

ATTORNEY'S FEES IN ACTIONS AGAINST PUBLIC ENTITIES:

Strategies to Reduce or Defeat Plaintiffs' Fee Claims and Potentially Recover Your Own Fees

PUBLIC AGENCY RISK MANAGERS ASSOCIATION

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1. Several grounds for a successful plaintiff to recover attorney's fees from a public agency
 - a. Bilateral provisions
 - i. Contractual (Civil Code § 1717)
 1. For example, provision in a construction or professional services contract
 - ii. Municipal Code provisions
 1. For example, provisions for recovery of attorney's fees in a nuisance-abatement action brought by the municipality
 - b. Unilateral or "semi-unilateral"
 - i. Most statutory attorney's fees provisions you will face are effectively unilateral – if the public agency loses, it pays the plaintiff's fees, but if the agency wins, it is not entitled (or not usually entitled) to collect its fees from the unsuccessful plaintiff
 1. Federal Civil Rights actions (42 U.S.C. § 1988)
 2. ADA actions (42 U.S.C. § 12205)
 3. Employment Discrimination (Title VII and FEHA)
 4. Ralph Act and Bane Act (Cal. Civ. Code §§ 52(b)(3) and 52.1(h))
 5. Cal. Civ. Proc. Code § 1028.5 (private attorney general statute)
 6. Inverse Condemnation (Cal. Civ. Proc. Code § 1036)
 - ii. There is an important difference between state and federal attorney's fees recovery statutes – under federal law, the Court cannot apply a multiplier of the basic "lodestar" amount of fees (hours X reasonable hourly rate) to compensate for the risk of contingent representation, but under state law, the Court can apply such a multiplier. See Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1106 (9th Cir.) cert. denied sub nom. City of Los Angeles, Cal. v. Chaudhry, 135 S. Ct. 295, 190 L. Ed. 2d 141 (2014).
 - iii. For the defendant to recover fees in such actions, it must do more than just prevail
 1. Section 1988, prevailing defendant may be awarded fees only where the action is found to be "unreasonable, frivolous, meritless, or vexatious." Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994)
 2. Under ADA, fees may be awarded against a Plaintiff only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1154 (9th Cir. 1997)
 - iv. In cases with this type of fee shifting, often by the time you're in a mediation near the end of the case, the Plaintiff's accrued attorney's fees is really what drives the settlement number, not the Plaintiff's actual damages
2. Ways to avoid paying your adversary's fees, or at least minimize those fees
 - a. Prevail in the lawsuit

- i. Generally, these types of fee-shifting provisions, even the unilateral ones, reward only the “prevailing” plaintiff. If you prevail, then you don’t have to pay your adversary’s fees
 - ii. Caveat re “prevailing,” especially in injunctive relief and “catalyst” cases
 - b. Properly evaluate your risk of loss early and try to settle before the plaintiff’s fees get too high, for example, before the retention and designation of experts
 - i. The Central District is currently experimenting with an early-mediation program (voluntary) in non-major police liability cases
 - 1. Cases screened for possible referral by the Court's ADR office
 - 2. If both parties agree to early mediation, case assigned to attorney mediator from the Court panel
 - 3. Mediation is scheduled before or shortly after the Rule 26 scheduling conference
 - c. Weigh carefully needless litigation tactics that will increase your opponent’s (and your) fees in the case
 - i. The less the plaintiff incurs in fees, the less you’re on the hook for if you lose
 - 1. “Strategic aggression” via demurrers and discovery requests intended more to exhaust your opponent than to obtain necessary information are not only ethically questionable (at best), but also counter-productive from a fee standpoint. Not only do you pay for your own efforts, if the plaintiff withstands the barrage and ultimately prevails, then you end up paying the plaintiff's fees too.
 - 2. Of course you have to balance this goal against the benefit of legitimate, but expensive, tactics that, if successful, may help you win and not have to pay Plaintiffs’ fees at all because you prevail
 - a. For example, motions for summary judgment are expensive, both to bring and to oppose. If you bring one and win, then you are the prevailing party. But if you bring it and are unsuccessful, then your opponent has incurred substantial cost in opposing the motion, and if you lose at trial, the plaintiff will seek recovery of those fees incurred in opposing the motion.
 - d. Statutory Offer of Compromise (CCP § 998 / FRCP 68 offers)
 - i. If you find yourself in a case (hopefully early on) with a substantial chance of being found liable, but the plaintiff’s provable damages are small, that is the quintessential case where attorney’s fees often become the driving force in settlement negotiations
 - 1. Plaintiff’s counsel feels that he or she has you over a barrel and are effectively playing with house money at that point because whatever they continue to spend in further prosecution of the case, they’ll get back from you when they prevail

2. This can happen especially in "non-major"¹ police litigation cases
 - a. A recent study within the Central District of California found that in cases filed in 2011 and resolved as of the end of 2013, 82% (111 of 135) of all police litigation cases filed in that court were "non-major"
 - b. Of those:
 - i. 21 % voluntarily dismissed
 - ii. 12% dismissed on defendant's motion (12(b)(6))
 - iii. 16% disposed by summary judgment
 - iv. 42% settled
 - v. 9% tried to verdict – ALL DEFENSE VERDICTS!
 - c. So far, settlements of cases in the Central District early mediation program have ranged from \$1,500 to \$42,000
 - i. new program – started in February 2014
 - ii. small sample size, 9 of referred 14 cases settled
- ii. If the plaintiff will not take a reasonable settlement offer because he or she (or more likely their attorney) is more interested in jacking up the attorney's fees, you can cut that off with a 998/68 offer
- iii. Similar procedure under state (CCP 998) and federal (FRCP 68) law, with only minor differences between the two
 1. Under federal law, only a defendant may make a Rule 68 offer
 2. Certain federal statutes (e.g., Individuals with Disabilities in Education Act) can moot out this rule. See, e.g. 20 USC § 1415(i)(3)(D)
 3. Federal offer has 14-day lifespan, rather than 30 days under the state rule, and federal offer is irrevocable within that 14 days
 - a. Including if defendant obtains summary judgment within that time!
- iv. Basic Features of Statutory Offers of Compromise
 1. Offer to have judgment taken against you on stated terms²
 2. If accepted, judgment entered against you on those terms
 - a. If rejected, the offer and the rejection are inadmissible, BUT if the plaintiff prevails but does not do better than the offer at trial:
 1. the plaintiff cannot recover post-offer costs, including statutory attorney's fees, and
 2. the plaintiff has to pay the defendant's post-offer costs (though only attorney's fees if the

