

## RESOLUTION 3-02-2002

### DIGEST

#### Attorney Fees: Calculation of Award in Non-Contingency Cases

Amends California Rules of Court, rule 870.2, to provide guidelines for determining attorney fee awards in non-contingency cases and to require explanations of the rationale for the court's award.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### Reasons:

This resolution amends California Rules of Court, rule 870.2, to provide guidelines for determining attorney fee awards in non-contingency cases and to require explanations of the rationale for the court's award. This resolution should be disapproved because it will create more problems than it will solve.

Existing law already provides courts with wide discretion to fix attorney fees and enumerates guidelines for that determination. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084.) Case law also requires an explanation of how the amount awarded was determined. Rule 870.2 is a procedural rule specifying how and when a party moves for such an award.

This resolution prescribes in great detail the criteria governing the trial court's award, the mode of analysis the trial court is to follow, the findings the trial court is to make, and the form of the order the trial court is to render. Attorney-fee litigation already consumes a disproportionate amount of time and energy. The creation of more guidelines, more criteria, and more procedural hoops to be jumped through is likely to engender more unproductive litigation than it could ever hope to eliminate.

The resolution has other major problems. It is too narrow. There is no reason to confine the resolution to non-contingency fee arrangements, since trial courts routinely evaluate and reduce awards based on contingency or other fee arrangements. The resolution also creates a "rebuttable presumption" of the accuracy of the moving party's representation of the amount of time spent on the case. That presumption imposes an unreasonably severe evidentiary burden on the opposing party, who has little or no way of knowing or finding out whether the time expended by the prevailing party's counsel was unreasonable or artificially inflated. Third, it requires the trial court in every instance to prepare what amounts to a statement of decision and to cite the evidence supporting some of its factual findings. By contrast, no statement of decision is required after a trial unless a party specifically requests it, and the trial court is never required to cite to the supporting evidence. Finally, the resolution is vague in that it provides that the trial court's failure to set forth its reason for reducing a fee award "may" be grounds for appeal.

The experience and knowledge of the trial judge and the information provided by the parties and counsel provide sufficient resources to enable a fair and reasoned determination of attorney fee awards.

There is no reason to burden a procedural rule with more requirements that will only add confusion, expense, and delay to the process.

## TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that the Judicial Council amend California Rules of Court, rule 870.2 to read as follows:

1 870.2

2 (a) Except as otherwise provided by statute, this rule applies in civil cases to claims for  
3 statutory attorney fees and claims for attorney fees provided for in a contract.  
4 Subdivisions (b) and (c) apply when the court determines entitlement to the fees, the amount of  
5 the fees, or both, whether the court makes that determination because the statute or contract  
6 refers to "reasonable" fees, because it requires a determination of the prevailing party, or for  
7 other reasons.

8 (b) (1) A notice of motion to claim attorney fees for services up to and including the  
9 rendition of judgment in the trial court--including attorney fees on an appeal before the rendition  
10 of judgment in the trial court--shall be served and filed within the time for filing a notice of  
11 appeal under rules 2 and 3.

12 (2) The parties may by stipulation filed before the expiration of the time allowed under  
13 subdivision (b)(1) extend the time for filing a motion for attorney fees (i) until 60 days after the  
14 expiration of the time for filing a notice of appeal; or (ii) if a notice of appeal is filed, until the  
15 time within which a memorandum of costs must be served and filed under rule 26(d).

16 (c)(1) A notice of motion to claim attorney fees on appeal--other than the attorney fees  
17 on appeal claimed under subdivision (b)--under a statute or contract requiring the court to  
18 determine entitlement to the fees, the amount of the fees, or both, shall be served and filed  
19 within the time for serving and filing the memorandum of costs under rule 26(d).

20 (2) The parties may by stipulation filed before the expiration of the time allowed under  
21 subdivision (c)(1) extend the time for filing the motion up to an additional 60 days.

22 (d) For good cause, the trial judge may extend the time for filing a motion for attorney  
23 fees in the absence of a stipulation or for a longer period than allowed by stipulation.

24 (e) If a party is entitled to statutory or contractual attorney fees that are fixed without  
25 the necessity of a court determination, the fees shall be claimed in the memorandum of costs.

26 (f) If a party in a civil case is found to be entitled to an award of statutory or contractual  
27 attorney fees and the attorney-client fee agreement is a non-contingent arrangement providing  
28 for payment of fees at an agreed upon hourly rate, the following rule shall be applied by the  
29 court in determining the amount of attorney fees to be awarded. In calculating the amount of  
30 the award, the court shall first determine the reasonable hourly rate for each attorney who  
31 provided services to the prevailing party. Next, the court shall make a determination how many  
32 hours of time expended were reasonably necessary to achieve the prevailing determination.  
33 There shall be a rebuttable presumption that the actual number of hours expended was

34 reasonably necessary to achieve the prevailing determination. The presumption may be  
35 rebutted by evidence that the prevailing party or the prevailing party's counsel performed  
36 unnecessary work or services for the scope and nature of the case, or created or caused issues  
37 to arise without justification which increased the amount of work needed to be performed on  
38 the case (i.e.g.: unnecessary discovery disputes). The following specific instances shall not be  
39 cause for decreasing an attorney fee award, without limitation:

- 40 (a) either party requested a jury trial instead of a court trial; or  
41 (b) the attorney for the prevailing party made an appearance in court at a duly noticed  
42 hearing or ex parte hearing that was not noticed by or sought by that attorney.

