

# Recovering Attorney Fees and Costs

## What You Need to Know

By Sara K. MacWilliams and Todd R. Mendel



**Y**ou won your trial. Your client is entitled to attorney fees. Now what?

When attorney fees are on the line, a successful verdict means you have another battle on your hands: the fight for attorney fees. For the lawyer in the enviable position of moving to recover attorney fees, this can be a daunting challenge, complete with briefings, evidentiary hearings, and challenges to professional qualifications, hourly rates, and total time spent. This article addresses what you need to know.

### Scenarios in which attorney fees are awarded

To obtain attorney fees and costs following a successful verdict, a litigant must first have a basis for recovering fees. “The general ‘American rule’ is that ‘attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary.’”<sup>1</sup> Possible legal bases for recovering attorney fees include the following:

- **A contractual attorney fee provision**—Whether a contract case is tried to a jury, court, or an arbitration panel, it may be possible to recover attorney fees and costs following

a successful verdict.<sup>2</sup> Attorney fees awarded under such provisions are considered damages, not costs.<sup>3</sup> Thus, determining which fees and costs are allowed starts with contract interpretation.<sup>4</sup> For example, the contract clause might state that if party A has to enforce the contract against party B, then party B is responsible for paying party A’s reasonable legal costs incurred in enforcing the agreement.

- **Case evaluation sanctions after one party rejects the case evaluation award**—Michigan’s case evaluation procedure is designed to encourage parties to consider carefully whether they should settle a case following court-ordered case evaluation.<sup>5</sup> Thus, MCR 2.403(O), Rejecting Party’s Liability for Costs, provides that if an action proceeds to verdict after a party rejects the case evaluation, then the rejecting party must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. Verdict is defined as any judgment entered after case evaluation, including jury verdicts, bench trial decisions, and judgment “entered as a result of a ruling on a motion after rejection of the case evaluation.”<sup>6</sup> A number of scenarios under the case evaluation

rules could lead to an award of attorney fees and costs against the opposing party.

- **Statutes providing for attorney fees**—Some federal and state statutes provide for the recovery of attorney fees in certain circumstances. Examples include divorce disputes, Elliott-Larsen Civil Rights Act claims, and consumer protection claims.<sup>7</sup>
- **Other sanctions**—Courts may also impose sanctions for discovery violations, egregious violation of court orders, or other events.<sup>8</sup> In such cases, sanctions may be measured by the reasonable attorney time incurred by the opposing party.

### What is included in a reasonable attorney fee award?

Obtaining an attorney fee award is not as simple as attaching the lawyer's billing statements to a motion and asking that they be paid. The moving party must demonstrate not only that fees were incurred, but also that the requested fees and costs are reasonable.

The process starts with a motion for fees and costs, supported by documentary evidence (bills, attorney biographies, and related items) and analysis demonstrating that the claimed fees and costs are reasonable. The initial calculation in this process is known as the "lodestar" method, set forth in the seminal attorney fee award case of *Smith v Khouri*.<sup>9</sup> The lodestar method is stated in mathematical terms as follows:

$$\begin{aligned} & \text{[“the fee customarily charged in the locality for similar} \\ & \text{legal services”]} \\ & \text{multiplied by} \\ & \text{[“the reasonable number of hours expended in the case”]} \\ & = X \\ & X \text{ is then adjusted up or down as appropriate.} \\ & X + \text{reasonable costs incurred} = \text{total award.}^{10} \end{aligned}$$

If there is a factual dispute regarding the reasonableness of the hourly rate, hours billed, or costs incurred (which there often is), the objecting party is entitled to an evidentiary hearing.<sup>11</sup> Thus, counsel should prepare to present testimony and documentary evidence at a fee hearing. Counsel needs to be familiar with *Smith v Khouri*, *Wood v Detroit Automobile Inter-Insurance Exchange*,<sup>12</sup> and Michigan Rule of Professional Conduct 1.5(a).

#### Reasonable fees for the case

The Michigan Rules of Professional Conduct set parameters governing how to determine a reasonable attorney fee in a given case. Caselaw construing reasonable attorney fee awards adopts the criteria set forth in Rule 1.5(a) as follows:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

## FAST FACTS

Attorney fee awards must be based on reasonable hours expended and reasonable rates for similar legal services in the locality, and otherwise meet the criteria of Michigan Rule of Professional Conduct 1.5(a) and relevant caselaw. Briefing and an evidentiary hearing on these issues, complete with fact and expert witnesses, could be required.

