RECOVERING ATTORNEY FEES IN A CONSUMER LAW CASE:

14 FACTORS WHICH MAY DEGRADE ATTORNEY FEE AWARDS

Ronald L. Burdge, Esq.

By

Ronald L. Burdge, Esq.
Burdge Law Office Co. LPA
2299 Miamisburg Centerville Road
Dayton, OH 45459-3817
Voice: 937.432.9500
Fax: 937.432.9503

Email: Ron@TheLawCoach.com

Table of Contents

INTRODUCTION

Most Consumer Law statutes have a "fee-shifting" provision that allows the prevailing consumer, and sometimes a prevailing merchant, to recover their reasonable attorney fees from the losing side of a Consumer Law case by filing a motion for an award of fees. In some jurisdictions it may be termed a "petition" instead of a motion, but the content, argument, evidence and strategies are the same no matter how the pleading is captioned. In this paper we shall refer to both as a fee motion.

At the outset it should be noted that time records are maintained for two reasons. First, so that complete billable records are maintained on a file in order to thoroughly document all activity that is occurring at all times. These records would normally be reasonably detailed and would often contain content that is protected by attorney-client privilege. Second, however, is so that billable records may be submitted to the court on a fee motion in a fee shifting case. This version of the time records would normally be of the same detail but with privileged content replaced with little more than a reference to the subject matter of privileged matters. As a practical matter, the first type of more thorough time records should be maintained in all cases, with those records being modified only when necessary for use in fee motions.

That first, more thorough billable time records are for the attorney to be able to use, if needed, in explaining to their client the work performed during the case. The second, "privilege modified" time records are for the attorney to explain to the court the work performed during the case when the case arrives at a fee motion.

The purpose of this paper is to examine the 14 most

common factors which Courts consider in determining what is a reasonable attorney fee to be allowed in a particular case and particularly how those factors may diminish the resulting award or provide evidence of the reasonableness of the award.

What a reasonable fee may be in a particular case is most often a decision made by the trial Court that is all but irreversible since it is within the sound discretion of the Court to make that determination, and it is often very difficult to reverse a discretionary decision made at the trial level.

The attorney fee hearing is, in reality, a "trial within a trial", in the sense that recovering attorney fees may often be an essential economic element of a court case for one side or the other. That is especially true in Consumer Law cases. For that reason, it is necessary to have an understanding how the calculation of fees is made and what factors are considered. Thorough preparation and planning is necessary.

Just like any trial, you have to plan in advance for the fee hearing. Part of that planning is an awareness of the common factors that are considered in a fee motion award by a trial court.

MAKING THE FEE CALCULATION: THE LODESTAR APPROACH

There are typically four steps used by the Courts in calculating a reasonable attorney fee in a fee shifting case.

1. Determine a reasonable hourly rate for the attorney.

2. Determine a reasonable amount of time for the case at hand.

3. Multiply “1” times “2” = the lodestar fee amount.

4. Any modification is made only in light of applying the Rules of Professional Conduct, Rule 1.5 (a)(1) thru (8).

Some courts require nothing more than affidavit submissions on the fee motion as long as the opponent does not request an evidentiary hearing. Others may require an evidentiary hearing as a matter of routine.

The burden of proof on a fee motion is on the movant to provide the Court with evidence in support of the motion, i.e., the reasonableness of the requested hourly rate and time expended and any requested lodestar modification.

The Lodestar result (from Step # 3 above) is presumed to be a reasonable attorney fee and any modification of it, up or down, is then discretionary with the Court, but must be based on those Rule 1.5(a) factors which the Court deems relevant. Not all factors may be relevant and some factors may be used by the Court in the initial determination of the reasonable hourly rate of an applicant.

It is thus seen that the key issues in a fee motion will almost always focus on the hourly rate and the time entries.

14 FACTORS WHICH MAY DEGRADE FEE AWARDS

An applicant’s attorney fee motion may be disputed on several primary approaches. Counsel should know these factors and prepare for them in advance. The Court’s ultimate attorney fee decision can often hinge on one or more of the factors discussed below. Moreover, office time-keeping procedures and litigation tactics should be considered throughout the handling of a fee shifting case. Administrative

safeguards should be instituted, if not already existing, to address each of the factors. The objective of the parties should be to assure that accurate and useful data is submitted to the trial court for its consideration in making the fee decision.

