THE ENFORCER

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Attorney Fees and the Evidentiary Hearing

When are Attorney Fees Awarded?

When is a party or his attorney required to pay for the adversary's attorney fees? At first glance, you may recall the general American rule that parties pay for their own attorney fees, and sleep well tonight. Not so fast. The American rule states attorney fees are not recoverable unless there is a common-law exception, statute, court rule, or a contract that expressly allows for fee recovery.[1] In fact, there are several contexts in which attorney fees may be awarded: refusing case evaluation awards that should have been accepted,[2] refusing to follow court orders,[3] filing an action or defense that is frivolous,[4] or signing documents without making reasonable inquiries to discover if it is well grounded in fact.[5] Ultimately, there is no particular statute that defines every situation when attorney fees can be awarded. Rather, there are a number of "scattered" statutes, court rules, and case law that will explicitly allow for attorney fees to be awarded.

How Does the Court Determine if the Fee Application is Reasonable?

If there is a legitimate claim for attorney fees, then the burden is on the fee applicant to produce satisfactory evidence that the fee and number of hours expended are reasonable.[6] The applicant must submit detailed billing reports, and may use affidavits, testimony, and reliable surveys (e.g. Michigan Bar Journal) to prove the reasonableness of his fees.[7]

The first question is "what is a reasonable attorney fee?" It is clear that there is no precise formula, and each case must be considered under the totality of the circumstances. The bottom-line is trial courts have broad discretion in awarding reasonable attorney fees. However, in an attempt to increase the consistency of reasonable attorney fee awards, the Michigan Supreme Court has specified a basic framework to direct judges in their evaluations. Essentially, the Court requires the lower court judges to establish a "baseline number" and then to adjust it up or down depending on several considerations.[8] The baseline number is the product of the "market rate" (average rate for attorneys in a particular locality) multiplied by the number of reasonable hours expended. This baseline number will be adjusted upon considering what have been termed the "Wood factors," MRPC 1.5(a) factors, and "any other relevant factor."[9]

What are these factors? The Wood factors include: attorney's experience, time involved, amount in question, results achieved, difficulty of the case, expenses incurred, and the nature of the professional relationship.[10] Many of the MRPC factors overlap the Wood factors but add requisite skill needed, time limitations imposed by client, and whether the fee is fixed or contingent.[11] The court may also consider any other factor it deems to be relevant, but should make those considerations explicit in their decision. In practice, the court will be required to determine the initial baseline number, but will have a large amount of discretion in moving that figure upward or downward from the long list of factors it may consider.

Is the Judge Required to Hold an Evidentiary Hearing?

When attorney fees are awarded, there will likely be an uproar from the losing party who will have to pay those fees that the rate is unreasonably high or the hours are unreasonably long. If the losing party contests the reasonableness of the fees, the court must inquire into the services the attorney actually rendered and make a finding whether the attorney fees requested are reasonable.[12]

Is the judge required to hold an evidentiary hearing to decide the reasonableness of attorney fees? The general rule is when the fee is contested, a trial court should normally hold an evidentiary hearing, but is not required to when the court has sufficient evidence to determine the amount of attorney fees and fully explains the reasons for the decision.[13] If the trial judge has access to detailed billing reports that specify work performed for each task, affidavits of counsel,

and/or trial judge is very familiar with the history of the case, then this probably will be sufficient evidence to bypass an evidentiary hearing.

In *John J. Fannon Co. v Fannon Product, LLC*, 269 MichApp 162, 171 (2005), the Court of Appeals did not require an evidentiary hearing where trial court judge was "very familiar" with the case's history and received detailed billing reports. Similarly, in *46th Circuit Trial Court v Crawford County*, 266 MichApp 150 (2005) (overturned on other grounds) the Court of Appeals did not require an evidentiary hearing where trial court obtained detailed billing reports and affidavits of counsel. In contrast, in *Petterman v Haverhill Farms, Inc.*, 125, 132 MichApp 30 (1983), Court of Appeals did require an evidentiary hearing where the trial court received a simple bill of costs only, and trial judge ruled the costs to be "prima facie accurate."

Conclusion

On a motion for attorney fees, an evidentiary hearing may be required if the court does not have sufficient evidence to make a determination as to the nature of the services performed and the reasonableness of those services. If the trial court has a long history with the case and is already in possession of detailed billing reports and affidavits, then an evidentiary hearing may not be necessary. In that case, the judge will already be in a position to determine whether the fees are reasonable. If there is no evidentiary hearing, you may consider requesting the judge to articulate his reasoning to act as a safeguard.

Endnotes

1. *Dessart v Burak,* 470 Mich 37, 42 (2004)
2. MCL 600.4969
3. MCR 3.206
4. MCL 600.2591
5. MCR 2.114
6. *Smith v Khouri*, 481 Mich 519, 531 (2008); MCR 3.206(C)(2)
7. *Smith*, at 530-31
8. *Smith*, at 530
9. *Wood v. DAIIE,* 413 Mich 573, 588 (1982)
10. *Wood*, at 588
11. MRPC 1.5(a)
12. *Petterman v Haverhill Farms, Inc.,* 125 MichApp 30 (1983); *Howard v Canteen Corp.,* 192 MichApp 427, 439 (1992)
13. *Van Elsander v Thomas Sebold & Assocs., Inc.,* 2008 WL 5077011, *19 (MichApp Dec. 2, 2008) (quoting *Head v Phillips Camper Sales & Rental, Inc.,* 234 MichApp 94 (1999))