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.<sup>13</sup>

Counsel should be prepared to address how each of these factors applies to the fees sought for each professional. These factors figure into calculating the lodestar amount and whether any adjustments upward or downward are appropriate. For example, an antitrust or complex commercial contract case entailing complicated or extensive factual development involving many witnesses and experts will require more attorney time, labor, and skill than a simpler case.

One cannot assume lawyers are fungible and that an attorney can simply be selected randomly from the *Michigan Bar Journal* directory regardless of skill, experience, reputation, and ability to handle a particular case. Likewise, in considering the fee customarily charged in the locality for similar legal services, it is important to note that lawyers charging lower rates for run-of-the-mill matters should not be used as the standard for providing legal services in more complicated matters. Each factor warrants close attention.

#### Hourly rates

The first mathematical step in the lodestar analysis is determining a reasonable billing rate for each professional (attorneys and



paralegals)<sup>14</sup> incurring time on the matter. Billing rates are one of the most heavily litigated aspects of the fee analysis. It's easy to see why: if hourly rates are reduced, fee awards are decreased dramatically across the board. Thus, counsel should present evidence demonstrating each professional's education, experience, and skill.<sup>15</sup>

A reasonable billing rate is based on the fees customarily charged "in the locality" and "for similar legal services."<sup>16</sup> Both of these distinctions are crucial. A reasonable hourly rate must take into account "variations in locality, experience, and practice area."<sup>17</sup> Stated another way, counsel must demonstrate the market rate for the attorney's work and for attorneys of similar credentials and ability in the legal specialty.<sup>18</sup> This can be shown in several ways:

- **Hourly rate in the case and similar cases**—Counsel may present testimony, invoices, and engagement letters demonstrating what the attorney has charged in the instant case and even in similar cases. "[T]he actual fees charged, while clearly not dispositive of what constitutes a reasonable fee, is a factor to be considered in determining marketplace value as it is reflective of competition within the community for business and typical fees demanded for similar work."<sup>19</sup> If there is a way to find out what opposing counsel charged in the same case, such information may be useful.
- **Surveys**—Courts recognize the utility of "reliable surveys or other credible evidence of the legal market."<sup>20</sup> However, a word of caution regarding surveys reporting on hourly rates: many surveys are based on a low response rate from area attorneys.<sup>21</sup> Thus, surveys should be a factor in determining reasonable billing rates but should not be relied on

as dispositive. Counsel should pay close attention not only to the reported hourly rates reflected in surveys, but also to the reported information reflecting response rates and accuracy of the information reported. Using more than one survey or arriving at a range of similar hourly rates through several different methods may be useful. For example, one might use surveys from a combination of the State Bar of Michigan, *Michigan Lawyers Weekly*, and the *National Law Journal* as well as hourly rates reported in caselaw.

- **Caselaw**—Caselaw is an important source of evidence that should not be overlooked. Reported opinions may be available indicating which hourly rates have been approved for comparable legal work in the area.<sup>22</sup> For example, the moving party may offer evidence that the legal work provided by a particular professional in the present matter is similar to the level of legal work provided by professionals in one or more of the reported cases, and the rates are reasonable for comparable legal services.
- **Appropriate adjustments**—To arrive at a reasonable rate for a case, a professional's hourly rate may be adjusted down. Alternatively, an "upward adjustment" may be appropriate for "the truly exceptional lawyer."<sup>23</sup>

#### Total time spent

Once the hourly rates are established, the next step is determining the reasonable time spent by each professional. Begin with billing statements (or in the case of contingency fees, time sheets) reflecting the actual time expended. Any "excessive, redundant or otherwise unnecessary hours" or time charged for inapplicable work should be excluded.<sup>24</sup> It may be helpful to prepare a chart depicting each professional's reasonable billing rate, total hours expended on the case, and total fees sought for the professional's time on the case. The sum of each subtotal is the total attorney fee sought before any upward or downward adjustments.

Depending on the basis for recovering the attorney fees and costs, the total time should include time spent defending the verdict post-trial and on appeal, not just the time through trial.<sup>25</sup> Thus, counsel's time spent in attending post-trial hearings should be included in the fee request, and the motion should also include a request that the case remain open so counsel can seek fees incurred on appeal if appropriate.

#### Costs

Finally, a fee petition must also include costs. The costs allowed by the court rule are set by statute.<sup>26</sup> Allowable costs include standard charges such as transcript fees, mileage, postage, and copying as well as expert witness fees.<sup>27</sup> Counsel should make sure they have authority and support for each cost they are seeking to recover.<sup>28</sup> Costs allowed pursuant to a contract, being a type of damages, may be broader and include all costs charged to the client pursuant to counsel's engagement letter.<sup>29</sup>

If there is a factual dispute regarding the reasonableness of the hourly rate, hours billed, or costs incurred (which there often is), the objecting party is entitled to an evidentiary hearing. Thus, counsel should prepare to present testimony and documentary evidence at a fee hearing.