From an administrative view, the fundamental idea should be to balance the additional time-keeping work necessary to support a future fee motion while at the same time litigating the case in the best manner needed to assure ultimate success.

PARTIAL SUCCESS

First, non fee shifting claims in the case may be an issue.

In Consumer Law litigation, oftentimes a case may frame several causes of action and some of those may not have a right to recover attorney fees in the first place. It may be argued that time spent on a non fee shifting claim in a case must be be considered by the Court in making a fee award. As a general proposition, that is accurate. However, it ignores the practical aspect that in some instances the time can not be "carved out" of the case because it is intertwined with fee shifting claims.

One should bear in mind that sometimes the work spent on one claim or factual issue (which may not be attorney fee compensable) is the same work that would have been spent on another claim which was attorney fee compensable.

For example, a Uniform Commercial Code breach of warranty claim carries practically the identical elements for a

federal Magnuson Moss breach of warranty claim in most jurisdictions. However, the UCC claim is seldom fee shifting, while the Magnuson Moss Act is often fee shifting. The evidence necessary to establish the breach of warranty may be the same for either claim.

Thus, necessary work that establishes a non fee shifting claim may also establish the existence of a fee shifting claim in the same case. In such an event, the time expended to gather that evidence and submit it to the Court is generally compensable under the fee shifting claim in the case and Courts have so held.

UNSUCCESSFUL PRETRIAL MOTIONS

Time expended on unsuccessful pretrial motions may be subject to attack. An example is a motion for summary judgment which was not successful.

Nevertheless, it must be remembered that some motions may serve a dual function. Not only may they attempt to resolve an issue of fact (such as the merits on a summary judgment motion), but they may also be useful to give the trial Court and the parties advance notice of and relevant argument or discussion upon the complexity of one or more legal issues that will ultimately need to be resolved even if the motion is not successful, i.e., at the trial itself.

An unsuccesful motion for summary judgment may also cause an opponent to bring forth evidence which the movant may not have been aware of and which then can be planned for in advance fo the trial for better handling and presentation. In addition, the motion may itself serve to provide the court and counsel with needed input on issues of fact or law in the case that, if disputed, need to be considered

more carefully than might be indicated at first blush.

In such event, motions and memoranda which are beneficial to the trial Court in this manner may be compensable, just as would be a memorandum of law submitted on an issue at trial. The only difference is the Court is getting it in advance of time, which benefits the Court in giving it additional time to research the issue and actually benefits the parties by giving them additional time to brief the issue, long before the trial actually arises.

The real question in such a case is whether or not the motion or memoranda was useful to the court or counsel in better understanding an issue or argument that may not be decided until a later date than its filing. If so, then it should be compensable in a fee motion.

DUPLICATION OF EFFORT

Duplicated time entries are frequently raised. When more than one attorney or other time-keeper work on the same file, additional clarity in the content of the time entries may be needed to avoid the suspicion that different people did the same thing twice and only one of them should be compensable and the other one deemed unnecessary.

Sometimes, an opponent may argue that the duplication shows the untrustworthiness of the fee records and that neither person's work should be compensated since "we don't know which one, if either, is really accurate."

It is important to carefully document the time amount and task purpose to avoid this argument. It may be that preliminary research work was necessary, or even drafting by lower level time keepers (such as law clerks or paralegals)

which is only reviewed and refined by an attorney working on the file. The same may be true for work done by a junior attorney which is then reviewed by a senior attorney.

It may not be a matter of who does the work, so much as differentiating the work being done, sufficiently to justify the time spent by both. Courts realize that it is generally more cost effective for lower level employees of the law firm to do fundamental work than it is for higher level employees (i.e., the senior attorney on a file). In fact, in larger firms it may be expected that greater amounts of such delegation will occur than in smaller firms which may lack the same amount of attorney support staff.

Nevertheless, the compensation being sought for both should be justified, both in terms of hours expended and rates sought.

The reality is that time which expended by lower level time keepers should save time that otherwise would be expended by the higher level time keepers (i.e., a more experienced attorney), who would bill at the higher rate. Cost effectiveness and billing discretion is key to justifying the attorney fee compensation when time records indicate similar work tasks being performed by more than one time keeper on a file.

