Attorney's Fees & Costs In Section 1983 Litigation

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AGENDA

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II. Pre-Trial – Rule 68
III. Prevailing Party
IV. Lodestar Method
V. Other Expenses Recoverable
VI. Post-Trial Relief
VII. Question and Answer

I. BACKGROUND

Civil Rights Attorney's Fees Act of 1976

- **Codified at 42 U.S.C. §1988**
  - Prevailing parties in §1983 cases should ordinarily be awarded attorney's fees unless "special circumstances."
- **Court's Discretion:** Limited to deny fees but wide as to amount of fees; Special circumstances exception is very narrow.
- **No fee award to *pro se* litigant**

II. PRE-TRIAL

Fed. R. Civ. P. Rule 68 – Offer of Judgment

- **Underlying Purpose**
  - Permits a party defending against a claim to make an offer of judgment.
  - If the offer is not accepted, and the ultimate judgment is not more favorable than what was offered, the party who made the offer is not liable for costs accruing after the date of the offer.
    - Gives the Plaintiff ability to obtain the equivalent of a default judgment but on terms defined by the Defendant.

II. PRE-TRIAL

FRCP Rule 68 Text – Offer of Judgment

(a) **Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the **date set for trial**, a party defending against a claim may serve on an opposing party an offer to allow judgment **on specified terms**, **with the costs then accrued**. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then **file the offer and notice of acceptance, plus proof of service.** The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, **but it does not preclude a later offer**. Evidence of an unaccepted offer is not admissible ***except in a proceeding to determine costs.***

II. PRE-TRIAL

FRCP Rule 68 Text – Offer of Judgment

(c) **Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
(d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains *is* ***not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made***.

II. PRE-TRIAL

RULE 68 – Fairness to Claimant

- **Reasonable Expectation of Recovery**
  - Extends the privilege of an offer of settlement for judgement only to the party defending against a claim but thought to furnish a just procedure to all parties concerned.
  - **Why?** Defending party obtains no benefit by making an offer that is not what claimant might reasonably expect to recover.
    - Defendant not freed of costs if judgment recovered is more than offer rejected.

II. PRE-TRIAL

Effects on Recovery of Attorney's Fees & Costs

- **Acceptance v. Rejection**
  - Effects of Acceptance – Can affect the recovery of Plaintiff
    - Explicit Language in Rule 68 Offer Needed
  - Effects of Rejection – Can affect the recovery by either party
- **Entry of Judgment v. Liability**
  - Does NOT require admission of liability
  - Defendant can include language disclaiming liability

II. PRE-TRIAL

FRCP Rule 68 Case Law

- *Delta Air Lines, inc. v. August,* 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981).
- *Marek v. Chesny*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)
- *Doe v. Spartanburg Cnty. Sch. Dist. Three*, 314 F.R.D. 174 (D.S.C. 2016) (4th Circuit)

III. PREVAILING PARTY

- ***Farrar v. Hobby,* 506 U.S. 103, 111 (1992):** "Materially Alters" standard: a plaintiff prevails when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Court held that nominal damages satisfies this test.

- **Degree of plaintiff's overall success:** Affects the reasonableness of a fee award, but does not affect the prevailing party inquiry. *Farrar, 506 U.S. at 114.*

III. PREVAILING PARTY (cont'd)

- **Injunctive or declaratory relief** which addresses merits of the claim generally satisfies this test. *Farrar*, 506 U.S. at 111; *Lefemine v. Wideman*, ___U.S.___, 133 S. Ct. 9, 11 (2012).

- **Procedural or Evidentiary rulings are insufficient.** *Hanrahan v. Hampton,* 446 U.S. 754 (1980)

- **Prevailing Defendant:** May recover fees only if Plaintiff's action was frivolous, unreasonable or without foundation. *Hughes v. Rowe*, 449 U.S. 5 (1980)

IV. LODESTAR METHOD

Lodestar Method of Determining Reasonable Attorney's Fee: *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983)

Steps: (1) Determine reasonable number of hours spent on litigation by Plaintiff's lawyers; and (2) multiply number of hours by a reasonable hourly fee.

Calculation: (Number of Hours) X (Reasonable Hourly Fee)

Fee Applicant bears burden and detailed timesheets required.

Opposing Party is entitled to discovery regarding amount of fees sought.

