
Considering the Mediation Privilege in Awarding Legal Fees

To what extent may mediation impact an award of attorney fees as part of the costs in litigation?

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Whether attorney fees may be awarded in our courts has, of course, been affected by the differences between the "American rule" and the "English rule."

Under the English rule, the losing party pays the prevailing party's attorney fees. The basis for this rule is that the successful party, who was subjected to a wrongful litigation, should be made whole by recovering all sums expended, including attorney fees and costs.

The American rule provides that each party must pay its own attorney fees. This position was justified on the ground that requiring losing parties to pay the opposing party's legal fees would discourage and penalize individuals, particularly the poor, from instituting actions to vindicate their rights.

Notwithstanding the American rule, however, the number of statutes and rules in Pennsylvania and nationally (on both state and federal level) allowing the award of attorney fees continues to grow. This trend has reflected assumptions that private litigants may help governments by assuring that there is compliance with and enforcement of laws; in addition, it assists those who might otherwise be unable to obtain legal representation in seeking to vindicate their rights.

Of particular importance in the making of such awards is whether the language of the statute or rule is framed in terms of the court "shall" or "may" award such fees (although the use of those words, as a review of the cases would reflect, is not necessarily determinative of whether a court is obligated or has the discretion to so act).

When the court does have the authority to award attorney fees, however, its actions are recognized as an exercise of equity powers. Moreover, courts are presumed to have great discretion in determining the amount of the attorney fees.

As a general rule, the method of determining a fee for legal services provided on an hourly basis is to multiply the total number of hours reasonably expended by the reasonable hourly rate, otherwise characterized as the lodestar method. The lodestar, however, gives the court discretion to adjust based upon several factors, including the "prevailing party's degree of success," as ruled in *Signora v. Liberty Travel*, 886 A. 2nd 284, 293 (Pa. Super 2005).

But how may the court determine this "degree of success" if some of the relevant information relating to the litigation may not be disclosed because it developed as part of the mediation proceeding?

A defendant in the Court of Appeals of California, Second District, in *Fogh v. Los Angeles Film Schools*, (Court of Appeals of California, Second District Division Two No. B230920, December 18, 2012, unpublished), recently faced such a situation. It found itself paying large attorney fees incurred at trial after the plaintiff had refused to accept an earlier offer of settlement.

The appellate court's opinion recites that Cody Fogh, an employee, sued Los Angeles Film Schools alleging various causes of action including failure to pay or provide overtime wages. The school responded that Fogh "was an exempt employee not entitled to any additional pay because he was employed in an administrative capacity."

The trial court found that Fogh was a nonexempt employee entitled to unpaid overtime.

The trial court entered judgment for Fogh in the amount of \$13,972. Fogh filed a motion seeking \$218,967 in attorney fees and was ultimately awarded \$96,800.

The school contended that "the trial court abused its discretion by not taking into consideration its oral settlement offer of \$20,600.24 in determining the reasonableness of the fee award." It reasoned that because its offer far exceeded the final judgment, any attorney fees incurred after the offer was made were not reasonable. In effect, the argument was that there was no "degree of success" achieved by the four-day nonjury trial because of the refusal of the pretrial higher offer.

The appellate court rejected the school's argument on two grounds. As its second holding, it concluded that even if the offer might have been considered, the trial court reasonably ignored it in light of the circumstances, including (1) that it was offered on a take-it-or-leave-it basis, (2) that it had a five-day deadline, (3) that it was never reduced to writing, (4) that the school refused to provide supporting documentation supporting the offer, and (5) the offer was revoked. In short, the offer cannot be said to have been made in good faith as Fogh lacked sufficient information and time to consider its merit.

As its first holding, however, the appellate court concluded that the trial court would not have been permitted to consider the earlier higher offer, even if it had been made in good faith, because it was subject to the mediation privilege provisions of the California Evidence Code, Sections 1115-28. They provide that "no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled."

The court found further support for the exclusion of the evidence by reason of the privilege because in their written confidentiality agreement the parties had expressly incorporated the above-cited mediation provisions. The school's settlement offer, therefore, was part of the mediation proceedings and, accordingly, consideration of it was barred by the mediation privilege.

Pennsylvania's mediation privilege statute (42 PS Sec. 5949) contains similar language relating to all mediation communications and documents in any judicial proceeding, and it would appear, therefore, that the same result would obtain.

One can understand how upset a defendant might feel in being compelled to pay attorney fees incurred after the plaintiff had rejected a good-faith offer that was greater than the amount of the final verdict.

Nonetheless, the result would appear to be consistent with the purpose of encouraging an open and full discussion at mediation, without fear of disclosure. Indeed, a contrary result might discourage a party from submitting to mediation if it believed that those mediation discussions might adversely impact a later claim for attorney fees.

This is not to say that the parties may not enter into mediation while protecting any subsequent claim for attorney fees. They may, for example, agree in advance of the mediation that the court in awarding attorney fees may later consider any written offers produced during the mediation.

Such written procedures allowing or limiting the payment of costs or delay damages are to be found in both federal

and state procedures. Accordingly, parties might consider adopting similar provisions relating to attorney fees and mediation.

For example, under Rule 68 of the Federal Rules of Civil Procedure, a party defending against a claim may serve on the opposing party an offer to allow judgment on specified terms, with the costs then accrued. If the judgment finally obtained by the plaintiff is not more favorable than the unaccepted offer, the plaintiff must pay the costs incurred after the offer was made.

Similarly, Rule 238 of the Pennsylvania Rules of Civil Procedure provides that the defendant need not be liable for delay damages if a written offer is made and the award is not more than 125 percent of the sum specified in the offer.

In summary, it would appear that the mediation privilege statute would ordinarily preclude the introduction of mediation communications and documents in subsequent proceedings relating to the award of attorney fees and costs. However, the parties may wish to consider fashioning procedures that will allow the court to consider certain aspects of the mediation proceedings in entering an equitable award for such fees. •

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