HOURLY RATE TOO HIGH

Hourly billing rate issues are frequently raised. No matter what hourly rate an applicant may think they are entitled to, one may rely on their opponent to argue that the requested rate is unreasonably high. Statistics, jurisdictional data and comparisons will likely be helpful to the trial Court. They may be submitted in the form of supporting affidavits

from other attorneys, accepted survey data, prior similar decisions, etc.

Comparisons in the geographic vicinity of the jurisdiction can be important, but in a niche practice of law, such as Consumer Law, even a statewide (or regional) comparison has been held to be appropriate. As at least one court has said, if few local attorneys handle a case of the type at hand, then the client necessarily may only have been able to obtain adequate legal assistance by seeking more distant help.

In short, it is probably fair to say that no state has such a huge quantity of Consumer Law practitioners such that localized attorney fee rates are of great use to the Court in an attorney fee motion in a Consumer Law case. Thus, the hourly rate applicable in any one part of the state by any Consumer Law attorney may be a valid comparable number for another area of the same state.

It may be questioned whether the hourly rate in the same town of an attorney who does no Consumer Law work at all is of much value in determining the reasonable hourly rate for an attorney who limits the practice to Consumer Law matters. In short, the degree of specialization of the practitioner will commonly have a bearing on the reasonableness of the hourly rate.

While the geographic vicinity is relevant, the "years in practice" factor bears an equally important relationship to the reasonableness of the Consumer Law attorney's hourly rate. In other words, the attorney with 20 years of experience in one locality necessarily will often receive a higher hourly rate than the attorney with only five years of experience in virtually any other locality in the same state. In fact, a good case can be made for the existence of a "state wide" hourly

rate based on the years of practice, when one considers the fact that not many attorneys represent consumers in Consumer Law disputes in the first place.

It is thus seen that the reasonableness of an hourly rate is often the result of considering a variety of aspects of the movant's attorney and the case itself.

Nevertheless, comparables are important to achieving a successful attorney fee motion, whether the evidence comes from survey data or testimony presented by the movant without survey data or the aid of an expert (which is probably not the best approach) or with the use of survey data or an expert on Consumer Law attorney fee issues or a "broader" expert (such as Altman-Weil or similar "accounting" firms who do economic analyses of the legal profession in general).

POOR RECORD KEEPING

Poor record keeping and error in calculations may provide a fee motion opponent to raise objections. Given the length of time a court case may take to conclude, and the amount of work needed throughout, it is not surprising that record keeping errors might happen.

Before submitting any details of your fee motion to your opponent or the court, it would be wise to go over all records with a proverbial "fine tooth comb." The more meticulously accurate and detailed your records are, the more credible will be your fee request.

The review can be done by non-attorney support personnel with attorney supervision, but the reality is that the further the attorney is from the actual review process, the more difficult it is for the attorney to have a thorough

understanding of the very records that he/she must testify about at the fee hearing. If a non-attorney does the initial analysis, the attorney should at least "spot check" the details of the review for overall accuracy.

The movant may find it helpful to compare actual letters in the file with the billing records to see that an entry exists for each one and no duplicate entries occurred. Compare the pleadings in the file with the time entries. Consider the time needed to do research and draft each pleading. Don't forget client phone calls and conferences. Reconstruct records where necessary but it is always best to contemporaneously create time records in the first place.

You should consider whether or not "no charge" time records should also be maintained and included in your fee motion, when they exist. Whether or not you do so may depend on the particular Court and case at hand. Some believe that including it reflects your consideration of billing discretion and can make it harder for a court to justify discounting the actual time for which you do seek compensation.

Make sure to put as much detail in each time record as possible. Each time entry should focus on the particular cause of action involved in the particular work task where possible — the more specificity, the better. And write down every separate task performed, when it is being performed.

Accurate, thorough and contemporaneous time records can go a long way toward evidencing the reasonableness of the total time sought in a fee motion.

THE HAZARDS OF "BLOCK BILLING"

An all-too-frequent complaint of an opponent on a fee motion is that the time records are done on a "block" basis instead of a "task" basis. There is nothing fundamentally wrong with keeping records either way; it just makes it more difficult to analyze the records for accuracy and adequacy. That may make it harder to deterlmine the reasonableness of a particular time entry.

