NO ATTORNEY IS WORTH THAT! TIPS ON LITIGATING AND MINIMIZING FEE AWARDS IN CIVIL RIGHTS CASES.

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“A request for attorney's fees should not result in a second major litigation.”
Hensley v. Eckerhardt, 461 US 424, 437 (1983)

42 U.S.C. § 1988

- In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985,1986, title IX, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000 or title VI, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee.
- May also award expert fees.

Prevailing Party

- There must be a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S 598, 605 (2001).
- Plaintiff must receive some judicial relief on the merits.

What Is Sufficient To Prevail?

- An enforceable judgment or order on the merits.
- Includes judgment for even nominal damages. *Farrar v. Hobby*, 506 U. S. 103 (1992).
- A consent decree, even if the lower court did not actually decide the legal claims. *Maher v. Gagne*, 448 U.S. 122 (1980).

What Is Insufficient To Prevail?

- A change of position by defendant without formal judicial relief being obtained. *Buckhannon.*
- Interim relief that does not change the relationship between the parties, e.g. reversal of directed verdict and remand for new trial. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).
- Determination of a legal issue without obtaining judicial relief, e.g. prevailing on issue of constitutional violation, but losing on qualified immunity. *Hewitt v. Helms*, 482 U.S. 755 (1987).

What About Defendants?

- Only a prevailing party for purposes of a fee award if the "claim was frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

What Is A Reasonable Fee? *Hensley v. Eckerhardt* 461 U.S. 424

- The lodestar: Reasonable number of hours expended on the litigation as a whole multiplied by reasonable market hourly rate.
- Taking into account the results obtained, i.e. the degree of success.

Determining A Reasonable Rate

- Market rate for attorneys of similar experience performing same or similar work in the forum. *Blum v. Stenson*, 465 U.S. 866 (1984).
- Higher than forum rates may be reasonable, if special counsel was necessary due to absence of local counsel with expertise. *Donnell v. United States*, 682 F.2d 240, 251 (D.C. Cir.).

Proof of Market Rate
Testimony From Prevailing Counsel

- Testimony from prevailing attorney as to hourly rate they receive for similar work (assuming they even have hourly clients) is significant, but not conclusive evidence. *United States v. Metro*. Dist. Comm., 847 F.2d 12, 19 (1st Cir. 1988).
- Must present other evidence. *Blum v. Stenson*, 465 U.S. at 896 n. 11("[T]he burden is on the fee applicant to produce satisfactory evidence — in addition to the attorney's own affidavits — that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.")

Proof of Market Rate
Testimony From Other Attorneys

- Testimony of other attorneys as to market rate for similar services.
- Beware of "logrolling", i.e. attorneys writing declarations supporting each other's rates in various cases.
- *Henry v. Webermeier*, 738 F.2d 188, 193 (7th Cir. 1984):"[T]here is a danger that lawyers who sign such affidavits will exaggerate their billing rates in order to establish a precedent that may help them some day — perhaps even in order to try to raise the market price of legal services.")
- Sam v. Hawaii Dept. of Ed., 788 F. 3d 1033, 1041 (9th Cir 2015): "That other attorneys may think that a given rate is 'reasonable' does not necessarily say what the prevailing market rates actually are. That is especially true when the opinions are expressed by attorneys whose own professional interests might motivate them to favor higher rates."

Proof Of Market Rate
District Court's Knowledge Of Rates

- District court's knowledge of hourly rates in the area is sufficient to support rate determination. *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179, 1190.
- But see, *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 131 (3rd Cir. 1999)("To the extent that the district court's calculation of hourly rates was based on a 'generalized sense of what is customary and proper,' rather than on evidence in the record, it was error"); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1206 (9th Cir. 2013)(District Court erred in setting rates based solely on personal knowledge and experience).

Proof Of Market Rate Awards In Similar Cases

- Rates awarded to prevailing counsel in similar cases. *Curtis v. Bill Hanna Ford*, 822 F.2d 549, 552 (5th Cir. 1987) (District court erred in granting hourly rate lower than plaintiff's counsel received in similar cases); *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 651 (District court properly reduced fees to reflect lower rate awarded in other cases.)
- Rates awarded to other counsel in similar cases. *Sierra Club v. EPA*, 769 F.2d 796, 809 (D.C. Cir. 1985).
- Key to attacking such evidence is focusing on lack of similarity. *Norman v. Housing Authority*, 836 F. 2d 1292, 1304-05 (11th Cir. 1988) (Evidence of other awards irrelevant because "there is no assurance that the attorneys in those cases possessed similar skill, experience or reputation or that the case or clients were similar to the one at bar").

