

Ninth Circuit Attorney Fee Awards & *De Novo* Review

By Audra Ibarra



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As attorneys, we care about these things. Our clients do, too. Attorney fees frequently exceed the damages in a case, and ensuring recovery, or limiting exposure, can be critical.

Most of us know the basic rules governing attorney fee awards in civil litigation. Under the English Rule, the loser in a civil case pays for the winner's fees. That rule is followed in England and most Western countries, other than the United States. The philosophy behind it is that a party is entitled to legal representation to prosecute or defend a claim and should not have to incur the cost if that claim or defense is proven valid. Proponents of the English Rule believe that because it

encourages meritorious claims and discourages frivolous ones, it ultimately reduces litigation.

By contrast, under the American Rule, each party pays for its own attorney fees regardless of the outcome, unless a specific statute or contract provides otherwise. The philosophy behind the American Rule is that parties should be free to prosecute or defend claims they perceive to be right and should not be discouraged by fear of potential liability for the opposing side's fees. Proponents of the rule believe that parties to a contract should be able to decide whether a fee-shifting provision would be beneficial to them and that the Legislature can put this in place where public policy requires it.

When federal district courts award or deny attorney fees, the courts of appeals most often apply the highly deferential abuse-of-discretion standard of review, which rarely results in reversals. But reviewing courts apply the more rigorous *de novo* standard of review to purely legal issues that can arise in decisions about fees.

Over the last few years, the Ninth Circuit has reversed and vacated attorney fee orders on *de novo* review of legal issues in five main categories: (1) prevailing party status; (2) attorney eligibility; (3) statutory and contractual authorization; (4) status or requirements; and (5) method of amount determination.

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— **Prevailing Party Status** —

The Ninth Circuit has applied a *de novo* standard of review and reversed attorney fee orders because it disagreed with the district court’s decision on prevailing party status. Most recently, in *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest* (9th Cir. 2010) 624 F.3d 1083, a nonprofit organization advocating on behalf of day laborers sued a city over the enforcement of restrictions on soliciting work on public sidewalks. (*Id.* at p. 1085.) After the parties settled, the nonprofit moved for attorney fees pursuant to the Civil Rights Attorney’s Fees Awards Act, and the district court denied the motion. (*Id.* at p. 1087; 42 U.S.C. § 1988(b).)

The Ninth Circuit reversed in relevant part. (*La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest, supra*, 624 F.3d at pp. 1085, 1090.) The court stated that it reviews “a district court’s determination regarding ‘prevailing party’ status *de novo*.” (*Id.* at p. 1089.) It noted that prevailing party status usually turns on the question of whether a judgment has materially altered the legal relationship of the parties. (*Ibid.*) And it explained that this question “is a legal one.” (*Ibid.*)

The court held that similar to a judgment that confers prevailing party status, a settlement agreement may confer such status when, as in this case, the agreement: (1) was judicially enforceable; (2) materially altered the legal relationship between the parties; and (3) provided actual relief on the merits of plaintiff’s claims. (*La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest, supra*, 624 F.3d at pp. 1089-90.)

The Ninth Circuit also reversed on the issue of prevailing party status in *Weissburg v. Lancaster School District* (9th Cir. 2010) 591 F.3d 1255 [finding status in case concerning Individuals with Disabilities Education Act], *Citizens for Better Forestry v. United States Department of Agriculture* (9th Cir. 2009) 567 F.3d 1128 [declining to find status in case concerning Equal Access to Justice Act], and *Echostar Satellite Corporation v.*

NDS Group PLC (9th Cir. Aug. 4, 2010, Nos. 09-55005, 09-55633) 2010 WL 3034603 [finding status in case concerning Racketeer Influenced and Corrupt Organizations Act].

— **Attorney Eligibility** —

Another area in which the Ninth Circuit has applied a *de novo* standard of review and reversed is where it disagreed with the district court’s decision on attorney eligibility for coverage by an award. Most recently, in *Rickley v. County of Los Angeles* (9th Cir. 2011) 654 F.3d 950, a woman sued a county for violating her rights to freedom of speech and equal protection. (*Id.* at p. 951.) After the parties settled, the woman moved pursuant to the Civil Rights Attorney’s Fees Awards Act to recover fees for her spouse, who was her lead attorney, and his co-counsel. (*Id.* at p. 952; 42 U.S.C. § 1988(b).) The district court denied the fees for the spouse, but granted them for co-counsel. (*Rickley v. County of Los Angeles, supra*, 654 F.3d at p. 952.)

