Post-Judgement Attorney's Fees Hearing

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Post-Judgement Attorney's Fees Hearing

By William F. Cobb

Although there is nothing in the Rules of Court that prohibit providing testimony regarding the issue of entitlement and amount of attorney's fees in the case-in-chief, it has become a practice of the Court and Bar to present the fact case and reserve jurisdiction to address the issue of attorney's fees at a later date. The proceeding surrounding the determination of entitlement and amount of attorney's fees is essentially a mini-trial.

Once the fact case-in-chief has been concluded and a judgment entered, whether by jury or judge trial, the court may or may not determine entitlement to the prevailing party. Unless there is a contract or statute providing for attorney's fees on the issues tried, the prevailing party is not entitled to attorney's fees, as Florida has adopted the American Rule regarding fees. If there are factual issues regarding entitlement, the court will generally reserve jurisdiction to determine entitlement and amount of fees for a later time. The prevailing party is entitled to recover all reasonable attorney's fees devoted to the entitlement issue, but generally not the time devoted to the determination of amount.

As the attorney's fee hearing is a mini-trial, as much time and attention should be devoted to the preparation and presentation of evidence as there was devoted to the preparation and presentation of evidence in the fact case-in-chief. All too frequently, prevailing counsel will view the attorney's fee hearing as "routine" and defeat their own purpose. The elementary rules of evidence cannot and should not be ignored in the preparation and presentation of evidence at the attorney's fees hearing. Further, as all attorney's fees must be supported by professional expert testimony, the selection of the expert to testify regarding attorney's fees is of equal

importance to the selection of skilled experts for the presentation of opinion testimony in the case-in-chief.

The Rules of Court define an expert witness as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify. While every licensed attorney in the State of Florida would qualify as an expert witness, there are additional considerations in the selection process. The expert will be required to testify to what is reasonable and necessary in terms of time and hourly fees charged in the marketplace. Accordingly, an attorney's fees expert should have sufficient knowledge and experience to testify to the reasonableness of the hours and billing rate in the marketplace where the action was tried or the testimony is insufficient. Further, the expert is not testifying to what the prevailing attorney is worth, but rather the reasonableness of the hourly rate by a reasonably competent attorney of like skill and experience, together with what hours would have been reasonably worked by an attorney of like skill and experience in the marketplace. Preparation of the expert is no less important in an attorney's fee hearing than the preparation of an expert regarding opinion testimony in a factual presentation.

The most frequent deficiency in the presentation of the evidence, the representation contract between the lawyer and the client and the billing records of the prevailing party's law firm, is avoidance of the requirements for business records. Business records of the law firm are hearsay, that is to say they are out of court statements offered in evidence to prove facts, the amount of time dedicated to the preparation and presentation of evidence at trial, together with the amount charged for the time. Section 90.803(6) of the Florida Evidence Code recognizes an exception to the hearsay rule

regarding business records, but only if the records are properly authenticated by testimony or properly certified. There are four (4) separate components to oral testimony regarding business records before they are properly authenticated for presentation as evidence:

- The records were made at or near the time they purport to have been made.
- Were made by or from information transmitted by a person with knowledge.
- The records were kept in the course of a regularly conducted business activity.
- It is the regular practice of the business activity to make the record.

The prevailing party's counsel is required to offer testimony on all of the components, or the business records testimony is insufficient to offer the records as evidence. The court is therefore without authority to make an award of attorney's fees since the award must only be based on competent evidence. It is a reversible error at the appellate level if the proper evidentiary foundation, set forth above, has not been offered to overcome the hearsay nature of the law firm business records.

As Associate Judge Sample wrote in ***Lyle v. Lyle*, in 1964**:

As between a lawyer and his client the matter of the fee is one of contract between the two, but a fee to be allowed by the court is something else and must be proved as any other fact and determined and allowed by the court in its judicial discretion. The reasonableness of the attorney's fee is not the subject of judicial notice, neither is it to be left to local custom, conjecture or guesswork. Each award must be made on its own merits and should be justified by the circumstances in each particular case.

In order to avoid an abuse of discretion, the court must hear and receive competent evidence to support both the time and amount sought by the prevailing party's law firm and then have that evidence supported by competent testimony from the attorney's fee expert. If the presentation of evidence by the prevailing party's law firm fails to provide competent evidence to meet the requirements, the court is without authority to make an award. We are reminded that the competent evidence presented is only persuasive and the court retains discretion to give the weight it deems appropriate to the evidence provided and make a discretionary award. It stands to reason that the more competent the evidence and better prepared the expert is in terms of the expert's opinion testimony, the more likely the award will be favorable.

The two maxims of trial work is: 1) Nothing beats preparation; and 2) There is never enough time to prepare. Just as with the preparation for the fact case-in-chief, take the time necessary to fully prepare for the presentation of evidence in the attorney's fees hearing. It will likely pay off in the long run.