Objecting to an Opposing Party's Request for Attorney Fees Can Have Ramifications

You just lost a case in which the opposing party has a claim for attorney fees pursuant to a contract, statute or other fee-shifting mechanism. The opposing party has now filed a motion for attorney fees. Your initial reaction is to oppose the motion by arguing that the amount of time spent by the opposing party's attorneys was excessive and their hourly rates are unreasonable. Before pulling the trigger, however, you will want to consider a potential negative ramification of taking that position.

When a party requests an award of attorney fees, the party must establish that its request is reasonable, meaning that the time spent on the case by its attorneys was reasonable in the context of the factual and legal issues in dispute, and that its attorneys' hourly rates are reasonable in the community in which the case is venued. The party on the other end of the motion, of course, has the right to challenge the fee request. When such a challenge is made, the moving party may counter by seeking discovery of the objecting party's attorney fees in the case. This is usually done for two reasons: (1) to try to back off the objecting party by creating the risk that its own attorney fees will be discoverable, and (2) to argue to the court that the best evidence of what is reasonable is what the objecting party paid in litigating the same legal and factual issues in the case.

Wisconsin has not yet decided whether such discovery is permissible, but courts in other jurisdictions have frequently considered the issue and are split on their holdings. The majority of courts hold that discovery of an objecting party's attorney fees is permissible under these circumstances. As one court held, "the defendant's fees may provide the best available comparable standard to measure the reasonableness of plaintiffs' expenditures in litigating the issues of the case." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 1996 WL 66111, at *3 (N.D. Ill. Feb. 13, 1996). As another court held, "the time spent by the defense counsel . . . may well be the best measure of what amount of time is reasonable," calling it a "logical yardstick." *Pollard v. E.I. DuPont De Nemours & Co.*, 2004 WL 784489, at *3 (W.D. Tenn. Feb. 24, 2004).

Numerous other cases hold the same way. *See*, *e.g.*, *Henson v. Columbus Bank & Tr. Co.*, 770 F.2d 1566, 1574-75 (11th Cir. 1985); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984); *Frommert v. Conkright*, 2016 WL 6093998, at **2-3 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F. Supp. 2d 667, 668-69 (W.D.N.Y. 2011); *Cohen v. Brown Univ.*, 1999 WL 695235, at **2-4 (D.R.I. May 19, 1999); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 153 (N.D. Iowa 1993); *Coal. to Save our Children v. State Bd. of Educ.*, 143 F.R.D. 61, 64-66 (D. Del. 1992); *Real v. Cont'l Grp., Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986); *Blowers v. Lawyers Coop. Publ'g Co.*, 526 F. Supp. 1324, 1325-28 (W.D.N.Y. 1981); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 562-64 (N.D. Ga. 1979); *Stastny v. S. Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978); *Vulcan Materials Co. v. Chandler*, 992 So. 2d 1252, 1268

(Ala. 2008); *Paton v. Geico Gen. Ins. Co.*, 190 So. 3d 1047, 1050-53 (Fla. 2016); *Miller v. Kenny*, 325 P.3d 278, 303 (Wash. Ct. App. 2014).

A minority of courts go the other way, holding that what an objecting party paid in attorney fees to defend a case is not relevant on the issue of whether what the plaintiff paid to prosecute the case is reasonable. The most recent case to so hold is *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017). In that case, the Texas Supreme Court held as follows:

To the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish or tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred. A party's litigation expenditures reflect only the value that party has assigned to litigating the matter, which may be influenced by myriad party-specific interests. Absent a fee-shifting claim, a party's attorney-fee expenditures need not be reasonable or necessary for the particular case. Barring unusual circumstances, allowing discovery of such information would spawn unnecessary case-within-a-case litigation devoted to determining the reasonableness and necessity of attorney-fee expenditures that are not at issue in the litigation.

