CALIFORNIA ATTORNEY'S FEES

CONTINUING LEGAL EDUCATION

June 20, 2008

NALFA SEMINAR ON JUNE 19, 2008 HAS HIGHLIGHTS ON MANY AREAS OF INTEREST IN THE ATTORNEY'S FEES ARENA

Los Angeles Seminar Provides Valuable Pointers, Which We Summarize Below.

On June 19, 2008, the National Association of Legal Fee Analysis (NALFA) hosted a Los Angeles attorney fee program, entitled "It Pays To Be Reasonable." Marc Alexander and Mike Hensley attended and were impressed by both the speakers and topics, not to mention the setting: it was held in the renovated Bullock's Wilshire (a beautiful architectural specimen now the home to Southwestern Law School). What follows is our summary of highlights from the program.

First Session—"California Fee-Shifting Provisions & Prevailing Party Standards"

Speakers were Gregory M. Bergman, John P. Dacey, and Ken Moscaret.

- The five keys to winning attorney fee litigation – consideration of these issues: (1) entitlement (contractual, statutory, sanction or damage grants); (2) reasonableness (focuses on the lodestar); (3) discretion; (4) apportionment versus inextricably intertwined; and (5) pragmatic concerns and lessons learned – do not inflate fees (this is overreaching, giving the trial court discretion to disregard fee claim altogether or severely reduce the claim) and take a credible position (reduce fees, apportion out work for fees that are not awardable, and submit good fee substantiation).
- Ken Moscaret mentioned that federal courts usually adopt a forum rule for determining the lodestar hourly rate (the venue controls), whereas California—as *PCLM* shows—may follow the home rule, allowing a San Francisco attorney to charge S.F. hourly rates even though the litigation was venued in Los Angeles.
- Reasonableness of hours billed will be judged by looking primarily at these factors: (1) case staffing—number of personnel on cases; (2) whether there was an appropriate mix of attorneys (senior versus junior); (3) whether work was reasonably delegated to less expensive, but competent billers; (4) whether there was duplication of effort; (5) whether work reflected junior attorney training time; (6) whether work included improper secretarial or overhead charges; and (7) whether the time entries were adequate (i.e., no block billing).
- John Dacey indicated that a trial judge most frequently uses the "asshole factor" in using his discretion to award fees—if the other side drove the work up, more fees will be awarded; however, if the plaintiff did shoddy work or was not very credible, expect lower or no fees.
- Mr. Dacey indicated that a judge is likely to award costs for materials or information that he sees or that he sees are used during the litigation.
- Ken Moscaret stated that the party seeking apportionment has the burden, and generally must do the apportionment for the court.

Second Session – "Attorney Fee Recovery in Commercial Litigation"

Speakers were Greg Bergman and John Dacey.

- Mr. Dacey stressed that litigants in fee motions should make sure the trial court discusses, on the record, the factors he/she used in deciding why a claimant was entitled to fees or why

the court did not award fees or reduced them.

Third Session – "Attorney Fees in Class Action Litigation"

Speakers were Aashish Y. Desai, John N. Quisenberry, and James C. Martin.

- John C. Martin expressed the view that class action attorney's fees are, more than fees claimed in other areas of the law, subject to a very transparent "fishbowl" type of review. This greater degree of judicial scrutiny comes about because (1) the press has painted class action attorneys as lining their pockets to the detriment of the class; (2) there are objectors who often time show up (with standing to appeal their complaints); and (3) only the court can protect the class on the fee issue once class notice is disseminated.
- Aashish Y. Desai expressed the opinion that it is better to be in federal court rather than state court as far as recovering class action attorney's fees. He believes that federal courts are better on reversion issues and awarding a percentage of the entire settlement fund. In federal court, he noted that the percentage of recovery approach is the Ninth Circuit benchmark, with the lodestar approach being a cross-check on reasonableness.
- John N. Quisenberry stated that plaintiff attorneys usually run into trouble recovering the fees they want where (1) the benefit to the class is small; (2) the benefit to the class is large but counsel did not put many hours or expenses into the matter; or (3) the court believes the fee settlement reached between plaintiffs and defendants was too cozy—e.g., cheap settlement, reversion of unclaimed settlement fund amounts, and payment of all plaintiffs' large attorney's fees even though little time was spent.
- Mr. Martin synopsized the three standards of appellate review used for fee awards: (1) for factual disputes, clear error in federal courts and substantial evidence in state courts; (2) *de novo* for applying the legal standards when exercising discretion; and (3) abuse of discretion, which displays the trial court's reasoning on the facts and the law.
- Mr. Martin then stated what he believed to be the four factors used to review lower court fee awards: (1) the legal basis for the award (the authorization and whether it fits the case); (2) methodology used in calculating the fee award (which is the area where there is greatest scrutiny); (3) factual and legal support for the award; and (4) the reasoning the lower court used to award or deny fees.
- Mr. Desai provided his synopsis of the lodestar and multipliers awarded by federal and state courts. For consumer state cases, he has seen 3 to 5 multipliers, versus 1 to 3 multipliers in federal consumer case counterparts (due, he believes, to the U.S. Supreme Court's *Day* decision, where Justice Scalia discounted looking at the contingency risk factor). Mr. Martin added that if plaintiffs' counsel is claiming a multiplier north of 3 in either federal or state court, that counsel better be prepared to show exceptional results and exceptional services.
- Even with the 25% Ninth Circuit percentage-of-recovery benchmark, Mr. Martin suggested that plaintiffs' counsel should still show the court the reasonableness of this sought-after percentage.
- Mr. Martin then advised on how plaintiff fee claimants can prove the reasonableness of hourly rates being claimed—(1) declarations from other attorneys in the community regarding hourly rates; (2) fees awarded in similar cases (from jury verdict tally services); (3) declarations from experienced retired judges; (4) mediator declarations describing the settlement efforts (but not the substance); and (5) results from national and local surveys.
- Mr. Martin also suggested that the plaintiffs' counsel discuss the reasonableness standard and factors in their moving papers so that the trial court can "borrow" that discussion. Plus,

