# MONTHLY LUNCHTIME SEMINAR SERIES

## 33RD Session:

# "ATTORNEY FEES, COSTS & EXPENSES: HOW TO RECOVER"

Judge Lynn M. Egan
Judge Mary A. Mulhern (Ret.)

April 16, 2015

# JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 15 years. She has presided over high volume motion calls, an Individual Commercial Calendar and bench and jury trials. Her current assignment is to the only General Individual Calendar in the Law Division and includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling nearly 200 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, attorney-client & work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a 7 member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 4,000 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in the case of *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

## JUDGE MARY A. MULHERN

Judge Mary Mulhern is currently assigned to the Law Jury Section of the Law Division, where she presides over jury & bench trials in every type of case filed in the Law Division, including medical & legal malpractice, premises liability, construction negligence, commercial disputes and other complex litigation. She also presides over frequent settlement conferences.

Judge Mulhern was initially elected to the Circuit Court of Cook County in 1996 and her prior judicial assignments include a Commercial Calendar in the Law Division, First Municipal District and the Child Protection Division. She has been selected to teach other judges by the Illinois Supreme Court Education Committee and is a frequent regular speaker at CLE programs.

Prior to joining the bench, Judge Mulhern was engaged in the private practice of law with the firm of Mulhern & Mulhern and also worked for the Illinois Attorney General's Office. She is a graduate of DePaul University College of Law and Rosary College.

# SECTION A

- *Attorney Fees, Costs & Expenses, by Judge Lynn M. Egan, April 2015.*

# ATTORNEY FEES, COSTS & EXPENSES

by
Judge Lynn M. Egan
April 2015

## I. Fees -- What, When & How?

Attorney fees "are an attorney's compensation for professional services rendered." *Guerrant v. Roth, 334 Ill.App.3d 259, 267 (1st Dist., 2002).* Although this may seem obvious, the words "attorneys' fees" and "costs" are considered "legal terms of art." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill.App.3d 276, 285 (5th Dist., 2001).* Thus, certain circumstances may generate some surprising results. For instance, if a contract does not govern the recovery of attorney fees, or fails to specify the type of recoverable expenses, items that seem more akin to expenses, such as charges for computer-assisted legal research, may be deemed "a form of attorney fees" that are not separately recoverable. *Guerrant, supra.* Therefore, it is important as a threshold matter to understand the reasons and circumstances that influence what are considered "attorney fees" as they govern a court's decision about what is recoverable.

As a general matter, parties in a lawsuit are responsible for their own attorney fees and litigation expenses. *State Farm Fire & Casualty Co. v. Miller Electric Co., 231 Ill.App.3d 355 (2d Dist., 1992).* Indeed, there has never been a common-law principle that allows a successful litigant to recover attorney fees. *Id. at 359.* Instead, the "American rule," which is followed in Illinois, is that a successful litigant cannot recover attorney fees or the ordinary expenses of litigation or trial preparation. *Id.* As a result, attorney fees, costs and expenses can only be recovered "when expressly authorized by statute or by agreement of the parties." *Id.*[1] Thus, the determination about whether, and to what extent, an attorney may recover fees, costs and expenses depends on the context.

Moreover, all fees, whether recovered pursuant to statute or contract, must be reasonable. Unless the parties agree, this is a determination left to the broad discretion of the trial judge. The broad scope of judicial discretion in this area means that in certain circumstances, the trial judge may independently review materials outside the trial record, including the contents of the entire court file, in order to determine whether a fee request is reasonable. *Wildman, Harrold, Allen & Dixon v. Gaylord, 317 Ill.App.3d 590, 596 (1st Dist., 2000).*

### A. Statutory Authorization

Because statutory provisions that authorize recovery of attorney fees are an exception to the general rule, they are strictly construed. *Board of Directors For Countryside Condominium Assoc. II v. Davis, 2013 IL App (1st) 130165-U, ¶ 13.* As a result, there must be express language in the statute that specifically states attorney

[1] *This rule "is so ingrained in our system of jurisprudence that our Supreme Court has repeatedly refused to change the rule even when constitutional grounds have been argued." Id.*

fees are recoverable. *McDermott v. Sibert, 405 Ill.App.3d 1218 (4th Dist., 2011).* Courts will not resort to extrinsic aids of statutory construction in relation to attorney fees. *Larson v. Wexford Health Sources, Inc., 2012 IL App (1st) 112065, ¶ 18.* Further, the party seeking recovery of fees must prevail in precisely the manner specified by the plain language of the statute. *Id. at ¶ 21-22.*

