

California Attorney Fee Orders:

When to Appeal, Defend or Settle

By Audra Ibarra

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“**Y**ou’ve got to know when to hold ’em, know when to fold ’em, know when to walk away and know when to run,” Kenny Rogers sang in “The Gambler.” Of course, an attorney fee appeal is

not gambling per se, but it is high-stakes. To maximize reward and minimize risk, you need to know when to appeal, defend, or settle.

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The answer, of course, depends largely on your chances of reversal. There is statistically an 18% chance of reversal, but your specific chances depend on many factors, including

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the facts, law, and standard of review. (Judicial Council of California, 2013 Court Statistics Report, Courts of Appeal, Figure 25.) While relevant facts and applicable law are case-specific, it is helpful to know which standard of review increases the chances of

reversal and which issues have been reversed under that standard.

In general, chances of reversal increase if an issue is reviewed *de novo* (and not for abuse of discretion or substantial evidence). The *de novo* or independent standard applies to issues of law. Under this standard, appellate courts give no deference to a trial court’s ruling. (*Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799.) Since 2000, appellate courts have reversed attorney fee orders in published opinions on *de novo* review of issues in six main categories: (1) jurisdiction; (2) entitlement based on undisputed facts; (3) statutory criteria; (4) application of the private attorney general statute to a published appellate opinion; (5) effect of an attorney fee clause on a third party; and (6) sufficiency of third-party interest to support intervention.

— Jurisdiction —

Did the trial court have jurisdiction to hear a fees motion? Jurisdiction is a classic issue for *de novo* review and has been the ground for a reversal. In *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 609, environmental groups challenged the county’s approval of a development project. The trial court granted relief on only one of three issues raised by the groups, and both sides appealed. The environmental groups moved for attorney fees under the private attorney general statute, and the trial court granted the motion but awarded a reduced amount of fees due to the groups’ limited success. (Code Civ. Proc., § 1021.5.) Both sides appealed the fees order. After the court of appeal denied the parties’ stipulation to stay the fees appeal pending resolution of the merits appeal, the parties stipulated to dismiss their fees appeals. When the court of appeal affirmed and modified the judgment on the merits in favor of the environmental groups, they moved for appellate fees and supplemental trial fees in at least the amount by which the award had previously been reduced. The trial court awarded appellate fees, but declined to

hear the motion on supplemental trial fees, reasoning that it lacked jurisdiction because the environmental groups had dismissed their appeal of the original trial fee award and that order was final.

‘*Did a published appellate opinion support a fee award under the private attorney general statute? Answers to this question are reviewed de novo and periodically result in reversal.*’

The court of appeal reversed and remanded for consideration of supplemental fees. The court held the issue of whether jurisdiction exists to hear a fees motion is subject to de novo review: “[t]he question of the trial court’s jurisdiction is a pure question of law subject to our independent review.” (188 Cal.App.4th at p. 611.) The court further held

“[a] motion for *supplemental* fees based on greater success on appeal does not challenge the original fee order and poses no jurisdictional impediment.” (*Id.* at p. 608 (italics in original).) The court explained a prevailing party does not have to appeal a fee order to seek supplemental fees after an appeal on the merits.

— **Entitlement on Undisputed Facts** —

Was the prevailing party entitled to attorney fees based on undisputed facts? Answers to this question are reviewed de novo and frequently form the basis for reversal.

The Department of Corporations sued a franchisor for violations of Franchise Investment Law in *People ex rel. Department of Corporations v. Speedee Oil Change Systems* (2007) 147 Cal.App.4th 424, 427. Franchisees intervened and asserted separate claims. The trial court entered judgment on the merits for the franchisor and awarded fees. After the court of appeal reversed the fees order, the franchisees moved for an award of fees for the appeal, which the trial court granted. The contract between the franchisees and franchisor included a clause authorizing an award to “the party in whose favor the ‘final judgment’ is entered.” (*Id.* at p. 426.) The trial court thought the court of appeal opinion reversing the franchisor’s attorney fee award was a “final judgment” within the meaning of the clause.

The court of appeal reversed in relevant part, holding that whether a party is entitled to fees on undisputed facts is subject to de novo review. (147 Cal.App.4th at p. 428.) The court further held although a prior appellate decision in a case reversing a fee order may be a judgment, it is not necessarily the “final judgment.” (*Id.* at p. 427.)

— **Statutory Criteria** —

What are the criteria for a fee award under a statute? Statutory interpretation is of course subject to de novo review and is regularly the reason for reversal.

In *Conservatorship of Whitley* (2010) 50

Cal.4th 1206, 1211, a woman served as conservator for her developmentally disabled adult brother. When the regional center decided to move the brother from a center where he had lived for over 40 years to a smaller facility, the sister objected, but the trial court affirmed. After the court of appeal reversed in a published opinion, the sister moved for attorney fees based on the private attorney general statute. (Code Civ. Proc., § 1021.5.) The trial court denied the motion, and the court of appeal affirmed on the ground the sister’s strong nonfinancial personal interest in the case disqualified her from recovering fees under the statute.

