Family Law

Clark County Bar Association

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Attorney's Fees at Family Court

By Hon. Mathew Harter

Not so long ago, a family law attorney could simply request fees and a judge would routinely grant what was considered to be reasonable on the spot. Technically, this still would comport with NRS 18.010(3) ("the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence"). However, as our society and laws grow ever so complex over time, unfortunately so has the process of requesting attorney's fees at family court. The holding in *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005) and the addition of NRCP 54(d)(2) in 2009 have combined to provide a procedural roadmap to obtaining a fee award.

Request Must Be Made By Motion

NRCP 54(d)(2) provides the procedural process for attorney's fee awards. First, the request must be made by motion. Next, unless a statute or rule provides otherwise, the motion must be filed no later than 20 days after the notice of entry of judgment is served. This time limit cannot be extended by the court after it has expired. Therefore, paying attention to the method and time frame for requesting attorney's fees is critical.

Request Must Identify The Basis For The Award

Both *Miller* and NRCP 54(d)(2) require an attorney requesting fees to identify the statute or rule that provides the basis for the award. Typically, multiple grounds concurrently apply. Attorneys should keep in mind that some statutes and rules make an award of attorney's fees mandatory instead of discretionary (*e.g.*, UCCJEA enforcement and child support arrears). It is amazing how often this is overlooked. Obviously, the mandatory provisions should be the primary basis if applicable.

Many awards of attorney's fees are based on the prevailing party provision in NRS 18.010(2). However, some zealous attorneys are unwavering in making the further allegation of frivolousness as their basis, typically because they feel they have somehow obliterated the other side. This is not the definition of frivolousness nor the intent. Further, if frivolousness is to be the basis, *Rivero v. Rivero,* 125 Nev. 410, 216 P.3d 213 (2009) ("*Rivero* II") held the district court is required to have a hearing, take evidence and make findings on this issue alone. Therefore, sometimes it is simply more logical and expedient to take a win and be done.

Family law attorneys habitually base their requests for attorney's fees on *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) (*i.e.*, "*Sargeant* fees"). Over the 40 years since *Sargeant* was issued, the Court has *never* referenced it as a legal basis for attorney's fees. In fact, the Court in *Miller* specifically distinguished the verbiage from *Sargeant* so often cited by attorneys ("without the district court's assistance, the wife would have been required to liquidate her savings and jeopardize her financial future in order to meet her adversary in court on an equal basis") as being only a factual

notation, *not* the legal conclusion of the case.

Brunzell Factors Must Be Addressed

The *Miller* decision expressly clarified for family law practitioners that the factors in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969), must be considered in determining the reasonableness of the fee award. *Brunzell* requires a Court to consider the qualities of the advocate, the character and difficulty of the work performed, the work actually performed by the attorney, and the result obtained.

Disparity In Income Must Be Considered

Miller reiterated that the disparity in income is also a factor to be considered in the award of attorney fees. For this proposition, instead of *Sargeant,* the Court cited *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998). This further necessitates that both parties file their financial disclosure forms, which is already required under EDCR 5.32 whenever attorney's fees are requested.

Request Must Be Supported By Affidavits Or Other Evidence

Finally, *Miller* requires that a request for attorney's fees be supported by affidavits or other evidence addressing the factors of *Brunzell* and *Wright*. Therefore, billing statements are often submitted to support the fee request, but courts are prohibited from conducting *in camera* inspections of such billing statements. Pursuant to *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998), the opposing party must have the opportunity to view and dispute any expenses contained in a billing statement. Further, many attorneys include costs in their request. Unfortunately, requesting costs has its own specific protocol. NRS 18.110.

In conclusion, it is reiterated that both the *Miller* requirements and process in NRCP 54(d)(2) are *not* discretionary. Any family law practitioner who peruses unpublished decisions from the Nevada Supreme Court is keenly aware that recent remands abound on attorney fee awards. Accordingly, both family law attorneys and judges are advised to follow the strict protocols set forth above or be subject to an easy remand. **C**

Hon. Mathew Harter serves the Family Division (Dept. N) of the Eighth Judicial District Court. Judge Harter is a native Nevadan and the proud son of local attorney Alan R. Harter. He graduated from Bonanza H.S. in 1984 then received a B.S. in Business Administration from UNLV. He is married with 8 children and obviously needs a hobby.

Moving? Changing firms? Let CCBA know.
E-mail stephabbott@clarkcountybar.org

3 Mandatory Local Rules Pervasively Not Followed At Family Court

By Hon. Mathew Harter

After several years on the bench, it has become patently obvious that attorneys who dabble in the family law arena seem to have no idea that Local Rules, Part V even exist. For those who routinely practice at family court, there is no excuse not to know and follow these rules, particularly the ones that are mandatory. In either case, for those who choose not to follow the local rules, it should be remembered that EDCR 7.60(b)(4) allows for sanctions, including fines, costs or attorney's fees.