The movant may well be able to fully explain a block entry in a contested fee hearing, but merely having to make the explanation gives the fee opponent an unnecessary opportunity to challenge the movant's fee records. And in the quiet of chambers, the movant risks that no explanation may be discerned by judicial eyes at all.

Block billing is, itself, an auditor's term. What it means is that several tasks are performed within a given time and grouped within a single time billing record which is then reflected in only a single time entry.

As an example, the work task on the time entry might just say "prepare memo in opp, 2.5 hours" when what was really done in that time frame was review of file and evidence, legal research, telephone call to client and witnesses, and drafting of memorandum in opposition and two affidavits — all on a single fee shifting cause of action.

It is certainly wise to create time records that are detailed by task instead of block parameters. This is not because it makes it easier on the timekeeper who documents the billing slip, because it clearly does not. It simply adds clarity to the time record and therefore the fee motion itself. The old adage is true: the more detail, the better.

VAGUE RECORD KEEPING

Vagueness issues may arise because of the lack of detail in time billing records.

A mere notation which fails to disclose the content or purpose of telephone calls or meetings or lacks sufficient detail for the reader to understand its full meaning and applicability or usefulness to the litigation. While great detail is not absolutely necessary, vagueness may cast doubt on the movant's credibility on this and perhaps other time entries. The best approach, certainly, is to put as much detail on the records as reasonably possible.

In other words, try to make notes of as much of the subject matter as possible. Indeed, the subject matter of a time slip should be categorized in various ways so that it is relatively easy to reconstruct the content if necessary.

For instance, all work activity can be categorized by some specific titles, such as Letter, Document, Appearance/Attendance, Conference, Deposition, Discovery, Document Production, Expert Witness, Miscellaneous, Other Motions, Plan and Prepare, Pleadings, Research, Review of (fill in the blank), Settlement, Trial Prep, Travel, etc. Then the time keeper may merely append to the description what the subject matter was of the activity, i.e., instead of "letter to client" it should say "letter to client regarding defendant's settlement offer" etc.

Also costs of litigation should be categorized with detail wherever possible, such as Copies of (fill in the blank), Postage, Parking to Attend (fill in the blank), Fax (of what, was it coming in or going out?), Mileage (to/from where?), etc.

For telephone call records, it may be useful to note the content of the calls under such headings as "What I said" and "What they said" in order to document the content of the

conversation, both for billable purposes, and for recall purposes. When making the fee motion, however, the time record should reflect the subject matter alone so that client confidences and attorney privileges are maintained.

And in multiple opposing party cases, note which opposing counsel are involved in each call, as well as the subject matter of the call.

FORMULAIC TIME ENTRIES

Use of formulaic entries is improper in time keeping and will almost always be detected and objected to by an opponent to a fee motion. A formulaic entry is where a standard amount of time is put down on the same type of task every time, regardless of the actual time involved in performing the task each particular time.

Formulaic time records are easy to spot and an even easier target of an opponent's objection. Common sense dictates that it is highly unlikely that it will take the exact same amount of time to do a task every single time that type of activity occurs. Life just isn't that normal. For example, researching one legal issue is very unlikely to take the exact same amount of time that researching another legal issue will take. But if the movant always lists the same amount of time for legal research, regardless of reality, it will be obvious.

Minimum billable time amounts are still an acceptable manner of billing, i.e., measuring time by the 1/10 or 1/4 hour. While using the 1/4 hour measurement was standard in years past, the standard minimum time entry in most jurisdictions is now the 1/10 hour increment.

To avoid the formulaic entry argument, repetitive entries

need to be made more distinctive. Trial preparation, review, miscellaneous, are hazardous categories of generalization. More detail would be wise to append to such general, broad entries on the time slip. The more detail the better.

Of course, the problem is that "trial prep" can appear to be repetitive when in reality it is not. For that reason, the nature of the trial prep itself should be detailed each time wherever possible (i.e., deposition review, witness outline, exhibit compilation, jury instruction prep, objection outlines, etc.).

INCONSISTENCIES

Inconsistent entries/timekeeping will be scrutinized.

