

# Special Feature

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## Petitioning for attorneys' fees in a contract dispute



By Roger T. Manwaring

"I don't believe it," the lawyer told his colleague. "Remember I lost that case defending the video store against a collection action by the company that sold the store defective shelving? The rental company was awarded \$60,000 on its claim of \$100,000, but just filed a motion seeking

### Litigation

\$150,000 in attorneys' fees under a provision in the sale contract awarding the prevailing party "reasonable attorneys' fees."

"Doesn't sound reasonable to me," said his colleague.

A provision awarding reasonable attorneys' fees to the victor in litigation between contracting parties is commonplace in many types of agreements, from real estate leases to sales of goods to loan guaranties. But how does a court decide what fee is "reasonable"? How can an attorney opposing a fee petition demonstrate that the fees claimed are excessive?

Conversely, what steps can a lawyer take, while handling a case, in order to make it more likely that his client's later petition for fees will be allowed in full?

These questions are important because, increasingly in recent years, trial of the merits of a contract case is followed by equally hard-fought litigation over a petition for attorneys' fees.

#### The petitioner bears the burden of proof

While litigants are generally required to pay their own attorneys' fees, a court will enforce a contractual fee-shifting provision. However, even where the contract requires payment of "all" fees incurred by the winner, the court will award only "reasonable" fees.

The burden is on the petitioner to convince the court that the fees are reasonable. In that regard, it is not enough for the petitioner to submit even an uncontroverted affidavit of counsel stating that the fees sought are reasonable. The court must be convinced.

Whether a fee is reasonable under the circumstances depends on both the reasonableness of the hourly rate charged and the reasonableness of the time spent on the work performed. This article focuses on the latter, assuming, for the sake of argument, that the hourly rate is reasonable.

#### The court as billing partner

A court will carefully scrutinize a fee petition. In doing so, the court will take into account that while the prevailing party is entitled to effective and competitive representation by counsel, the losing party

should not have to pay for perfection.

A court reviewing a fee application "need not feel handcuffed by counsel's submission of time records, no matter how elaborate." *Stanford v. President and Fellows of Harvard College*, 2001 WL 716834, \* 2 (Mass. Super. March 21, 2001), quoting *U.S. v. M.D.C.*, 847 F.2d 12, 18 (1st Cir. 1988).

The *M.D.C.* court also provided the following guidance:

"... [T]he law firm's bill need not be swallowed whole by the client's litigation adversary just because it is the law firm's bill. That the firm is, as here, highly reputable and well regarded, does not change the equation. The loser cannot be left at the mercy of the winner's lawyers, bound to pay not a "reasonable" fee, but a fee on the order of what the victor — for whatever reasons — might be willing to tolerate." 847 F.2d at 17.

#### Courts consider multiple factors

In determining if the fees and costs sought are reasonable, and thus recoverable, a court enforcing a contractual fee-shifting agreement will consider the factors identified in

### A court will take into account the zealotry with which the opposing party pursued the case, reasoning that hard-fought litigation is naturally more expensive.

#### *Cummings v. National Shawmut Bank:*

"[T]he ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of property affected by controversy, and the results secured." 284 Mass. 563, 569 (1933).

Where the court concludes that the time invested in a case, or part of it, was not reasonable, it need not review and disallow individual time entries, but instead may consider the bill as a whole and apply an across-the-board percentage reduction to the fees claimed.

#### When will a court reduce or deny the fees sought?

While fee petitions are highly fact specific, the *Cummings* factors, and rulings in past cases, make it possible to identify a number of circumstances that may lead a court to reduce or deny a fee award.

- *Indications of possible overstaffing.* The involvement of many attorneys and multiple other staff in a case makes waste and duplication more likely and should be closely examined when reviewing a fee petition.

- *The amount of fees sought does not bear a rea-*

*sonable relation to the amount in controversy:* A court will look closely at a petition seeking fees in excess of the amount in controversy. The *Cummings* factors suggest such a focus by including "the amount and importance of the matter involved" and "the amount of money or the value of property affected by the controversy."

- *The result obtained was significantly different from that sought.* The overall success obtained via the lawyer's efforts is a factor that a court must consider. This does not mean that the fee and the damages recovered are to be compared, or must be proportional to one another. Rather, the recovery must be compared to what was sought.

- *The case was not factually or legally complex.* Where the issues in controversy depend primarily upon an undisputed documentary record and/or a limited number of witnesses, a court may conclude that it is not complex enough to justify the level of effort expended and attorneys' fees sought.

- *The tenacity of opposition counsel.* A court will take into account the zealotry with which the opposing party pursued the case, reason-

and *City of Greeley, Colorado v. Goodell Brothers, Inc.*, 1987 WL 13509, \*5 (D. Colo. July 7, 1987) (holding that 66 hours spent on two motions for summary judgment in antitrust case were excessive).

The court also is likely to raise an eyebrow if the time spent preparing for a hearing is vastly in excess of the length of the hearing itself. See *Microsoft Corporation v. United Computer Resources of New Jersey, Inc.*, 216 F.Supp.2d 383, 393 (D.N.J. 2002) (holding it excessive for attorneys to spend 17 times as long preparing for a hearing as in it, citing caselaw holding a multiple of three also excessive, and awarding fees only for preparation twice the length of the hearing).

- *Vague billing records.* A party seeking an award of fees or costs must submit billing records sufficiently detailed to enable the court to determine whether the fee or cost is reasonable. Because the petitioner bears the burden of proving that the requested fees are reasonable, any ambiguities in the billing records are to be interpreted against the petitioner.

Courts are especially critical of the practice known as "lumping" or "block billing," where more than one task is described in a single time entry, without a breakdown of the time spent on each task.

In addition to block billing, entries that are vague may justify a reduction in the fee award. For example, billing entries for telephone calls to, conferences with, letters to, or preparation or review of unidentified people or documents, or with respect to time entries for which there is no description at all, are unacceptable.

Entries for legal research that fail to describe the purpose of the research or the issues to which it relates are also deficient. A number of courts have held that background research into an area of law is not compensable.

- *Costs may be non-recoverable overhead or inflated.* The costs sought under a contractual provision may also be subject to attack. Arguably, charges for copies, telephone calls, messenger service, and expedited delivery, faxes, postage and travel constitute law firm overhead and are not recoverable at all.

Even if such items can be recovered upon proper proof, the petitioner must still provide sufficient information to convince the court that the expenditures were both necessary and reasonable.

#### What should attorneys do?

Attorneys should keep in mind from the beginning of a case that they may later have to justify work done and fees incurred. That means the attorney should institute, from the very outset, billing practices that produce high quality, informative bills that explain in detail the work performed.

In addition, the attorney should discuss with the client the level of staffing, resources and effort to be invested in the case. Counsel should make clear that while the client may be willing to pay top dollar for perfection, not all of the fees incurred in such a Herculean effort may be recoverable from the opposing party.

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