The Ninth Circuit vacated and remanded the order as to the spouse. (*Rickley v. County of Los Angeles, supra*, 654 F.3d at p. 957.) It explained that although “[a]wards of attorney’s fees are generally reviewed for an abuse of discretion,” the court “only arrive[s] at discretionary review if [it is] satisfied that the correct legal standard was applied and that none of the district court’s findings of fact were clearly erroneous.” (*Ibid.*) By contrast, it reviews “questions of law *de novo*.” (*Id.* at p. 953.) The court held that the Civil Rights Attorney’s Fees Awards Act does not require “counsel to be independent and emotionally detached.” (*Id.* at p. 955.) Thus, the court concluded that under the Act, “a successful civil rights plaintiff may recover a reasonable attorney’s fee for legal services performed by her attorney-spouse.” (*Id.* at p. 951.)

The Ninth Circuit also reversed on the issue of attorney eligibility in *Weissburg v. Lancaster School District, supra*, 591 F.3d 1255 [finding grandmother eligible] and

Winterrowd v. American General Annuity Insurance Co. (9th Cir. 2009) 556 F.3d 815 [finding out-of-state attorney eligible].

— Statutory and Contractual Authorization —

Review of the district court’s finding of statutory or contractual authorization can also lead to *de novo* opinions and reversals. In *Hyde v. Midland Credit Management* (9th Cir. 2009) 567 F.3d 1137, a debtor brought an action against a debt collector for violations of the Fair Debt Collection Practices Act. (*Id.* at p. 1139; 15 U.S.C. § 1692k (a)(3).) After a bench trial, the district court returned a verdict in favor of the collector. (*Hyde v. Midland Credit Management, supra*, 567 F.3d at p. 1139.) The collector moved for attorney fees. (*Ibid.*) The district court granted the motion and found the debtor and his attorneys were jointly and severally liable for the award. (*Ibid.*) The Ninth Circuit reversed as to the attorneys. (*Id.* at pp. 1139, 1142.) The court noted that it reviews “*de novo* the legal question [of] whether attorney’s fees and costs may be awarded” under a statute. (*Id.* at p. 1139.) It held, on a matter of first impression, that the Fair Debt Collection Practices Act does not authorize a district court to order that an attorney (as opposed to a party) pay an attorney fee award. (*Id.* at pp. 1140-42; 15 U.S.C. § 1692k(a)(3).)

The Ninth Circuit also reversed on the issue of statutory or contractual authorization in *Oregon Natural Desert Association v. Locke* (9th Cir. 2009) 572 F.3d 610 [holding no retroactive authorization under Freedom of Information Act] and *SCIE LLC v. XL Reinsurance America, Inc.* (9th Cir. Sept. 27, 2010, Nos. 08-56502, 08-56537) 2010 WL 3825495 [finding no authorization under contract].

— Statutory Requirements —

The Ninth Circuit has also applied a *de novo* standard of review, and reversed and vacated attorney fee awards because it dis-

agreed with the district court’s interpretation of statutory requirements. Most recently, in *Fabbrini v. City of Dunsmuir* (9th Cir. 2011) 631 F.3d 1299, a city sued an individual for failure to sufficiently collateralize a municipal loan. (*Id.* at p. 1301.) The city voluntarily dismissed the lawsuit, and the individual filed a defamation claim and a section 1983 malicious prosecution claim against the city. (*Ibid.*; 42 U.S.C. § 1983.) The city moved to strike the defamation claim under California’s anti-SLAPP statute and to dismiss the malicious prosecution claim. (*Fabbrini v. City of Dunsmuir, supra*, 631 F.3d at p. 1301.) The district court granted the motion to strike, but denied the motion to dismiss. (*Ibid.*)

The court awarded attorney fees to the city on the basis of the successful anti-SLAPP motion and later granted summary judgment in favor of the city on the malicious prosecution claim. (*Fabbrini v. City of Dunsmuir, supra*, 631 F.3d at p. 1301.) The attorney fee award included fees not only for the successful anti-SLAPP motion, but also the unsuccessful motion to strike the malicious prosecution claim “to the extent that any of those hours were ‘inextricably intertwined’ with the anti-SLAPP motion.” (*Id.* at p. 1302.)

