TO MARC HANKIN
FROM ROGER ROSEN 3/10/2004/
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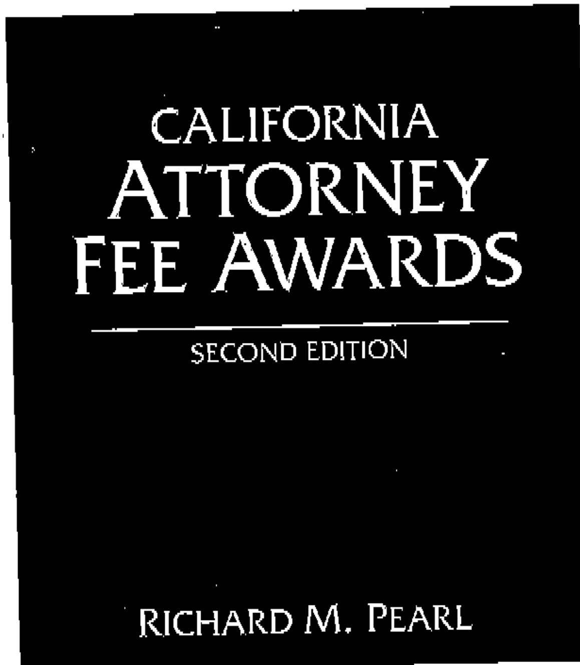

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importance of the right protected or the number of persons benefited under CCP §1021.5. More often, they address the amount of fees, going to the reasonableness of the rates claimed or the number of hours spent or both, the quality of the work, the effect of contingent representation, and any other relevant factors. See, *e.g.*, *Lobatz v U.S. West Cellular, Inc.* (9th Cir 2000) 222 F3d 1142, 1148 (in upholding class action fee award, court refers to expert's opinion); *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 700 n12. See also §§13.5–13.15.

- A declaration stating that the rates are reasonable should also state the evidentiary basis for that conclusion, *i.e.*, that the claimed rates are consistent with the declarant's rates or that the declarant has specific knowledge of community rates. See, *e.g.*, *Children's Hosp. and Med. Ctr. v Bontá* (2002) 97 CA4th 740, 118 CR2d 629; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1546, modified on other grounds (9th Cir 1993) 984 F2d 345; *Jordan v Multnomah County* (9th Cir 1987) 815 F2d 1258, 1263 n9; *Chalmers v City of Los Angeles* (9th Cir 1986) 796 F2d 1205, 1214; *Corder v Gates* (CD Cal 1988) 688 F Supp 1418, 1422, aff'd in part and rev'd in part (9th Cir 1991) 947 F2d 374. For a discussion of the facts relevant to a percentage-based award, see *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1049.

- A proposed Order Awarding Reasonable Attorney Fees, including specific findings on the lodestar or touchstone figures, may be useful, although in larger fee cases, courts tend to prepare their own decisions. See §14.42.

PRACTICE TIP➤ Counsel should always consult local court rules for motion procedures. For example, ND Cal Local R 54–5(b) describes supporting materials required for fee applications in the United States District Court for the Northern District of California.

§14.36 B. Discovery

Discovery concerning the basis for a fee award is permissible. See *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 712, 32 CR 288; *State v Meyer* (1985) 174 CA3d 1061, 1075,

220 CR 884. See also *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319, 1329.

PRACTICE TIP➤ If discovery is sought, it should be timed so that responses, if helpful, can be incorporated into the opposition or reply.

A party seeking discovery should do so by a specific request (*i.e.*, notice a deposition or request documents) as soon as the need for discovery is known. Because fee issues are generally resolved by motion, discovery may have to be conducted on an expedited basis or, preferably, with the cooperation of opposing counsel by establishing a discovery, briefing, and hearing schedule. A party who waits until the hearing on the fee motion to seek discovery is likely to be disappointed. See *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 235, 226 CR 265 (denial of generalized request for "discovery" not an abuse of discretion).

Discovery must be limited to relevant factors. For example, in both *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754, and *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 185 CR 145, the courts rejected defendants' attempts to discover the salaries and overhead costs of plaintiffs' public interest attorneys. See also *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Lit.* (1st Cir 1995) 56 F3d 295, 303 (nothing "require[s] freewheeling adversarial discovery as standard equipment in fee contests").

Similarly, in *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 250, 100 CR2d 725, the court held that when the party opposing a fee award had produced evidence suggesting that the litigation had been funded by outside sources and might not meet the CCP §1021.5 "burden of private enforcement" requirement, then limited, incremental, in camera discovery concerning the funding of the litigation would be allowed.

On the discovery rights of objectors to class action fee awards, see *Lobatz v U.S. West Cellular, Inc.* (9th Cir 2000) 222 F3d 1142, 1148.

Issue such as attorney salaries, costs, or the "internal economics of a law office" are not relevant and not discoverable. As the court said in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1098, 95 CR2d 198, quoting *Serrano v Unruh (Serrano IV), supra*, 32 C3d at 642, "We do not want 'a [trial] court, in setting an attorney's

fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It . . . is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief.'"

Fee records. Sometimes, a fee claimant may wish to discover the opponent's fee records in order to show, *e.g.*, that the number of hours claimed is reasonable. The discoverability of such records has engendered some conflict within the federal courts. Compare *Gaines v Board of Educ.* (11th Cir 1985) 775 F2d 1565, 1571 n12 (in some circumstances opponent's fee records are discoverable), with *Johnson v University College* (11th Cir 1983) 706 F2d 1205, 1208 (district court has discretion to deny discovery of opponent's fee records). See also *Cairns v Franklin Mint Co.* (9th Cir 2002) 292 F3d 1139 (declining to reduce defendant's lodestar in part because opponent had incurred even greater fees); *Robinson v City of Edmond* (10th Cir 1998) 160 F3d 1275, 1284 (opponent's hours relevant but not dispositive); *McGinnis v Kentucky Fried Chicken* (9th Cir 1994) 51 F3d 805, 809 (noting that defendant spent "considerably more money losing than its adversary spent winning"); *Chalmers v City of Los Angeles* (9th Cir 1986) 796 F2d 1205, 1214 (stating that information about defendant's fees would be helpful); *Mirabal v GMAC* (7th Cir 1978) 576 F2d 729, 731 (fees paid by opposing party to its own counsel irrelevant to determination of fees awardable to prevailing party); *Dease v City of Anaheim* (CD Cal 1993) 838 F Supp 1381, 1383 (that defendant's counsel spent less time than plaintiff's was "irrelevant"); *Real v Continental Group, Inc.* (ND Cal 1986) 116 FRD 211 (defense counsel's hours and rates relevant and not privileged, but underlying billing records not discoverable to extent they reveal nature of services provided). See also *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145, 1151 (explaining reasons why plaintiff's attorney may need to expend more hours than defendant's).

As a practical matter, fee opponents tend to submit their own fees when they are significantly less than the claimant's and object to discovery requests when they are greater. The fee claimant's strategy is the opposite. The California courts have noted the utility of such comparisons (see, *e.g.*, *Deane Gardenhome Ass'n v Denktas* (1993) 13 CA4th 1394, 1399, 16 CR2d 816 (comparing losing party's fees with prevailing party's claim for fees); *West Coast Dev. v Reed* (1992) 2 CA4th 693, 707, 3 CR2d 790) but have not ruled directly