Id. at 799. Other cases similarly holding include *Hernandez v. George*, 793 F.2d 264, 268 (10th Cir. 1986); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 659-60 (7th Cir. 1985); *Costa v. Sears Home Improvement Prods., Inc.*, 178 F. Supp. 3d 108, 113 (W.D.N.Y. 2016).

Because Wisconsin has not decided this issue as of yet, and other jurisdictions are split on the issue, it may be risky to oppose an opponent's request for attorney fees on the grounds that the time spent by its attorneys was excessive or its attorneys' hourly rates are unreasonable, particularly if it is anticipated that the attorney fees you spent likely exceed the attorney fees spent by your opponent.

Dean Laing is the President of O'Neil, Cannon, Hollman, DeJong & Laing S.C., and a member of its Litigation Practice Group. He can be reached at 414-276-5000.

Firm Obtains Big Win for Client

From 1997 to 2009 Sujata Sachdeva embezzled over $36 million from her employer, Koss Corporation, in one of the Top 10 Largest Embezzlements in U.S. history. The embezzlement was reported all over the world, including on the cover of *The National Enquirer*.

Ms. Sachdeva was criminally convicted of embezzlement and is currently serving a prison term. In an attempt to recoup its loses, Koss sued its auditor, credit card company, and banks. Its auditor, Grant Thornton, settled the claim for $8.5 million, and its credit card company American Express, settled the claim for $3 million. Those lawsuits were filed in Illinois and Arizona, respectively.

Koss also sued its local bank, Park Bank, in Milwaukee, arguing that Park Bank acted in bad faith under the Uniform Fiduciaries Act by failing to discover and report the embezzlement. In the lawsuit, Koss sought damages of $43,749,400 from Park Bank. After five years of litigation, on March 11, 2016, the trial court dismissed the case in a 24–page written decision, finding that "Park Bank did not act in bad faith." The court held that, under the Uniform Fiduciaries Act, bad faith "requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction," and "there must be some factual basis—whether an allegation of monetary self-interest or compelling evidence of wrongdoing—to suggest the bank acted intentionally to avoid knowledge of the fiduciary's wrongdoing." Here, the court held, "Koss has not provided any evidence that Park Bank intentionally ignored Sachdeva's embezzlement," and it "declines to require banks to act as detectives, whether they be Sherlock Holmes, Columbo, or Andy Sipowicz."

Dean Laing of our firm was Park Bank's lead attorney. Also working on the case were Greg Lyons and Joe Newbold.

Attorney Dean Laing and Laura Now Contribute Article to the ABA Health Law Litigation Newsletter

The article, published in the American Bar Association, Section of Litigation, Committee on Health Law Litigation's Winter 2010 Health Law Litigation Newsletter, discusses the common law development of a radiologist's duty to directly communicate his or her findings to a treating physician, and how the American College of Radiology's attempt to provide guidance to radiologists by establishing communication guidelines may not have had the effect that the ACR intended.

While the duty to directly communicate radiological findings has been firmly recognized by the courts for a number of years, courts have not been as consistent in articulating when that duty is triggered. The ACR originally set forth its recommendations to radiologists by creating its Standard for Communication-Diagnostic Radiology in September of 1991 which required

radiologists to directly communicate their findings to treating physicians under certain circumstances. Since that time, this standard has undergone a number of revisions and is currently recognized as the ACR Practice Guideline for Communication of Diagnostic Imaging Findings. This Practice Guideline continues to provide guidance to radiologists regarding when direct communication with a treating physician may be necessary. More importantly, however, this Practice Guideline has increasingly been recognized and relied on by medical journal articles and the courts as evidence of a standard of care for the communication of radiological findings, despite the ACR's explicit statement that its standards are not to be used to establish a legal standard of care.

Keeping this trend in mind, whether relying on established case law or the guidelines established by the ACR, radiologists should be especially diligent in communicating directly with a treating physician when the circumstances surrounding the radiologist's findings mandate immediate communication.

A full copy of the A Radiologist's Duty to Communicate with the Treating Physician can be found here.