### Consider expert testimony

Expert testimony can be useful in establishing that the criteria of Michigan Rule of Professional Conduct 1.5(a) are met. Expert witness testimony is recognized as credible evidence of what a reasonable attorney with similar qualifications in a given specialty and within the relevant location should charge.<sup>30</sup> Expert testimony can be particularly helpful in establishing the reasonable hourly rate and time spent on the case compared to similar cases in the locality. Depending on the basis for recovery of the attorney fees and costs, the expert's time preparing for and appearing at hearings may properly be recovered as part of the total attorney fee and cost award.<sup>31</sup>

### Conclusion

If your client is in the fortunate position of being able to recover attorney fees and costs from the opposing party, this article provides the basic framework you should consider in pursuing those fees and costs. Absent a stipulation, you need to be prepared to brief and try the issues in an evidentiary hearing. It is an enviable position to be in, but it still requires an effort for which you need to be well prepared. ■



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### ENDNOTES

1. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008), quoting *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37–38; 576 NW2d 641 (1998).
2. See *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007); *Rafferty v Markovitz*, 461 Mich 265, 271, n 5; 602 NW2d 367 (1999).
3. *Fleet Business Credit*, 274 Mich App at 589.
4. *Mikiciuk v Verhines*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2000 (Docket No. 217865) at \*1 ("This case involves the interpretation of the parties' contract term regarding costs and attorney fees. Parties may include in their contract a provision for the payment of these expenses, and such a provision is judicially enforceable.").
5. *Smith*, 481 Mich at 527–528.
6. MCR 2.403(O)(2)(c).
7. MCL 37.2802; MCL 445.273(1); and MCL 552.13(2).
8. *Persichini v Beaumont Hosp*, 238 Mich App 626, 637–641; 607 NW2d 100 (1999); *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997); MCR 2.114(E).
9. *Smith*, 481 Mich at 519.
10. *Id.* at 530–531.
11. *Id.* at 532.
12. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982).
13. *Smith*, 481 Mich at 530.
14. See MCR 2.626.
15. See generally *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 174–175; 761 NW2d 784 (2008).
16. MRPC 1.5(a)(3); *Smith*, 481 Mich at 530.
17. *Smith*, 481 Mich at 532.
18. *Prins v Mich State Police*, 299 Mich App 634, 644; 831 NW2d 867 (2013).
19. *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 234; 823 NW2d 843 (2012).
20. *Prins*, 299 Mich App at 643.
21. See, e.g., State Bar of Michigan, 2010 *Economics of Law Practice: Attorney income and billing rate summary report* (January 2011), p 3. The survey was sent to 29,475 State Bar members and only 3,775 returned useable questionnaires—a 13 percent response rate.
22. Examples of opinions discussing reasonable attorney fees for Michigan lawyers include *Bluewav Systems, LLC v Durney*, unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued November 5, 2012 (Docket No. 09-13878) at \*4; *Grosse Ile Twp v Grosse Ile Bridge Co*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2010 (Docket No. 291255); and *Smith*, 480 Mich at 524.
23. *Smith*, 481 Mich at 535.
24. MRPC 1.5(a); *Smith*, 481 Mich at 532, n 17.
25. Regarding post-trial fees, see *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 179; 568 NW2d 365 (1997). But see *Smith*, 481 Mich at 527, n 10 (excluding fees on appeal for case evaluation sanctions).
26. See MCL 600.2405; MCL 600.2552; and MCL 600.2549.
27. See *Elia v Hazen*, 242 Mich App 374, 379; 619 NW2d 1 (2000).
28. *Van Elslander v Thomas Sebold and Assoc, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket Nos. 272396, 274966) at \*19, n 17.
29. *Fleet Business Credit*, 274 Mich App at 598.
30. Examples of cases in which experts were used to establish reasonable fees include *Coblentz v Novi*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2009 (Docket No. 285431), rev'd in part on other grounds, 485 Mich 961; *Grosse Ile Twp v Grosse Ile Bridge Co*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2010 (Docket No. 291255); *Van Eman v Cars Protection Plus*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 267473).
31. See MCL 600.2401; MCR 2.302(B)(4)(c)(i); see also *Shaneberger v Hope Network Behavioral Health Services*, unpublished opinion per curiam of the Court of Appeals, issued August 15, 2013 (Docket No. 310035).