The Supreme Court reversed. The court held the issue of interpreting statutory criteria for a fee award is subject to de novo review: “de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.” (50 Cal.4th at p. 1213.) The Court further held the fact a party is subjectively motivated by nonfinancial personal concerns “does not disqualify her from section 1021.5 fees.” (*Id.* at p. 1226.) The Court explained “the purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms.” (*Id.* at p. 1211.)

**Application of Private
— Attorney General Statute —
to Published Opinion**

Did a published appellate opinion support a fee award under the private attorney general statute? Answers to this question are reviewed de novo and periodically result in reversal.

A county Democratic Central Committee removed one of its members from office in

Wilson v. San Luis Obispo County Democratic Central Committee (2011) 192 Cal. App.4th 918, 921. The former member petitioned for writ relief, seeking to compel the Committee to reinstate her and remove other members. The trial court denied the petition. After the court of appeal affirmed in a pub-

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lished opinion, the Committee moved for fees under the private attorney general statute. The trial court denied fees on the ground the former member’s litigation was not adverse to public interest.

The court of appeal affirmed the denial as to fees incurred by the Committee in defending against the former member's claim for reinstatement, but reversed the denial and remanded for fees incurred in defending against the claim to remove other members. The court held the issue of whether a pub-

former member's litigation was adverse to public interest to the extent it sought to remove members from the Committee and invalidate the Committee's bylaws authorizing their appointment. The court further found the Committee met all the criteria for awarding fees under the private attorney general statute. In particular, the Committee had enforced an important right affecting the public interest and conferred a significant benefit on a large class of persons by virtue of the prior published opinion.

‘The court of appeal reversed. Whether a third party has sufficient interest in an attorney fee award to support intervention is subject to de novo review.’

lished opinion may justify attorney fees under the private attorney general statute is subject to de novo review: “Where, as here, our published opinion provides the basis upon which attorney fees are sought, de novo or independent review is appropriate because we are in at least as good a position as the trial court to determine whether section 1021.5 fees should be awarded.” (192 Cal.App.4th at p. 924.) The court found the

— **Effect of Attorney Fee Clause on Third Party** —

How did an attorney fee clause in a contract affect a third party? Answers to this question are reviewed de novo and are often the ground for reversal.

In *Whiteside v. Tenet Healthcare Corporation* (2002) 101 Cal.App.4th 693, 698, a patient sued a hospital after it collected payment from both the patient's health insurance company and another insurer with whom the patient held a group health insurance policy. The trial court entered summary judgment for the hospital and awarded fees based on an attorney fee clause in a contract between the hospital and the patient's insurance company. The court of appeal reversed the fee award. The court held the issue of how an attorney fee clause affects a third party is subject to de novo review. (*Id.* at p. 707.) The court further held the fee provision did not support an award against the patient who was a nonsignatory to the contract.

— **Sufficiency of Third-Party Interest to Support Intervention** —

Did a third party have sufficient interest in an attorney fee motion to intervene? The answer to this question has been reviewed de novo and has been the basis for reversal.

A prior provider of waste management services for a town petitioned for writ relief, arguing the town had unlawfully entered into an interim contract with a successor provider



in *Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499, 1502. The trial court denied the petition, but the court of appeal reversed in a published opinion. When the earlier provider of waste management services would not authorize its attorneys to file a motion for fees, they moved to intervene to request fees under the private attorney gen-

interest in an award of attorney fees” to support permissive intervention. (*Id.* at p. 1502.) The court explained, “absent an agreement allocating fee awards to the clients, fees awarded...‘belong to the attorneys who labored to earn them.’” (*Id.* at p. 1502, quoting *Flannery v. Prentice* (2001) 26 Cal.4th 572, 575.)

An attorney fee appeal is high-risk, high-reward litigation for both sides. Knowing whether the court of appeal is likely to reverse minimizes that risk. If a trial court awards fees to a prevailing party and you are the losing party who made a good argument against the award on an issue that can be framed as subject to de novo review, you may want to appeal, given the better than average chances of reversal. This is especially so if the issue concerns jurisdiction or entitlement, ideally in one of the categories appellate courts have reversed on in the past: entitlement based on undisputed facts, statutory criteria, application of the private attorney general statute to a published appellate opinion, effect of an attorney fee clause on a third party, or sufficiency of third-party interest to support intervention. Alternatively, as the prevailing party in such a case, you may want to consider settling to maximize recovery of attorney fees.

Conversely, if a trial court denies fees and you are the prevailing party who made a good argument in favor of an award on an issue subject to de novo review, you may want to appeal because you will have better than average chances. But if you are the losing party in such a case, you may want to settle to minimize attorneys’ fees. Remember, when deciding whether to appeal, defend, or settle a case with an attorney fee order, “If you’re gonna play the game...you gotta learn to play it right.... Every gambler knows that the secret to survivin’ is knowin’ what to throw away and knowin’ what to keep.”

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eral statute. (Code Civ. Proc., §§ 387, 1021.5.) The trial court denied the motion on the ground the attorneys lacked standing to seek an award.

The court of appeal reversed. Whether a third party has sufficient interest in an attorney fee award to support intervention is subject to de novo review. (139 Cal.App.4th at p. 1505.) The court further held the attorneys had “standing to move for fees and sufficient