IV. LODESTAR (cont'd)

- **12 Factor Analysis to Determine Reasonable Hours and Reasonable Rate:** *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)*

  1. **Time and Labor Required by the Representation:**

  - **Duplicative and vague billing not permitted.**
  - **Block billing not permitted.** Example: Billing 10 hours for "prepare for and attend pretrial with judge; meet with co-counsel; calls to CIR" *Gratz v. Bollinger, 353 F.Supp.2d 929 (E.D. Mich. 2005)*

IV. LODESTAR (cont'd)

2. Novelty and Difficulty of Case

- **Reductions for routine cases with simple legal issues.** See *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 956 (1st Cir. 1984)

3. Skill Required to Perform the Legal Service

- Cannot claim to need a specially-skilled civil rights lawyer and then attempt to collect for substantial time for basic §1983 research.

4. Preclusion of Other Employment Due to Acceptance of Case

IV. LODESTAR (cont'd)

5. **Customary Fee in Community for Similar Work**
   - Normally established by affidavits of other lawyers; Defense can offer counter-affidavits
6. **Whether Fee is Fixed or Contingent**
   - §1983 does not invalidate contingent fee contracts.
   - Fees not limited to amount provided by contract.

IV. LODESTAR (cont'd)

7. **Time Limitations Imposed by Client or Circumstances**

- Injunctions and Temporary Restraining Orders

8. **Amount Involved and Results Obtained**

- **Nominal Damages:** *Farrar v. Hobby*, 506 U.S. 103, 115-16 (1992)(when plaintiff sought $17 million but only recovered nominal damages, Court held that "the only reasonable fee is usually no fee at all.")

- **Reduction for Partial Victory:** *Montanez v. Simon,* 755 F.3d 547 (7th Cir. 2014)(50% fee reduction when plaintiff lost 4 of 6 claims and only obtained $2,000 jury verdict)

IV. LODESTAR (cont'd.)

9. **Experience, Reputation, and Ability of Attorneys**

- **Examines need for specialized, high-profile and/or out-of-town lawyers.** See *Guckenberger v. Boston University*, 8 F.Supp.2d 91(D. Mass. 1998)(retention of higher priced out of town lawyer was unreasonable in light of extensive legal talent in community)
- **Can be a difficult and uncomfortable argument to make**

IV. LODESTAR (cont'd.)

10. Undesirability of Case

- *Knop v. Johnson*, 712 F. Supp. 571 (W.D. Mich. 1989)(*Lodestar* enhancement proper in prison case)
- *Dickerson v. Pritchard, 551 F. Supp. 306, 313 (W.D. Ark. 1982)*(*Lodestar* enhancement proper since case was an unpopular case requiring very skillful presentation)

11. Nature and Length of Professional Relationship with the Client

12. Awards in similar cases

V. OTHER EXPENSES

- **Fees for Paralegals, Law Clerks:** Recoverable when prevailing practice in area is to bill for paralegals and law clerks at market rates; *Missouri v. Jenkins by Agyei, 491 U.S. 274 (1989)*

- **Computer-assisted legal research:** Majority of courts have held that charges for legal research are recoverable as long as they are reasonable and customarily billed to the attorney's client.

  - Invoice for the research must indicate specific issues researched and not be duplicative.

VI. POST-TRIAL RELIEF

Challenging Attorney's Fees and Costs via Appeal

- **Likelihood of Success**
- Appellate review of attorney fee awards is limited to highly deferential abuse of discretion. *Est. of Borst v. O'Brien*, 979 F.2d 511 (7th Cir. 1992)
- Award of costs is type of discretionary ruling to which appellate court should give virtually complete deference. *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1244 (7th Cir.1985).
- An attorneys' fee award need not be proportionate to the damage award. This is so because the amount of an award, taken alone, does not represent the full value achieved by litigation vindicating one's civil rights.

VI. POST-TRIAL RELIEF

Post-Trial Motions:

- **Motion to Defer or Stay Consideration of Attorney's Fees and Costs – Districts differ but arguable**
  - Judicial Economy and No Undue Hardship to prevailing party.
  - When district court judgment is reversed or substantially modified on appeal, any costs awarded to previously prevailing party are automatically vacated and district court may not proceed to tax costs against the successful appellant. *Furman v. Cirrito*, 782 F.2d 353 (2d Cir. 1986)
    - Fed. R. App. P. 39 – Redefining Prevailing Party


Questions &
Answers