A legal note from Marshal Willick about attorney's fees (part of an occasional series) – burden-shifting.

I. THE PROBLEM BEING ADDRESSED – GENERALLY

Among the perennial sources of conflict between bench and Bar – so much so that it has become a subject of self-lampooning at the annual conference at Ely, on both sides – is the subject of attorney's fees. But the various problems are not in fact intractable. Some common-sense approaches can make the task of judging a bit easier, leave the Bar more satisfied, and allocate benefits and burdens more fairly between litigants.

Judges should care about developing standard approaches to fee awards because the perceived fairness of their fee rulings, not just within a case, but across cases, affects their reputation and careers, whether they wish it to or not. Lawyers should care because they can best advise clients when they can meaningfully predict outcomes – including cost/benefit outcomes. And clients obviously are concerned with the bottom line costs of asserting, or defending, their positions.

II. LEGAL BACKGROUND

Attorney's fees may be ordered to be paid by one family court litigant to another in a substantial variety of contexts, and for multiple reasons. Fees may be awarded in pre-divorce or post-divorce proceedings (NRS 125.150(3)), or in any case involving paternity (*Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005)), and in other sorts of cases not discussed here.

Traditionally, case law stressed the discretionary nature of fee awards (*Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973); *Halbrook v. Halbrook*, 114 Nev. 1455, 971 P.2d 1262 (1998)).

A good deal of the statutory and rule framework treats fee awards as a mechanism for punishing a litigant's misbehavior. EDCR 7.60 provides for "imposition" of "sanctions" against an attorney or litigant, consisting of "fines, costs, or attorney's fees" when the person charged is found to have increased costs by over-litigating "unreasonably and vexatiously."

The same phrase is used in NRS 7.085, which was intended to deter abuse of the legal system, as a test for holding a lawyer ***personally*** responsible for costs, expenses, and fees. In the alternative, the statute is to be applied upon a finding that litigation was not "well-grounded in fact" or warranted by law.

Even the traditional "prevailing party" fees statute (NRS 18.010) was amended in recent years to encourage its invocation when intended to "punish . . . and deter frivolous or vexatious claims and defenses, because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public" (*see also Trustees v. Developers Surety*, 120 Nev. 56, 84 P.3d 59 (2004) (discussing the legislative intent of the quoted language)).

But in family law, fee awards can be appropriate in several circumstances ***without*** any finding of "unreasonableness" by the other party or justification for "punishing" them.

For instance, family courts are authorized to award preliminary attorney's fees to "level the playing field" between the parties during litigation (*see Sargeant v. Sargeant*, 88 Nev. 223, 227, 495 P.2d 618 (1972) ("The wife must be afforded her day in court without destroying her financial position. This would imply that she should be able to meet her adversary in the courtroom on an equal basis")).

Similarly, after a decision is rendered, NRS 125.180(1) calls for an award of fees and costs whenever the other party defaults in paying any sum of money required by a prior order. In such situations, the "award" of fees is essentially restorative – placing the innocent or injured party in the same situation that party would have been in but for the harm inflicted by the failing of the other side.

III. THE PROBLEM BEING ADDRESSED – SPECIFICALLY

This legal note is addressed to these latter situations – awards of fees intended to balance the parties, either before or after litigation. A better analysis of these situations would lead courts to better awards in such cases.

Specifically, what many courts tend to ***do*** is either grant some token or rounded sum having little to do with the actual cost of litigation ("OK; I'll award $2,500") or look at the total attorney's fee bill on the innocent party's part, and order some portion of that bill paid by the other side – usually only after questioning whether the other party has the capacity to pay it.

In the context of fees designed to level the playing field, or restore an innocent or prevailing party to the position he would be in but for the other side's failing, this approach is incorrect, and inadequate.

Where a prevailing party is awarded fees only some fraction of those actually incurred to prevail, he might very well be left worse off at the end of the day than if he had allowed the party in the wrong to have whatever the subject might be.

And this harmful effect is magnified where there is any disparity in the parties' resources; in those situations, the wealthier party can continue arguing dubious propositions as a ***tactic***, knowing that even though he will lose and some fees may be awarded, the other party will be more injured by way of the litigation itself.

This recently happened to us. After multiple motion hearings, our client's custody was confirmed and support was set. But his ex, who has essentially unlimited resources from her millionaire spouse, had no incentive to settle on any point, and our client ran up a bill of $32,000 to retain access to his child and a reasonable support order. The court's "prevailing party" fee award of $2,500 left my client with a $30,000 bill, and my office with an uncollectible "collectible." We had no choice but to withdraw.

What judges do not seem to be perceiving in such unbalanced-resources cases is that the litigation itself is being used for the sake of attrition by the wealthier parties, and the poorer party, even if prevailing, will eventually lose access to counsel, who cannot indefinitely go unpaid.

This is one of the realities of attorney's fees ***awards*** disconnected from the actual scope of fees ***incurred***, and it is the reason for all the resentment expressed every year at Ely.

Many lawyers have responded by resolving that they cannot or will not represent the poorer party, causing a host of unfortunate consequences, including an increase in proper person litigants. All of this was exacerbated by the 2009 decision in *Argentena*, making attorney's liens all but uncollectible in the real world of family law litigation (see legal note #3, posted at http://www.willicklawgroup.com/newsletters).

