

RESOLUTION 08-05-2009

DIGEST

Attorneys Fees: Procedure for Determining Proper Fee Award

Adds Code of Civil Procedure section 1018.5 to codify the procedure for determining prevailing party attorney fee awards.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to resolution 03-02-2002, which was disapproved.

Reasons:

This resolution adds Code of Civil Procedure section 1018.5 to codify the procedure for determining prevailing party attorney fee awards. This resolution should be approved in principle because it would promote fairness, consistency and predictability with respect to attorney fee awards.

This resolution carefully defines where it does and does not apply, mandates the determination of a lodestar amount; sets forth the criteria by which both the lodestar and any adjustment must be determined; provides that pre-judgment interest must be awarded on attorneys' fees already paid; provides a substantial evidence standard of review for the trial court's determination of the lodestar amount; and requires that the court issue a memorandum decision upon request by any party where the fee award requested is in excess of \$25,000.

This resolution creates an objective standard and a codified procedure for attorney fee awards. It would promote clarity and order, eliminate arbitrary trial court adjustments, and provide for meaningful appellate review of attorney fee awards.

This resolution is similar in its intended purposes to resolution 08-03-2009. This resolution is applicable to all prevailing party attorney fee awards; whereas resolution 08-03-2009 is applicable only to attorney fee awards in contract actions and pursuant to Civil Code section 1717; and this resolution is more detailed in its language and broader in its effect. Both resolutions, however, mandate the lodestar approach, seek to curtail the trial court's discretion, and provide for a more expansive standard of review.

TEXT OF RESOLUTION

RESOLVED that the Conference of the Delegates of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure to section 1018.5 read as follows:

- 1 § 1018.5
- 2 It is the intent of the Legislature to provide a uniform process and market-based
- 3 standards for court awards of attorney fees when a party has a legal right as prevailing party

4 to recover attorney fees from an opposing party. To the extent this section is inconsistent
5 with precedent that applies to awards of attorney fees to prevailing parties, the Legislature
6 has considered that precedent and decided to replace it with the process and standards for
7 both trial and appellate courts set forth in this section. It is also the intent of the Legislature
8 that this section shall not apply when the basis for an award of attorney fees is any ground
9 other than entitlement as a prevailing party to recover attorney fees from an opposing party.
10 Code of Civil Procedure section 1021.5 and Family Code sections 274, 916, 1101, 2030,
11 2031, 2107, 2255, 3557, 3652, 4002, 4063, 4303, 4403, 4919, 4927, 17512, and 17803
12 nonexclusively illustrate grounds for court awards of attorney fees other than entitlement as a
13 prevailing party. Precedent displaced by this section in prevailing party situations is not
14 disapproved to the extent it applies when attorney fees are awarded for a different reason.

15 (a) This section applies to attorney fees awarded pursuant to contract or statute by a
16 court to a party who is entitled to the award on account of being a prevailing party in an
17 action, in a special proceeding, or on a motion. It also applies when the prevailing party is
18 entitled to attorney fees subject to the court's discretion to deny them and when the court in
19 its discretion may award attorney fees to the prevailing party. It does not apply to sanctions
20 or penalties that may be measured in whole or in part by attorney fees. It does not apply
21 when a court orders attorney fee shifting on a ground other than prevailing party status. It
22 does not apply to attorney fees as damages.

23 (b) To set the amount of an award of attorney fees, the court must determine a
24 lodestar and an adjustment.

25 (1) A lodestar is an amount determined by the court to be within the range of fees that
26 a reasonable client would pay for the relevant legal services in the relevant market. Legal
27 services includes services of paralegals and other support personnel to the extent a
28 reasonable client would pay for them in the relevant market. "Timekeeper" in this section
29 includes attorneys and support personnel. If the amount the prevailing party has agreed in
30 writing to pay for the legal services is equal to or less than what the court determines to be
31 reasonable under subdivision (c), the court must determine that the agreed amount is the
32 lodestar.

33 (2) An adjustment increases or reduces the lodestar. There is a rebuttable
34 presumption going to the burden of proof that the adjustment should be zero. The adjustment
35 must be zero if no party requests an adjustment.

36 (3) If the adjustment is zero, the award must be the lodestar.

37 (c) The court must determine the lodestar by finding: the actual hourly rate charged
38 or otherwise recorded at the time the services were performed by each timekeeper who
39 performed legal services for which the award is requested; whether the actual hourly rate for
40 each timekeeper is within the range of rates reasonably charged at the time the services were
41 performed for comparable work by timekeepers in the relevant market; the actual amount of
42 time correctly recorded by each timekeeper for the legal services for which the award is
43 requested; and whether the actual amount of time is reasonable for the legal services
44 performed.

45 (1) In its sound discretion in the particular case, the court may refer lodestar
46 determination for report and recommendation pursuant to subdivision (a) of section 639, but
47 on timely request by any party after such a reference the court must make all findings de
48 novo.

49 (2) If requested, the court must award interest at the prejudgment rate on that portion
50 of the lodestar actually paid by the prevailing party, from the date of each payment until the
51 date of entry of the award. If awarded under this subdivision, interest must be included in the
52 lodestar for all further purposes under this section.