It is important to make certain that entries which should have "parallel" entries (such as travel time) with some other activity (such as a court appearance or conference out of the office) match up in the time records. Another example would be postage charges with correspondence or documents that are being mailed out (same with fax charges) where the preparation of the document exists on one day but no fax or postage costs charge exists in the billing records or vice versa.

This "cross-checking" of such entries is important to insure consistency. In fact, while it takes time for the analysis, it is an easy way to prove the thoroughness, or lack of thoroughness, of time records in a fee hearing.

THE "LONG DAYS"ARGUMENT

"Long days" may be argued by a party opposing a fee motion. It would be nice to go home at 5 o'clock in life, but

that is not always what happens. Sometimes, it is seldom what happens.

Some opponents may argue that the movant's counsel did not work 10 hour days on non-trial dates or 12 hour days on a trial date. Trial attorneys in the real world know otherwise. Long days are not unusual for a trial attorney in any area of practice.

Nevertheless, the argument may be raised and it is valuable to be able to document your time carefully and accurately, in order to precisely justify the length of time expended in a long day.

Actually, when an opponent argues "long days," it is probably a gift to the movant since many trial Judges practiced law before taking the bench. In such instances, they usually realize that the "long days" argument has little validity in real life (assuming you have not repeatedly billed 20 + hours in a given day). The time to beware the argument most is when you are in front of a Judge who has little pre-bench professional experience.

EXCESS TIME PER TASK

Excessive time claims may arise. For instance, excess expenditure of time for research or writing dealing with a specific issue, such as jury instructions.

Remember that many Judges were once trial attorneys and they typically recall how much time they spent on a case. The "good news" is that many of them did not have the extensive computer assistance that many of attorneys now enjoy, so they recall the "long days." The "bad news" is that some fee opponents still argue that the use of computers and

word processing programs actually should mean that you spend less time drafting documents that formerly took much longer to compile.

Some Judges may believe that computers mean that it should take you huge amounts of less time than it once did to do the same task. In reality, the time savings is often minimal or non-existent, perhaps because a trial memorandum, for example, may be reworked as it is being created by many attorneys who see the finished product as they create it. Formerly, such a memorandum was committed to final or near-final stage when dictated by the attorney.

Again, documentation with detail is the best answer. Precise starting and stopping times on work tasks, which are explained in detail and itemized by "tasks" performed, are a good means to analyze the truhof the argument.

UNUSUAL WORK TASKS

Unusual work tasks may be problematic in some time records. For instance a niche area of law practice often involves doing tasks of a unique nature, or in a different way, than opposing counsel or Judges are experienced with in other areas of law practice.

For instance, a computer program called Time Map enables the attorney to document in a very graphical way the events that occur in the transaction between the consumer and the dealership, including the repair history. Some attorneys do this by creating a "chronology" using a word processing program or some other computer program. Such a chronological or graphic illustration of events can be invaluable for the attorney's thorough understanding of the events and an effective communication tool with a jury or the

Court itself.

However, it necessarily means constant updating as new facts and information are learned. The result is that a considerable amount of time can be written up under a category or subject that is not readily understood or recognized by an opponent or a Judge who has no experience with the unique program or its usefulness to a trial attorney. In that case, the misunderstanding can raise doubt on the balance of time slips and entries which would otherwise be acceptable.

In such cases, it would be wise to consider providing an explanation for the potentially confusing or otherwise-vague term or task, so that it is readily grasped as being important, useful, unique, and valuable to the Court as well as to plaintiff's counsel in preparation of the case.

Remember, the Court's analysis is whether the time expended was reasonable and necessary. For that reason, the movant show that the net effect of what was done (i.e., the graphic chronology or time map in our example above) was to make it easier for the Court and the jury to understand the facts, and apply the law, to arrive at a fair and just verdict.

However, the movant must do it in a way that the Court will recognize, appreciate, and acknowledge is worthy of compensation.

CLERICAL-ADMINISTRATIVE TIME

What fee detractors call clerical or administrative work can be a problem in a fee motion. It is not unusual for an opponent to argue that the attorney was doing "clerical work" which should have been performed by a "lower level"

employee who would not ordinarily create billable time to a client and, so the argument goes, the time is not compensable in a fee motion.