¹ "Non-major" civil-rights cases are those where physical injuries are minor in nature (scrapes, bruises, etc.), injuries involving broken or fractured bones that do not require significant future care (i.e. no surgery), and false arrest/imprisonment cases where the plaintiff is incarcerated for a period of less than one year.

² In state court, judgment need not be entered, but instead the offer can provide for payment in exchange for dismissal.

case not frivolous, a showing generally precluded by the fact that the plaintiff prevailed. See Adams v. Wolff, 110 F.R.D. 291 (D. Nev. 1986))

- v. The trick is in selecting your offer amount
 - 1. Needs to be high enough that the plaintiff is unlikely to do better at trial; otherwise it's ineffective
 - 2. In judging whether offer was better than result at trial, amount of the plaintiff's fees incurred at time of offer is added to judgment amount
 - 3. Two ways to deal with this:
 - a. Make a lump-sum offer and make clear that it includes any and all recoverable costs and fees
 - i. Requires you to estimate what the plaintiff's fees to date are
 - ii. Advantage of being a firm number with no uncertainty as to what a judge will award on a fees motion
 - iii. Disadvantage that if Plaintiff does not accept and prevails at trial, the Court will have to determine post verdict the amount of fees the plaintiff had incurred as of the time of the offer, and if you underestimated it in your offer, your offer will be ineffective to cut-off post-offer fees
 - b. Make an offer of a set sum for damages, plus fees and costs to be awarded by the Court (e.g., "\$5,000 plus fees and costs incurred to date in an amount to be determined by the Court on noticed motion under 42 U.S.C. § 1988")
 - i. You don't have to guess what the plaintiff's fees are at the time of the offer, because the Court will determine that and add it to the set sum you offered for "damages"
 - ii. Advantage that if rejected and the plaintiff prevails at trial, no need for court to determine fees incurred as of offer date – requires only comparison of the jury verdict with the amount of the set sum for "damages" included in the offer
 - iii. Disadvantage is if accepted, you lose control of the amount of fees to be awarded, which will be determined by the Court

3. How to Recover Attorney's Fee from your adversary

- a. For bilateral, prevail in the lawsuit, and you'll be entitled to judgment for your fees!
- b. In unilateral or semi-unilateral cases, very difficult for prevailing defendant

- i. For state civil rights laws and inverse condemnation, prevailing defendant simply cannot be awarded fees. For example, Civil Code §§ 52 and 52.1 (see D.C. v. Harvard –Westlake School, 176 Cal. App. 4th 836, 864-865 (2009); Turner v. Association of Am. Med. Col., 193 Cal. App. 4th 1047, 1069-71 (2011)), inverse condemnation (Cal. Civ. Proc. Code § 1036).
- ii. Federal civil rights laws (Section 1983, ADA) stack the deck against a prevailing defendant requiring a showing that the plaintiff’s action was unreasonable, frivolous, meritless, or vexatious, as noted above.
 - 1. Very difficult to show, and often not worth seeking because the plaintiff is essentially judgment proof
- iii. Federal and state employment discrimination laws (FEHA and Title VII) both employ a similar test to the federal civil rights laws – prevailing defendant may be awarded attorney’s fees only if the plaintiff’s claim was “frivolous, unreasonable, or groundless” (Cummings v. Benco Building Services, 11 CA4th 1383, 1389 (1992))
- c. Sanctions for Frivolous Cases (Fed. R. Civ. P. 11 and Cal. Civ. Proc. Code § 128.7)
 - i. In both federal and state actions, sanctions available against a party and/or its attorney for frivolous cases
 - ii. California provision mirrors the Federal rule
 - iii. Attorney’s fees are an available sanction, but the purpose is to deter frivolous filings, not necessarily to compensate the victim of such frivolous filing. Thus, sanctions are “limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated.”
 - iv. 21-day safe harbor requirement to allow voluntary withdrawal of the offending pleading
 - v. Sanctions may be awarded against the party, counsel, and the law firm for cases presented for an improper purpose, or which are factually frivolous, but only against counsel (or an unrepresented party) for cases that are legally frivolous.
- d. In federal actions, 28 U.S.C. § 1927 may be available
 - i. “Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”
 - ii. Applies to the attorney personally, not just his or her judgment-proof client
 - iii. Requires showing of frivolous or vexatious tactics
 - iv. Award discretionary, not mandatory
- e. Cal. Civ. Proc. Code § 1038
 - i. Provides the potential for successful public agency or employee to recover fees in a frivolous action under the Government Claims Act
 - ii. Applies only to claims under the Government Claims Act, or express or implied indemnity (so not, e.g., civil rights actions or inverse claims)

- iii. Available only where the defendant public agency or employee prevails on summary judgment, motion for judgment at the close of Plaintiff's case, motion for directed verdict, or motion for non-suit
 - 1. Not available where defendant prevails on demurrer or on a jury verdict
- iv. Award is against not only the plaintiffs, but also the plaintiffs' counsel