A legal note from Marshal Willick about attorney's fees (part of an occasional series) – the impact of deferring fee awards, fees in child support cases, and the role of EDCR 5.11 in fee awards.

I. THE PROBLEM BEING ADDRESSED – GENERALLY

There is much uncertainty and conflict among judges and lawyers on the subject of fees. For a recap of the general problem and legal background relating to fee awards, see legal note # 28, posted at http://www.willicklawgroup.com/newsletters).

II. THE PROBLEM BEING ADDRESSED – SPECIFICALLY

A. THE HARM IN JUDGES DEFERRING FEES TO ANY LATER TIME

Wrongful, overly stubborn, or over-litigious parties are not deterred in any way by fee awards that are not payable ***immediately***. And much too often, at the end of the case, judges' threats as to the fee awards that are to be made "if this conduct continues" (etc.) prove utterly hollow, either because they are imposed in unrealistically small sums having nothing to do with the fees actually incurred, or because by then the wrongful party has declared bankruptcy or otherwise liquidated the assets that would be used to pay such an award.

When that happens, the innocent party ends up with an unjustifiable bill to pay for having prevailed, and much too often the lawyer has a large collectible to try to get from his own client. These are bad effects, and worth avoiding.

In a recent paternity case, our client was the relatively impoverished mother. The father was an older, married fellow with a million dollars in the bank, who at one point simply stopped paying child support. He was ordered to resume payments – and fees were deferred to trial. He then refused to provide discovery, which he was ordered to provide – and fees were deferred to trial. He then propounded his own discovery having nothing to do with the child support case at issue; a protective order was granted against that abuse – and fees were deferred to trial.

So when we got to trial, the case had been dragged out many months beyond the 30 to 90 days such a case ***should*** have taken, and the other side had run our total fees up to $40,000, at least $18,000 of which was due ***entirely*** to the misbehavior specified above.

Having never been made to actually ***pay*** for any of that misbehavior, he had no incentive to stop doing it. In fact, as explained in the earlier legal note (No. 28; posted at http://www.willicklawgroup.com/newsletters), the lack of judicial action gave him ***every*** reason to continue – wealthier parties can and do file serial groundless motions as a ***tactic***, knowing that the other party will be injured by the litigation itself, and may even be deprived of the assistance of counsel, who may be forced to withdraw for non-payment.

B. THE BENEFITS OF IMMEDIATELY PAYABLE FEE AWARDS

The predictable bad outcomes from deferral of fees discussed above stand in contrast to the results predictable from assessing realistic fee awards right when they are needed, either to punish wrongful behavior, or to balance the playing field.

First, and perhaps best, if the cost of misbehavior is felt immediately, misbehavior should decrease.

And where the fees actually required to fully litigate a case are beyond the realistic capacity of parties to pay for it, front-loading actual ***payment*** of those fees will pressure the parties to settle the matter earlier rather than later, without forcing the lawyers to effectively play the role of bankers.

In short, judges should virtually ***never*** find that fees are warranted, but defer their imposition "to trial," or to any time other than right when they are found to be warranted.

III. FEES IN CHILD SUPPORT CASES

Anecdotal reports continue to appear that some judge are not aware that fee awards are essentially mandatory in cases where an obligor is found to owe arrears in child support.

There is more than one controlling statute. The first of them, NRS 125.180(1), appears to make such awards discretionary:

> When either party to an action for divorce, makes default in paying any sum of money required by the judgment or order directing the payment thereof, the district court may make an order directing entry of judgment for the amount of arrears, together with costs and a reasonable attorney's fee.

However, the far newer and more specific provision is NRS 125B.140(2)(c)(2), which provides that in adjudicating a child support arrearage, a district court ***shall*** "determine and include in its order . . . a reasonable attorney's fee for the proceeding." The statute goes further, stating that if the support is not paid, "additional attorney's fees must be allowed if required for collection."

The Nevada Supreme Court has made it clear that such awards are ***mandatory*** in the absence of an express finding that "the responsible parent would experience an undue hardship" by paying such fees. (*Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (2003)). The choice for every court in every child support arrears case is to either award fees or find an undue hardship.

And as detailed in legal note No. 28, the starting presumption should be that the sum of fees to be ***paid*** is identical to the fees ***incurred***. Every dollar less penalizes the innocent parent for seeking to enforce the support award, for which there is almost never a justification.

IV. THE ROLE OF EDCR 5.11

The court rule requires that before a family division motion is heard by the court, the movant "must . . . contact . . . the other party's counsel . . . in an attempt to resolve the issue . . . without the

necessity of court intervention." And the penalty for failing to do so is "an award of attorney's fees and costs to the non-movant if the issues would have, in the opinion of the court, been resolved if the movant had attempted to resolve the issues prior to the hearing."

Unfortunately, common sense in applying this rule is not always employed. For example, we recently prevailed in dismissing an action which should never have been filed – but the court denied us any recovery of the many thousands of dollars incurred in doing so, on the basis that we had not first contacted the party filing the frivolous action and attempted to talk them out of going forward with it.

This was an abuse of discretion. When the party filing the motion or countermotion is the ***responding*** party, it is too late to avoid litigation – the other side has already initiated it. Given the time limits to respond to an action or motion filing, imposing an additional hoop to jump through under EDCR 5.11 is both unreasonable and unjustifiable. And NRCP 1 requires that the rules be "construed and administered" so as to secure "the just, speedy, and inexpensive determination of every action." Requiring a party under a ten-day time limit to file an opposition to try to talk the other party out of proceeding with an already-filed motion would serve ***no*** legitimate purpose.

In short, EDCR 5.11 as a gatekeeper for fee awards is fine, but only makes sense where judges perceive and act on the difference between initiating and responding to litigation. If the moving party is the ***responding*** party, using EDCR 5.11 as a rationale to deny an award of fees makes no sense and does not serve the purpose for which the rule was intended. Hopefully, this analysis will prevent that error from being repeated.

V. CONCLUSIONS

The current normal judicial approaches to attorney's fees are counter-productive and simply wrong. They increase litigation that should be reduced, damage innocent parties who should be protected, and even make the judges' own jobs harder – all unnecessarily.

Fees should essentially ***never*** be deferred to the time of trial. Fees – in the amount actually incurred – should be awarded in nearly every child support arrearage case. And prevailing parties ***responding*** to filings from the other side should not be denied fees under EDCR 5.11.

If judges would learn to use fee awards as an instrument to encourage behaviors they wish to see, and discourage those they don't, they might see an improvement in the world in which they work. And perhaps good guys, and bad guys, will both be treated more appropriately.

VII. QUOTES OF THE ISSUE

"Whatever fees we earn at a distance, if not paid *before*, we notice we never hear of after the work is done. We therefore are growing a little sensitive on the point."
– Abraham Lincoln, letter, Nov. 2, 1842.

"How noble the law, in its majestic equality, that both the rich and poor are equally prohibited from peeing in the streets, sleeping under bridges, and stealing bread!"
– Anatole France, The Red Lily, ch. 7 (1894).

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