43 Upon reaching a determination of the amount of an attorney fee award, the court shall  
44 prepare an order containing the following information:

- 45 1. The hourly rate upon which the attorney fee award is based;  
46 2. The number of hours the court finds to be reasonable and upon which the award  
47 is based;

- 48 3. If the court has reduced the number of hours to be awarded or reduced the hourly  
49 rate from that requested by the prevailing party, the order shall set forth the reason for such  
50 reduction, including supporting evidence therefor.

51 The failure of the court to set forth reasons for reduction of a fee request may be  
52 grounds for appeal and remand of the attorney fee award.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

#### STATEMENT OF REASONS

Existing Law: Currently there is no procedure or formula set forth in statute for calculation of attorney's fees in non-contingency civil cases. There is a general statement of the methodology set forth in case law which generally leaves the determination to the unfettered and absolute discretion of the trial judge. Further, if the trial court fails to set forth its reasoning for a fee award, there is nothing the appellate court can use to analyze the determination and consequently no successful appeal could be brought in the face of an unfair or unreasonable award.

This Resolution: Amends the California Rules of Court to set forth a procedure, standards and requirements for calculation of fees in non-contingency civil cases, including the requirements for the content of the order.

The Problem: Currently, the trial judge has virtually unfettered discretion in determining attorney fee awards to the point where a judge may award less than half of the fees incurred by the prevailing party who will be required to pay all fees to his or her attorney while recovering substantially less. The end result is a prevailing party can still be a loser because he or she has been forced to pay defense costs

which will not be recouped. In one instance, a judge who found that the plaintiff should never have sued the defendant, who prevailing on summary judgment on a fraud claim, awarded one half of the fees (\$12,000 out of \$24,000) sought (in a case involving multiple parties and multiple depositions. In another case, the judge, following a jury verdict finding retaliatory eviction, awarded 40% of the fees sought ostensibly because the case could have been tried by bench trial (although this reason was not set forth in the court order which contained no reason for the reduction and failed to set forth the hourly rate or the number of hours found to be reasonable, though in oral argument the court did state that the hours worked were reasonable and noted that the case could have been tried to the court, rather than a jury). This proposal seeks to place limitations on judicial discretion so that judges cannot simply reduce a fee award without explanation or justification.

## IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

## AUTHOR AND/OR PERMANENT CONTACT

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RESPONSIBLE FLOOR DELEGATE: Michael L. Schack

## COUNTER ARGUMENTS

### SAN DIEGO COUNTY BAR ASSOCIATION

The Delegation of the San Diego County Bar Association recommends DISAPPROVAL of this resolution and its companion resolution 3-01-2002. As a preliminary matter, it appears that the Proponent has sought to amend its companion resolution 3-01-2002 by this resolution, and, as such, it is unclear which resolution the Proponent would have the Conference of Delegates pass. Turning to the arguments made by the Proponent of the resolution, the Proponent is incorrect that trial court's have "unfettered discretion" in determining an award of *reasonable* attorney's fees. An order awarding attorney's fees is appealable as a final order on a collateral matter (*In Re Marriage of Skelley* (1976) 18 Cal.3d 365, 369; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119) and as an order made after a final judgment (Code of Civ. Proc., §904.1, subd. (a)(2)). Where the attorney's fees are awarded pursuant to contract, the contractual provision providing the basis for the attorney fee award is subject to de novo review. (See *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336-1337.) As to the trial court's determination of the amount of attorney's fees awarded, the order is subject to review for an abuse of discretion (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 621), but may also be subjected to de novo review on issues of whether the trial

court applied the proper criteria (*Ibid.*; *Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 973; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298).

As to the substance of the proposed resolution, there are several problems. First, the party seeking to recover attorney's fees should have the burden of proving and establishing the reasonableness of those fees. The proffered resolution shifts the burden to the opponent by providing a rebuttable presumption that the actual number of hours were reasonably incurred. As a matter of policy, such a shift should be rejected. Second, by creating such a rebuttable presumption, it provides a disincentive to the providing of *efficient* legal services. Third, the provision for "appeal and remand" where the trial court fails to set forth reasons for reduction of a fee request is problematic. This language purports to provide an independent basis for appeal of an attorney's fee award in a Rule of Court, however the right to appeal is statutory.