Alyeska case, which is the case that led the Congress to
13 enact Section 1988.

14 And there, in rejecting the notion that the
15 court should on its own conclude to award plaintiff's
16 attorney's fees in successful civil rights cases, Justice
17 White's opinion for the Court said that that approach
18 would make -- I'm quoting now -- would make major inroads
19 on a policy matter that Congress has reserved for itself.

20 And in rejecting the rule in that case that had
21 been adopted by the court below, this Court said that the
22 law concerning attorney's fees, "is deeply rooted in our
23 history and in congressional policy. That it is not for
24 us to invade the legislature's province by redistributing
25 litigation costs in the manner suggested by respondents."

1 I submit to the Court that that's what's being
2 asked in this case. That the petitioners here are asking
3 this Court to invade the legislative province and to
4 redistribute litigation costs in the manner in this case
5 quite favorable to the prevailing plaintiff who has
6 secured the benefit of his bargain. This plaintiff
7 actually concedes a role for these private contracts.

8 In his brief he says, well, when they settle,
9 then maybe -- and part of the settlement is waiver of the
10 attorney's fees under Section 1988 -- then perhaps an
11 attorney can enforce his private contract. Well, if you
12 can enforce --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Miller.

14 The case is submitted.

15 (Whereupon, at 11:07 a.m., the case in the
16 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Juan Francisco Venegas, Petitioner v. Michael R. Mitchell

Case No. 88-1725 - February 21, 1990

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Alan Friedman

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