The issue is raised because some courts consider administrative or clerical work to be part of the overhead of a law office and not compensable in an attorney fee motion. Thus, the key question is whether or not the task was purely administrative or if some legal knowledge or judgment was involved in the performance of the task.

First, the expertise necessary to deal with the disputed task should be examined. Is this a true "secretarial" task or does it involve some exercise of legal decision making or analysis, either in whole or in part, which made it appropriate for a billable time keeper, such as an attorney or paralegal, to perform the task? If it was purely administrative, then it may not be billable time but merely law office overhead time. If some legal analysis or work is involved, even if some administrative issue was also involved, the time should be considered billable and, thus, may be included in a fee motion.

Another thing to bear in mind is that in some niche areas of law, the normal secretarial work may not be the same as normal secretarial work in a more general practice law office. In such a case, there are two inquiries. First is the educational and experience level of the otherwise-administrative time keeper more in line with a law clerk or paralegal? Second, was that specialized knowledge necessary to carry out the task that is under dispute? If so, then the movant should differentiate and explain the basis for its inclusion in the fee motion.

It may be helpful to explain to the Court the personal training that is provided by the attorneys to the

administrative staff so that they may properly function in the niche law office practice is more than an administrative role. In smaller, niche law practices such as Consumer Law, it is common for some otherwise-paralegal tasks to be performed by otherwise-administrative support staff.

The key aspect in a fee motion is often not the status of the time keeper but the subject matter noted for on the time record for the time expended.

TOTAL TIME TOO HIGH

"Working the file" arguments may arise but are seldom valid because they are usually made with no specificity. No matter how little (or how much) work an attorney may do on a file, opponents of fee motions seem to frequently argue that the movant's counsel "worked the file." This is a personal attack on the movant's integrity and ethics and should be soundly rejected in the absence of specific, substantial and persuasive evidence.

The argument risks being harshly and soundly rebuffed in the face of thorough and detailed timekeeping records.

Relevant to this argument, is the question of a movant's billing discretion. That means that it may be prudent not to seek compensation for every time slip that was written. Consider whether or not one or more time entries would have been "written off" or otherwise reduced if the case had involved a paying client instead of a fee shifting claim.

Some courts may expect an attorney to work more hours on a file than they would expect a paying client to pay for, sometimes without any discernable reason for it. This may be a holdover from the days when a law practice was less

of a business than it is in these times.

Nevertheless, a wise approach is to carefully review all time records and, when submitting the fee motion to the Court, discount or “write down” the billable time the movant may wish to note some time to be “no charge.”

The simple fact of the matter is that if you are able to show that you expended even more time on the file than you are asking the opponent to pay for, it enhances the likelihood that you will receive compensation for the full amount you request, because you are showing that you understand the need to work hard and work your best at winning a case, paramount over expecting the client to pay for every minute you spend on a file.

ABOUT THE AUTHOR

Ronald L. Burdge is an attorney and the founder of Burdge Law Office Co LPA in Dayton, Ohio. Mr. Burdge is in private practice in Ohio, Kentucky and Indiana and elsewhere by *pro hac* admission, and is a nationally known Consumer Law attorney. For over a decade, Mr. Burdge has testified as an expert witness on Consumer Law and Attorney Fee issues in numerous state and federal courts. He is a member of the Total Practice Management Association and numerous professional associations.

He has authored numerous articles and lectured widely on Attorney Fee issues and Consumer Law and Consumer Trial Practice, and is a member of the American Society of Legal Writers and the Legal Writing Institute. Mr. Burdge has also lectured widely at national and state Consumer Protection Law seminars before attorneys, Judges, and both public and business groups, and has testified before the Ohio Legislature and its committees on Consumer Law issues.

He has served as Board Examiner for the National Board of Trial Advocacy and has extensive Consumer Law trial and appellate experience in individual and class action cases involving lenders, retail sales practices, defective products, and warranty litigation. Since 2004, he remains the only Consumer Law attorney in Ohio who has been named to Ohio Super Lawyer status by *Law & Politics* Magazine and Thomson Reuters, and whose practice is entirely devoted to Consumer Law work for consumers only. Thomson Reuters is the world's leading source of intelligent information for businesses and professionals. In 2004, he was named Trial Lawyer of the Year by the National Association of Consumer Advocates and in 2010 he was elected to the Board of the National Association of Consumer Advocates.