Proof of Market Rate Surveys

- Legal market surveys may establish hourly rate for similar work.
- *Berberena v. Coler*, 753 F. 2d 629,633 (7th Cir. 1985) (National Law Journal Survey supports rate); But see, *Pacific W. Cable Co. v. City of Sacramento*, 693 F. Supp. 855, 869 (E.D. Ca. 1988) (National Law Journal survey "not competent evidence of the reasonableness of the claimed hourly rate if for no other reason than the fact that there has been no explanation provided to the court as to the basis of the survey or the method of collecting the data").
- Relevance determined by foundation for survey.

Proof Of Market Rate
Defense Counsel's Rate

- May be relevant to show actual market rate for litigating such cases. *United States v. Metro. Dist. Comm.*, 847 F.2d 12, 19 (1st Cir. 1988) (District court did not err in considering defense rates for "substantially similar work" was "the best barometer of reasonableness").
- However, many courts reject defense rates as irrelevant, given discounting for institutional clients. *Trevino v. Gates*, 99 F. 3d 911, 925 (9th Cir. 1996); *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 869-70 (11th Cir.1993).

Litigating The Market Rate

- Is this fight necessary? If rate is reasonable, stipulate or reach agreement on something close and concentrate on other issues.
- Don’t personalize –refer to market factors such as experience of attorney or simplicity of case.
- When addressing awards in other cases focus on lack of similarity.
- Be aware of the interplay between market rate and reasonable hours: Higher rates should mean more efficient hours. *Cooper v. Casey*, 97 F.3d 914, 920-21 (7th Cir. 1996).

Reasonable Number Of Hours

- Hours expended on tasks for which a client in the market place would compensate the attorney.
- Rule of thumb –if total hours expended by plaintiff's counsel is close to the total expended by defense counsel, court will typically grant requested amount, absent specific showing that portion of hours expended on unsuccessful claims.

Contesting Hours
Defense Attorney Declaration

- Strongest evidence to rebut claim is from someone who knows the case.
- Detailed analysis of time records explaining why too many hour expended on a particular task, too many attorneys employed, or work related solely to claim on which plaintiff did not prevail.
- Time consuming, but vital –make the trial court's job easier.

Contesting Hours
Do You Need An Expert?

- In some highly complex suits, expert analysis may be useful to show work was unnecessary or excessive.
- Beware of one size fits all approach used by many fee auditors, that fails to take into account work actually required for particular case.

Reduction For Lack Of Success Unsuccessful Claims

- Hours should be reduced if expended on claims plaintiff lost.
- May be particular causes of action or theories of recovery, i.e. class action claim.
- May be particular defendants.
- Be mindful of overlapping claims, or hours expended on tasks necessary for all claims – plaintiff is entitled to fees for such work. *Hensley*, 461 U.S. at 435.

Reduction For Lack Of Success
Degree Of Success

- Are the fees reasonable in light of what the suit achieved?
- If “a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.” *Hensley*, 461 U.S. at 436.

Assessing The Degree Of Success

- Comparing amount recovered to amount of fees sought.
- Proportionality not required, i.e. fees can outstrip recovery. *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (Plurality).
- But when fees disproportionate to recovery, plaintiff must show some public interest served by the suit, beyond vindication of personal interest. *Rivera*, (Powell, concurring).
- Some Circuits either do not follow the Powell concurrence, or broadly define public interest. See e.g. *Bravo v. City of Santa Maria*, 810 F.3d 659 (9th Cir. 2016)($5,000 damage award justified $1 million in fees in light of vindication of Fourth Amendment rights, success on *Monell* claim, and plaintiffs' receipt of substantial settlement form other defendants.