53 (3) The lodestar is a factual finding, and if it is reviewed on appeal, review must be
54 under the substantial evidence standard. There shall be no presumption that a judge of the
55 superior court has any inherent or personal knowledge of the reasonableness of the lodestar
56 or its elements.

57 (d) If any party requests an adjustment, the court may adjust the lodestar upward or
58 downward.

59 (1) If requested, the court must consider in deciding whether to grant an adjustment
60 any contingent risk of not recovering a fee incurred by any of the prevailing party's attorneys
61 and any agreed or inherent delay in recovering a fee incurred by any of the prevailing party's
62 attorneys. The court may also consider any other circumstances that make it just and
63 reasonable to increase or reduce the lodestar.

64 (2) Interest must not be awarded on the difference between the lodestar and an
65 upwardly adjusted award, but the court may consider the time value of money in setting the
66 adjustment.

67 (3) An adjustment is a matter of the superior court's discretion and if it is reviewed on
68 appeal, review must be under the abuse of discretion standard. The Court of Appeal must
69 base its review on the record and the superior court's memorandum decision if one is
70 requested under subdivision (f) and must not presume that a judge of the superior court has
71 any inherent or personal knowledge of the reasonableness of attorney fees in the relevant
72 market.

73 (e) The applicant must present admissible evidence sufficient for the court to make
74 the findings required by subdivision (c) and to support any requested adjustment. There is a
75 rebuttable presumption going to the burden of proof that the relevant market is the county in
76 which the court is situated. A party opposing an award of attorney fees other than as a matter
77 of law must do so with admissible evidence to support each ground of opposition. Any direct
78 or indirect interest of an attorney in a fee award shall not be a ground for excluding that
79 attorney's opinion evidence, providing that the evidence would otherwise be admissible, but
80 may be taken into account in the weight given to the evidence.

81 (f) If the prevailing party requests a total award exceeding \$25,000, any party may
82 request a memorandum decision at any time before the court declares the attorney fee matter
83 submitted. If a party requests a memorandum decision, the court must provide a statement
84 sufficient for an appellate court to understand: the basis for the court's findings under
85 subdivision (c); the factors the court considered in making any decision concerning an
86 adjustment; how the court applied the factors it considered in making its decision concerning
87 an adjustment. If a party requests a memorandum decision, the court must also make rulings
88 either on the record or in the decision on each evidentiary objection made by each party.
89 Failure to decide an evidentiary objection shall not be a ground to reverse or remand the
90 award, but an appellate court must deem that each unresolved objection was resolved (i) in
91 favor of receiving evidence that supports any finding; (ii) to exclude evidence on a point as to
92 which the court made no finding; and (iii) to exclude evidence contrary to any finding.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS:

Existing Law: Case law provides the standards and process for setting the amount of attorney fees to be awarded to a prevailing party entitled to fees by statute or contract. Only the timing of making a request for attorney fees is covered by statute or rule. (See Code Civ. Proc., § 1033.5, subd. (a)(10); Cal. Rules of Court, rules 3.1700, 3.1702, 8.278(d)(2).)

This Resolution: Codifies the law of prevailing party attorney fees and makes some important changes in that law. The most important matter of agreement between existing case law and the resolution is in adopting the lodestar plus-or-minus-adjustment method of valuation. The most important changes are these: (1) the overall approach to determining reasonableness of attorney fees is anchored in the market in which attorneys actually compete to the perform services that the court is evaluating; (2) as part of adopting a market-based approach, the “experienced trial judge” theory of wide discretion is intentionally and explicitly discarded; (3) on timely request when a fee claim exceeds \$25,000, the judge must issue a memorandum decision explaining the basis for lodestar findings and how the court applied adjustment criteria.

The Problem: Huge sums are shifted under prevailing party statutes and by contract. Attorney fees may exceed what might otherwise have been the value of a case; indeed, this is often true of anti-SLAPP fees. The jurisprudence of attorney fees makes no sense, resulting in windfalls to some claimants and unjust deprivations to others. The first problem is the need for clarity and order.

The second problem is that core precedential standards internally conflict. While the California Supreme Court has definitively adopted the lodestar method, it has preserved the ancient principle that the experienced trial judge is the best assessor of the value of attorney fees and therefore must be given wide discretion in fixing attorney fees. Lodestar embodies objective market analysis. “Experienced trial judge” is gestalt and subjectivity. It is also nuts; most superior court judges know little or nothing about fees in the competitive civil practice market. And there is no other civil process in which we trust trial judges to be inquisitors rather than adjudicators.

The third problem is the lack of meaningful appellate review. When substantial value is at stake in a trial, the parties can demand a statement of decision. (Code Civ. Proc., § 632.) In addition to making the trial judge think about the law and integrate factual findings with legal criteria, the statement of decision exposes gaps and findings made without supporting evidence. But fixing the amount of attorney fees is a posttrial motion process, so no statement of decision is required. Several cases encourage judges to make a record of how they exercise their discretion. But others explicitly say it is not error to refuse to do so.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Charles A. Bird; Luce, Forward, Hamilton & Scripps, LLP; 600 West Broadway, Suite 2600; San Diego, California, 92101. (619) 699-2406 voice, (619) 645-5360 fax, cbird@luce.com

RESPONSIBLE FLOOR DELEGATE: Charles A. Bird