he suggested that the claimant provide a proposed order with findings. Last, he strongly recommended that the claimant create a record of the trial court's reasoning for the fee he/she awarded or did not award.

Fourth Session – "Attorneys Fees & Legal Billing: A Practical Guide"

Speakers were Joel Mark and Gerald F. Phillips.

- Mr. Mark provided a very comprehensive roundup of recent California ethics opinions and cases, including the *Fletcher v. Davis* opinion that we reviewed on our May 26, 2008 post.
- Messrs. Mark and Phillips both indicated that an attorney committing a serious ethical breach or misconduct might forfeit even quantum meruit recovery in the right circumstances.
- Mr. Mark observed that the ethical screen is a fiction that will not work in state cases, citing *Cho v. Superior Court.*
- Mr. Phillips had some great pithy observations – "It's not hourly billing, but the abuses of it that causes problems" and "dishonest billing is the perfect crime."
- Mr. Phillips cited these as the problem areas to avoid: (1) block billing (federal courts do not tolerate, and state courts are getting more intolerant); (2) overstaffing; (3) minimum number of hour targets for partners or employees; and (4) padding bills. He believes that (3) creates an incentive to not bill clients fairly for actual time worked.
- A lawyer in the audience commented that after auditing billions of dollars in attorney bills during his career, he found overstaffing to be the biggest problem, even more so than bill padding.

Fifth Session – "Attorney Fees & Insurance Coverage Litigation"

Speakers were John N. Quisenberry and Ken Moscaret.

- Mr. Quisenberry provided a tutorial on *Brandt,* where the California Supeme Court only allowed fee recovery for work performed in obtaining contractual benefits under the insurance policy (not allowing fees for tort recovery or punitive damage recovery).
- Mr. Quisenberry noted that, in *Cassim,* 33 Cal.App.4th 780, the Second District has made it clear that this DCA want to see an allocation of the hours spent on the contract benefits in relation to total hours in order to award *Brandt* fees.
- Mr. Quisenberry indicated *Brandt* allows the jury to consider the amount of fees as damages, and the defense often uses this as a means of distracting jurors' focus on damning liability facts.
- Mr. Moscaret discussed *Cumis* arbitrations, which are binding and nonappelable. He discussed four issues that come up frequently in these arbitrations:
  (a) Rate cap—the hourly rate paid to *Cumis* counsel can be no more than the hourly rate paid to panel counsel for defending like cases. He noted that the burden of proof is on the carrier, and that many carriers fail to come forward with competent evidence. (He also suggested that the noncarrier interests in the arbitration pick an arbitrator who will enforce procedural and burden of proof rules.)
  (b) Hours billed—whether the work related to covered versus uncovered claims, with the carrier having to make a *Buss* allocation if it challenges the work on this basis.

(c) Fees spent on cross-complaint or third-party complaint—
Claimant needs to show the offensive actions
had defensive purposes or involved common law/facts.
d) Carrier billing guidelines—arbitrator must decide if the
guidelines are enforceable. Usually, if
guidelines are sent later into the case, they are
only enforced prospectively.
The guidelines will not be enforced where they unnecessarily
shackle the *Cumis* attorney's decisionmaking or discretion to
litigate effectively. Arbitrators usually rule that
carriers cannot unreasonably withhold consent to
attorney actions under the guidelines.

- Mr. Moscaret ended by noting that carriers usually settle most of the *Cumis* arbitrations well before adjudication.

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