

# Think Ahead About An Attorney's Fee Award

By: Ken Moscarel, Esq. and Gregory Bergman, Esq.

Attorney fee litigation is often viewed as nothing more than a "backwater" in the legal profession, a very narrow niche. When someone says "attorney fee litigation," it immediately conjures up images of angry clients and their former attorneys suing one another over disputed fees in a nasty battle. Actually, that image is outdated now.

Today, the majority of attorney fee litigation has graduated beyond the traditional two-way battles between attorneys and their clients. Instead, attorney fee litigation today more often involves the winning, or "prevailing," party in a civil lawsuit trying to recover its legal fees from the other, losing party. It's called "fee-shifting," and it happens every day in California courts under an ever-increasing number of state statutes, federal statutes, and everyday business contracts that provide for recovery of attorney's fees to the prevailing party.

Usually hundreds of thousands or even millions of dollars in legal fees are at stake in each individual case. Yet many civil litigators do not have much first-hand experience with advancing successful attorney fee applications in court, or effectively opposing another party's fee request. It's as if the post-trial attorney fee phase is relegated to being an afterthought, dwarfed by the stress, intensive energy, and exertion involved in the trial itself. However, it is vital that civil litigators understand the substantive and procedural law that separates the winners from the losers in attorney fee litigation in fee-shifting cases.

Consider this analogy for a moment. Every experienced plaintiff's attorney asks themselves this question before they file a lawsuit: "Does the defendant have an insurance policy to pay for a settlement or judgment in my client's favor?" Likewise, every defense attorney asks themselves, "Does my client have an insurance policy to pay my legal fees for defending them?"

Just as smart civil litigators ask about insurance coverage at the beginning of a lawsuit, so, too, should smart litigators be asking themselves from day one if either their client, or their opponent, might be entitled under law to an attorney fee award at the end of the case. If so, litigators need to start planning toward that fee award from day one, not waiting until the trial is over. They need to plot



the right strategy and tactics as the case progresses in order to set up the result that they ultimately want on the fee issue. Waiting until the end of the case to do that is too late.

First, litigators need to understand the issue of "entitlement" to attorney's fees. From the very beginning of the case, they should remain mindful of whether the prevailing party in their lawsuit, if there is one, may have a legal right to recover their attorney's fees by way of contract or statute. There may be competing claims about who is the prevailing party at trial for the court or arbitrator to decide. Each basis of entitlement

to attorney's fees has its own set of required proofs, which a litigator must be prepared to present in order to maximize the attorney fee recovery if their client ends up being the prevailing party at trial.

Once entitlement to attorney's fees is established by a judge or arbitrator, then the focus will shift to the "reasonableness" of the amount of fees being claimed. There are different mechanical approaches that federal and state courts use to arrive at an attorney fee award. The most common formula that courts use today is the "lodestar" method of multiplying a reasonable, prevailing hourly rate for the working attorneys by a reasonable number of hours billed for the legal work. However, there may also be an enhancement, or "multiplier," on top of the lodestar fee award that the prevailing party can seek, which can greatly boost the ultimate dollar amount of the fee award.

Today, civil litigators have a real stake in making certain that they realize how to recover attorney's fees if their client ends up being the prevailing party at trial. The availability of attorney's fees in a case may make the difference in whether or not to even pursue litigation against an opponent. Just as with insurance coverage, a fee-shifting case becomes potentially more attractive for any litigator who might not have a deep-pocketed client. Since that might describe the majority of clients that some law firms have, an attorney fee award is one way that a law firm can be rewarded for success.

---

*Ken Moscarel, Esq. is an attorney fee expert witness in Pasadena who has trained retired judges ([www.FeeDispute.com](http://www.FeeDispute.com)). Gregory Bergman, Esq. is a partner at Bergman & Dacey, a litigation firm in Westwood. One of Greg's and his firm's specialties is attorney fee litigation ([www.BergmanDacey.com](http://www.BergmanDacey.com)).*