EDCR 5.32(a) states that any financially related motions (including requests for exclusive possession and attorney's fees) must be accompanied by a financial disclosure form (FDF). The problem frequently presented is not the filing of the FDF, it is the timing of when it ends up actually being filed. Even seasoned family law practitioners seem to not understand the unambiguous phrase contained in the rule "must be accompanied." This is even more troubling when the rule itself specifically allows for attorneys fees, sanctions and/or possibly that the court consider the motion not meritorious if the FDF is not filed timely. Further beware that failure to properly file a FDF under the new NRCP 16.2 may be treated as contempt, including "jail time" for "the party or the party's attorney, or both." What is the painfully obvious, practical solution? Advise your client that you cannot file their motion until you have received their completed FDF. My personal experience in private practice was that when I required this of my client, I would typically get a completed FDF either later that day or first thing the next morning. Otherwise, it would usually not be returned by the client until the day before or day of the hearing, which is inexcusable. Late filings only cause the court and opposing counsel unnecessary strife.

Next, EDCR 5.70 provides for mandatory mediation through FMC pursuant to NRS 3.475 for all contested child custody/visitation cases. Again, the problem is often in the timing. This rule requires the parties to attend mediation *prior* to the hearing or trial in the matter. Pursuant to EDCR 5.70(b), Plaintiff must submit the request for mediation within 10 days of notice of the answer, or, if a motion is filed simultaneously with the complaint, the request must also be accompanied. Therefore, it is suggested that unless an abso-

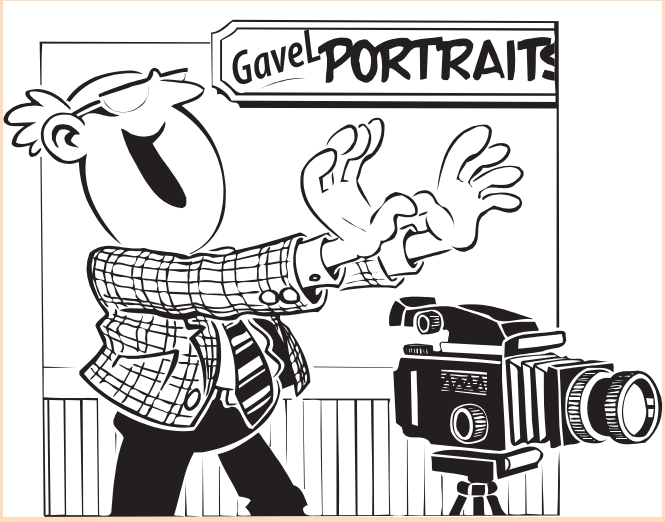
lute emergency exists (which likely would be set on a shortening time anyway), the hearing date on the motion should be set out approximately 45-60 days so that mediation can properly occur prior to the hearing. If either party believes that mediation is inappropriate, they must file a motion requesting an exemption pursuant to EDCR 5.70(g). Typical practice is that most attorneys will wait until the initial hearing date to request the referral to FMC. This is not the mandated protocol, the violation of which typically results in at least one additional hearing. It is cautioned that EDCR 7.60(b)(3) provides for sanctions, including fines, costs or attorney's fees specifically for unnecessarily multiplying the proceedings.

Finally, EDCR 5.87(a) requires that counsel (or a pro se party) meet for a pre-trial conference to exchange exhibits, lists of witnesses and arrive at stipulations for the purpose of simplifying the issues *prior* to any calendar call. Plaintiff is the one designated to set the place and time of the meeting. Given the chaos that normally ensues at the beginning of trials involving these types of issues which should have already been addressed, it is apparent to most family court judges that this mandatory rule is seldom if ever complied with. However, most seem unaware of the drastic, potential consequences of not following this particular rule. EDCR 5.87(c) states that in addition to sanctions, failure to comply with this rule may result in a default judgment or dismissal.

Both NRCP 1 and EDCR 1.10 state that the procedure in district courts shall be administered to secure efficient, speedy, and inexpensive determinations in every action. Violation of the aforementioned mandatory rules directly affects the efficiency and speed of the court process and unnecessarily increases costs. Attorneys who dabble in family law should take heed; failure to comply with these particular rules can result in anything from sanctions to dismissal. Recently, one of these attorneys had the audacity to blame his not following a mandatory rule on his feigned associate Mr. Green (a reference from The Lincoln Lawyer of nonpayment by the client). For those attorneys who regularly practice at family court, there is no excuse for not knowing and following these mandatory rules. Remember that your clients pay you to know and follow the legal process on their behalf. C

Hon. Mathew Harter graduated Cum Laude from Thomas M. Cooley Law School in 1994 where he served on Law Review and received the Am Jur Award in national moot court. He clerked for Judge G. Hardcastle and then entered private practice (primarily Family Law) until elected in 2008.

Portrait Session



Portrait Session for CCBA Members

WHEN: **Thursday, August 22, 2013**
Thursday, November 7, 2013
9:30 a.m. to 2:00 p.m.

WHERE: **Clark County Bar Center**
725 S. 8th Street
Las Vegas

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Mark your calendars!