The Ninth Circuit vacated and remanded the order as to the fees for the malicious prosecution claim. (*Fabbrini v. City of Dunsmuir, supra*, 631 F.3d at p. 1302.) It stated “any elements of legal analysis and statutory interpretation which figure in the district court’s decision are reviewable *de novo*.” (*Ibid.*) The Ninth Circuit held that the Civil Rights Attorney’s Fees Award Act requires that a section 1983 malicious prosecution claim be found “unreasonable, frivolous, meritless or vexatious” in order for a prevailing defendant to recover attorney fees. (*Ibid.*) The court noted that the district court had failed to make the requisite finding. (*Ibid.*)

The Ninth Circuit also reversed or vacated on the issue of statutory requirements in *Harris v. Maricopa County Superior*

Court (9th Cir. 2011) 631 F.3d 963 [finding requirements not met under Arizona statute], *Kimbrough v. California* (9th Cir. 2010) 609 F.3d 1027 [finding requirements not met under Prison Litigation Reform Act], and *21X Capital LTD v. Werra* (9th Cir. March 4 2011, No. 09-17336) 2011 WL 759954 [finding requirements not met under California Civil Code section 1717, subdivision (a)].

— Method of — Amount Determination

Lastly, the Ninth Circuit has applied a *de novo* standard of review and vacated fee awards because it disagreed with the district court's method of determining the amount of the award. In *Harris v. Maricopa County Superior Court*, *supra*, 631 F.3d 963, a former Arizona court employee sued her former employer, the state court, for violations of, among other things, Title VII and the Fourteenth Amendment. (*Id.* at p. 968.) The district court granted the employer's motions for judgment on the pleadings and summary judgment, and awarded the employer attorney fees. (*Id.* at p. 969.)

The majority of the employer's request for attorney fees was not allocated to a specific claim in the case, but instead was designated "general fees." (*Harris v. Maricopa County Superior Court*, *supra*, 631 F.3d at p. 971.) To determine the amount of the attorney fee award, the district court divided the general fees equally across the 10 claims in the employee's complaint; then for each claim for which an award was appropriate, it added one-tenth of the general fees to the total. (*Ibid.*)

The Ninth Circuit vacated and remanded. (*Harris v. Maricopa County Superior Court*, *supra*, 631 F.3d at pp. 969, 980.) The court held that a challenge to the method used to determine the amount of fees attributable to claims for which an attorney fee award is appropriate is "legal in nature and therefore reviewed *de novo*." (*Id.* at p. 970.) The court further held that in a civil rights

case, "the pro-rata allocation of general fees between claims for which a fee award is appropriate and claims for which such an award is not appropriate, based solely on the number of claims, is impermissible." (*Id.* at p. 971.) The court explained that a party that moves for an award of attorney fees bears the burden of proving entitlement to the amount requested. (*Id.* at pp. 971-72.)

The Ninth Circuit also reversed and vacated on the method of amount determination in *Evon v. Law Offices of Sidney Mickell* (9th Cir. 2012) 688 F.3d 1015 [holding district court must consider several factors under Fair Debt Collection Practices Act] and *Hohlbein v. Utah Land Resources LLC* (9th Cir. April 22, 2011, No. 09-17598) 2011 WL 15268727 [holding lack of prelitigation notice of intention to sue does not justify reduction].

— Why These Cases — are Significant

The Ninth Circuit is ready, willing and able to reverse on legal issues regarding prevailing party status, attorney eligibility, statutory and contractual authority, statutory requirements, and method of amount determination if it disagrees with a district court's decision on an attorney fee order. Although attorney fee awards and denials are usually affirmed on appeal, affirmance is not guaranteed, especially on these issues.

The court reviews these and other legal issues under a *de novo* standard, conducting a more searching and independent review. Thus, the loser in a civil case should litigate and preserve these and other legal issues in the district court and, if necessary, raise them on appeal. Given the Ninth Circuit's willingness to reverse on these issues, if there is doubt on the outcome of appeal, both sides may want to explore settlement.

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