IV. A PROPOSED ANALYSIS – BURDEN-SHIFTING

In short, the proposed steps of establishing a proper fee award are (1) determining that a case is a fee-burden-shifting situation; (2) establishing the legitimacy of the sum in question; and (3) shifting the burden for the fees to the responsible or able party.

Once a court determines a prevailing party in a "balancing the playing field" or "making the innocent party whole" situation, it should obtain documentation of the fees projected for litigation (in the pre-litigation cases) or actually incurred (in the post-litigation cases), and then should ***presume*** that the entirety of fees projected, or incurred, are equal to the award to be made.

This is so because those fees are simply a truth – it is not ***whether*** they will be incurred, but ***who*** should bear them, and there are only three possibilities. Either the wealthier or wrongful party should bear the expense, or the poorer/innocent party – or the lawyer has to take the loss of not being paid for work that is or was necessary.

In the preliminary fees cases, there might be some wisdom in letting both parties feel some of the pain of the fees incurred, so as to encourage settlement, but it should be made at least ***proportional*** to their ability to pay it. If the wife made $2,000 per month, and the husband $10,000, and the court determines that the wife requires $20,000 to meet the husband on a level playing field, the award to the wife should reflect that five-to-one imbalance in ability to pay, and the husband should be ordered to pay at least $16,000 of it.

The reason "at least" is used twice in the paragraph above is because of the reality that at the lower end of the income scale, a much higher percentage of income is consumed for the necessities of life. A strictly proportional division of fees ***still*** hurts the poorer party more than the wealthier one, and perhaps comparing proportions ***after*** deducting a subsistence reserve of the first $2,500 or so in income would be fairer. In the hypothetical circumstance suggested above, this would have the husband paying 100% of the wife's fees.

In any event, once the total or proportional fee burden has been identified, the burden shifts to the

wealthier or wrongful party to show that the sum is ***improper*** for some reason. For future fees, the necessary showing is that the litigation budget is unrealistic or unnecessary to some degree. For fees already incurred, the necessary showing is that the fees were excessive for the work performed. To the degree the paying party cannot make such a showing, the ***entirety*** of fees incurred should be awarded.

Judges tend to recoil at this suggestion for several reasons, first because the sums involved are often perceived as just being "too large." But the fees incurred are ***already*** that size, and the alternatives to burden-shifting are ***worse*** – leaving the innocent party uncompensated, or telling the prevailing lawyer that despite being correct, he cannot get paid for the work required to show it.

The public policy benefits of adopting this approach are substantial – if burden-shifting was the expected judicial course, wealthier or wrong-doing parties will have ***every*** reason to settle out of court, knowing that they will not be able to evade responsibility or financially wear down their opponents.

Could this proposal encourage litigation by those hoping for a "score"? Perhaps – but they have to be right, and prevail, to be eligible, which should be self-governing. If this process becomes the norm, litigation might well be decreased, depending on whether lawyers have the skill to perceive the legal merits, and clients are willing to take advice.

And if the total sums at issue are beyond the reasonable ability of either side to pay? Then, if settlement is not reached, the question becomes which of those involved parties ***should*** be left with substantial debt hanging over them – the wrongful party, the innocent party, or the attorney incurring the fees for his prevailing client? There really is not – or at least should not be – much doubt as to the correct answer.

Some might complain that cases are not always that "clean" – sometimes a prevailing party does not win on all issues, or may be partially responsible for a loss or expense. In such cases, the award should still ***start*** with the entirety of sums actually incurred – and then be reduced by percentage of the prevailing party's fault, or responsibility for them being incurred.

V. CONCLUSIONS

The current judicial approaches to fees – token awards, out-of-thin-air-guess-work, or starting with the apparent capacity of the wrongful party to pay the fees incurred – are all backward. Starting in the wrong place, they cannot help but arrive at the wrong destination, with unintended consequences of damaging innocent parties, leaving counsel unpaid, and encouraging litigation that should be avoided.

Awards of "level playing field" and "compensating innocent party" fees should start with treating the sums that actually have been or will be incurred as a ***fact*** to be allocated. The number should be tested, with the burden on the paying party to show how and why they are excessive, and then imposing them in accordance with responsibility or ability to pay.

This "allocation" methodology is ***much*** fairer than what is typically done now, and places burdens on the parties in accordance with their responsibility for or ability to bear them. It requires a bit more work by lawyers, and a bit more thought by judges – but the improved outcomes all around are worth the extra effort.

VI. QUOTES OF THE ISSUE

"You want justice, but do you want to pay for it? When you go to a butcher you know you have to pay, but you people go to a judge as if you were off to a funeral supper."
– Bertolt Brecht

"Your lawyer in practice spends a considerable part of his life in doing distasteful things for disagreeable people who must be satisfied against an impossible time limit in which are hourly interruptions from other disagreeable people who want to derail the train; and for his blood, sweat, and tears, he receives in the end a few unkind words to the effect that it might have been done better, and a protest at the size of the fee."
– William L. Prosser

.....

To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For more on fee and cost issues, go to http://www.willicklawgroup.com/fees_and_costs. For the archives of previous legal notes, go to http://www.willicklawgroup.com/newsletters.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.