UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1725
Summary Calendar

JEAN ABSTON, ET AL.,

Plaintiffs-Appellees,

LIMITED FUND SUBCLASS,

Plaintiffs-Appellees,

VERSUS

ROBERT LESLIE JOHNSON, ET AL.,

Defendants,

VERSUS

ART B. CLIFTON,
formerly attorney for the Class,

Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:90-CV-0194-H)

(July 15, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Art B. Clifton, formerly class counsel in a RICO civil action, challenges the denial of his request for attorney's fees and expenses. We **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Clifton represented one of several plaintiff sub-classes in an action filed in January 1990, to recover funds lost in a fraudulent investment scheme. In October 1992, the district court requested that he withdraw from representation, after he was indicted on five counts of, *inter alia*, money laundering, mail fraud, wire fraud, and conspiracy involving misappropriation of class funds. He was convicted on all counts.

Before he was convicted, but after he had withdrawn from representation, Clifton filed an application for fees and expenses, totalling approximately $420,000. *See* 18 U.S.C. § 1964(c) (authorizing recovery of treble damages, including reasonable attorney's fees, in RICO actions). In support of his request for over $140,000 in expenses, Clifton submitted a half-page summary of costs and expenses, listing amounts paid for such general categories as "EQUIPMENT, REPAIRS, SERVICE, PRINTING, SUPPLIES, ETC. (Atty. - Rec.) ... [$]11,665.88". Similarly, in lieu of contemporaneous time records to document requested fees, he appended a list of the pleadings, motions, and other documents he had filed. He contended that he should be compensated based on a percentage of the approximately $2,000,000 common fund established for the benefit of his former clients, *see* ***Boeing Co. v. Van Gemert***, 444 U.S. 472, 478-79, 100 S. Ct. 745, 749 (1980) (discussing "common fund" doctrine of calculating attorney's fees), rather than according to the hourly rate-based "lodestar" method applied in this circuit. *See* ***Johnson v. Georgia Highway Exp.,***

Inc., 488 F.2d 714 (5th Cir. 1974) (enumerating factors to be considered in determining compensation under "lodestar" theory); ***Copper Liquor, Inc. v. Adolph Coors Co.***, 684 F.2d 1097 (5th Cir. 1982) (applying ***Johnson***).[2]

Clifton requested approximately 20% of the common fund, for an award of approximately $400,000. In the alternative, he stated that he could "support an expenditure of approximately 1,400 hours of non-duplicative hours on this case, at $300.00 per hour based on the market place standard for this litigation, in justification for the award of $420,000.00."

While Clifton's request was pending, the district court entered final judgment on February 19, 1993, pursuant to Fed. R. Civ. P. 54(b), adopting a proposed stipulation of settlement, and directing that the common fund be disbursed accordingly. Pursuant to the final judgment, the court directed that the attorney appointed to represent Clifton's former clients be awarded approximately $60,700 in fees and reimbursement. The judgment did not dispose of Clifton's request.

Clifton submitted additional documentation in support of his request; as with the earlier request, however, those materials did not contain contemporaneous time records, or a detailed or specific statement as to hours worked, services performed, or expenses incurred. The district court denied the request in June 1993. In

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[2] In supplemental documentation to his request, Clifton conceded that this circuit follows the "lodestar" method of calculating fees, but asserted that the percentage of recovery test should apply.

so doing, it relied partly on Texas law, holding that, because Clifton had withdrawn after knowingly acting in a manner that jeopardized his ability to practice law, he had abandoned his clients and thus forfeited all right to compensation. Also, the court stated that, even had Clifton not been convicted, it was "doubtful whether the Court could award him the requested fees and expenses based on his Application", because

> [t]he twelve-factor "lodestar" analysis set forth in ***Johnson v. Georgia Highway Express, Inc.***, 488 F.2d 714 (5th Cir. 1974) and ***Copper Liquor, Inc. v. Adolph Coors Co.***, 684 F.2d 1087, 1092 (5th Cir. 1982) is still the method of fee calculation used in the Fifth Circuit. ***Longden v. Sunderman***, 979 F.2d 1095, 1099 n.9 (5th Cir. 1992). The lack of documentation in Mr. Clifton's Application makes it inadequate for such an undertaking.
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> Additionally, when Mr. Clifton was retained, he received a retainer fee in the amount of one percent of each class member's investment, for a total of $44,085.12. *See* Application at 8. While declining Special Counsel's request to order Mr. Clifton to repay this money, the Court notes that he has not gone entirely without compensation. He has not shown himself to be deserving of more.

II.

We review the district court's decision to deny attorney's fees only for abuse of discretion.[3] *E.g.*, ***Longden v. Sunderman***,

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[3] Special counsel for the appellee subclass contends that this appeal should be dismissed as moot, because, pursuant to the final judgment, all funds in the common fund registry from which Clifton seeks compensation have been allocated, and most have been disbursed. *See* ***In re Sullivan Cent. Plaza, I, Ltd.***, 914 F.2d 731, 735 (5th Cir. 1990) (appeal is properly dismissed as moot where appellate court lacks power to provide an effective remedy should it find in appellant's favor on merits). Because we conclude that the district court properly denied Clifton's request, we need not consider whether any funds remaining in the common fund registry could be used to satisfy a fee award.

979 F.2d 1095, 1100 (5th Cir. 1992) (quoting ***Copper Liquor***, 684 F.2d at 1092, 1094); ***Wilson v. Southwest Airlines, Inc.***, 880 F.2d 807, 812 (5th Cir. 1989). In the first instance, the district court based its denial of the request on Texas law; however, it also stated that Clifton's request for fees and expenses did not comport with the requirements for documentation set out in ***Johnson***, 488 F.2d at 717-19.[4] As noted, Clifton did not submit contemporaneous, detailed records of hours spent, expenses incurred, or services performed. "The absence of any time records to support the amount demanded alone would justify the district court's discretionary denial of the request for compensation from the common fund." ***Longden***, 979 F.2d at 1101 (citing ***Copper Liquor***, 684 F.2d at 1094). And, the "fact that counsel normally does not keep records, or maintains casual ones, or handles cases on a contingent fee basis[,] does not excuse failure to observe good

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For the same reason, we need not reach whether attorney's fees are properly recoverable under § 1964(c) where, as here, the action is disposed of by settlement, rather than by an award on the merits (issue of first impression in this circuit). *See* ***Aetna Cas. & Sur. Co. v. Liebowitz***, 730 F.2d 905, 906 (2d Cir. 1984) (holding that RICO recovery provision in § 1964 authorizes recovery of attorney's fees only when "a plaintiff ... obtains a judgment for damages on the merits", and not when the plaintiff recovers pursuant to pre-trial settlement).

[4] Under ***Johnson***, the "lodestar" is calculated by multiplying the hours reasonably expended on the case by the prevailing hourly rate charged in the community for similar work. ***Copper Liquor***, 684 F.2d at 1092. The "lodestar" is then adjusted according to 12 additional factors set out in ***Johnson***, 488 F.2d at 717-19, including: time and labor required; novelty and difficulty of issues; amount of skill required; preclusion of other employment; customary fee; whether fee is contingent or fixed; time limitations; amount involved and results achieved; etc. ***Longden***, 979 F.2d at 1099-1100 n.10 (listing factors).

business practice when he seeks to have someone other than the acceding client pay for his services." ***Copper Liquor***, 684 F.2d at 1094. In short, given Clifton's failure to provide it with adequate documentation, the district court acted "solidly within its discretion" in denying his request. ***Longden***, 979 F.2d at 1101.

III.

For the foregoing reasons, the order denying attorney's fees and expenses is

AFFIRMED.