No Fees For De Minimis Success

- *Farrar v. Hobby*, 506 U.S. 103 (1992) (Plurality).
- Where plaintiff recovers nominal damages, court can award no fees. ("If ever there was a plaintiff who deserved no attorney's fees at all, that plaintiff is Joseph Farrar. He filed a lawsuit demanding 17 million dollars from six defendants. After 10 years of litigation and two trips to the Court of Appeals, he got one dollar from one defendant.")
- In case seeking damages, main consideration in assessing success is the amount awarded.
- Guidelines from Justice O'Connor's concurrence: Compare the amount sought to amount recovered, determine whether any ancillary public purpose served.

Confusion Caused By *Farrar*

- Like *Rivera*, a plurality opinion hence no clear holding.
- What is de minimis? Some Circuits only apply *Farrar* to nominal damages. *Estate of Enoch v. Tienor*, 570 F.3d 821, 823 (7th Cir. 2009). Other Circuits apply *Farrar* analysis to any disproportionate award, see e.g., *McGinnis v. Kentucky Fried Chicken,* 51 F. 3d 805, 810 (9th Cir. 1994) (reduction in damages requires reduction in fees under *Farrar*: "Lawyers might reasonably spend $148,000 worth of time to win $234,000. But no reasonable person would pay lawyers $148,000 to win $34,000").

Open Issues Under *Farrar* Spawn Fee Litigation

- No guidance on when vindication of a particular constitutional right renders a public benefit sufficient to justify disproportionate fees. Do Fourth Amendment claims always serve a public purpose by exposing misconduct?
- Plaintiff's attorneys may be encouraged to pursue minor claims in hopes of major fees.
- Defendant in cases with minimal damages may be unwilling to settle, given prospect of applying *Farrar* to minimize fee recovery.

Other Grounds For Reducing Lodestar

- Poor documentation of hours by counsel. *Montanez v. Simon*, 755 F.3d 547, 555-56 (7th Cir. 2015)
- Circuit split on whether refusal of reasonable settlement offer (putting aside Rule 68) can justify fee reduction.
- Yes: *Lohman v. Duryea*, 574 F.3d 163, 169 (3d Cir. 2009); *McKelvey v. Sec of Army*, 768 F.3d 491, 495 (6th Cir. 2014); *Paz v. Porfolio Recovery Associates*, 924 F.3d 949, 951 (7th Cir. 2019); *A.D. v. California Highway Patrol*, 712 F.3d 446, 460-61 (9th Cir. 2013).
- No: *Joyce v. Town of Dennis*, 720 F.3d 12, 32 (1st Cir. 2013); *N.A.A.C.P v. Town of East Haven*, 259 F.3d 113, 119 (2d Cir. 2001).

Limited Grounds For Enhancing Lodestar

- Compensating for substantial delay in payment in lengthy litigation –use current rates for all work, or apply interest rate to fees from time work performed. *Skelton v. General Motors Corp*., 860 F.2d 250, 255 n. 5 (7th Cir.1988).
- Compensating for work that exceeds market rate in quality, i.e. superstar associate who performed at partner level.
- Generally, no enhancement because most factors included in calculating lodestar. *Perdue v. Kenny A*, 559 U.S. 542 (2010).

Minimizing Exposure To Fee Awards

- Assess liability early –change in policy prior to formal relief may bar fees under *Buckhannon*.
- Make reasonable settlement offer early.
- Avoid scorched earth litigation tactics –they just run up opposing counsel's fees.

Special Considerations In Settling Fee Claims

- Fees belong to the client, not the attorney, so client may waive fees as part of settlement. *Evans v. Jeff D*. 475 U.S. 717 (1986).
- Where settlement is subject to court approval, i.e. class action, court must determine whether fee waiver offset by some benefit to the plaintiff class, such as broader relief. *Evans*.
- Lump sum offers create tension between attorney and client, as they must internally divide between fees and damages.

Rule 68 Offers To Cut Off Fees

- Failure to Accept a Rule 68 offer that exceeds judgment plus fees to date of offer, bars post offer fees. *Marek v. Chesny*, 473 U.S. 1, 12 (1985).
- May be difficult to evaluate fees to date prior to making offer.
- Seek discovery on amount of fees incurred by plaintiff as of a particular date.

Appealing A Fee Award

- On the defense side, very difficult, given abuse of discretion standard.
- Misapplication of law, i.e. improper enhancement, or gross disproportion between fees and damages, may be worth pursuing.
- Weigh risk of paying other side's fees.

THANKS!

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