Although not an exhaustive list, the following statutes contain provisions for the recovery of attorney fees under certain specified circumstances:

- Illinois Marriage & Dissolution of Marriage Act – *750 ILCS 5/508(a)*
- Illinois Condominium Property Act – *735 ILCS 5/9-111(a)*
- Illinois Workers' Compensation Act – *820 ILCS 305/1 et seq.*
- Fair Debt Collection Practices Act – *15 U.S.C. § 1692*
- Illinois Mortgage Act – *765 ILCS 905/4*
- Illinois Consumer Fraud Act – *815 ILCS 505/1 et seq.*
- Illinois Eminent Domain Act – *735 ILCS 30/10-5-70(a)*
- Illinois Administrative Procedure Act – *5 ILCS 100/10-55(c)*
- Illinois Securities Law – *815 ILCS 5/13(A)*
- Hospital Records Act – *735 ILCS 5/8-2001*
- Illinois Freedom of Information Act – *5 ILCS 140/11(i)*
- Illinois Civil Rights Act – *740 ILCS 23/5(c)*
- Charitable Trust Act – *760 ILCS 55/16(a)*
- Nursing Home Care Act – *210 ILCS 45/3-602*
- Illinois Insurance Code – *215 ILCS 5/155*
- Magnuson-Moss Act – *15 U.S.C. § 2310*

Importantly, attorney fees are automatically recoverable under some statutes (*Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman, 2013 IL App (1st) 111779, ¶ 46),* but left to the discretion of the trial judge under other statutes. *Doe v. Flava Works, Inc., 2014 IL App (1st) 121491-U, ¶ 17.*

**B. Contract Clauses**

Similar to statutory attorney fee provisions, contracts that include fee shifting clauses are exceptions to the long-standing rule that an unsuccessful litigant in a civil action is not responsible for an opponent's attorney fees. *Wildman, Harrold, Allen & Dixon v. Gaylord, 317 Ill.App.3d 590, 594-595 (1st Dist., 2000).* As a result, such clauses are strictly construed and fees cannot be recovered unless they are provided for "by the specific terms" of the contract. *Guerrant v. Roth, 334 Ill.App.3d 259 (1st Dist., 2002).*

Even if the specific terms of the contract provide for recovery of fees, the party seeking them bears the burden of establishing the reasonableness of the amount requested. *Kaiser v. MEPC American Properties, Inc., 164 Ill.App.3d 978 (1st Dist., 1987).* Regardless of the contractual language, "only those fees which are reasonable will be allowed." *Id. at 983.* Moreover, the trial court must be presented

with sufficient evidence about the fees in order to determine reasonableness. *Id.* Not surprisingly, the opinion of the attorney seeking fees is insufficient. *Id. at 984.*

When determining a reasonable fee award, the trial court must consider the following factors:

- The skill & standing of the attorney;
- The nature of the cause of action;
- The novelty & difficulty of the issues;
- The amount & importance of the subject matter;
- The degree of responsibility in the case management;
- The time & labor required;
- The usual & customary charges in the community;
- The benefits to the client.

*Mountbatten Surety Co., Inc. v. Szabo Contracting, Inc., 349 Ill.App.3d 857, 873 (2d Dist., 2004).*

**NOTE:** The trial judge is not limited to the evidence presented by the attorney in determining a reasonable fee. Instead, the judge may apply his own knowledge and experience in making this determination. *Anderson v. Anchor Organization, 274 Ill.App.3d 1001, 1008 (1st Dist., 1995).*

**CAUTION:** There is a distinct difference in the burden of proof & standard of review applicable to fee petitions against a losing party and those presented by an attorney seeking payment from a former client. *Wildman, Harrold, Allen & Dixon, supra at 598.* Stricter scrutiny is applied to petitions against a losing party because the attorney submitting the fee petition "has no fiduciary relationship with the party ultimately liable for payment of the fees." *Id.*

When the fee petition is presented pursuant to a contract with a former client, "the usual rules governing breach of contract actions apply," which means matters outside the trial record cannot be considered and the hourly rate agreed upon by the parties "is the starting point of the court's analysis." *Id. at 601.*

**ETHICAL OBLIGATION:** When an attorney seeks to recover fees from a former client, his request must satisfy Illinois Rule of Professional Conduct 1.5, which applies to all attorney fees. The following factors will be considered by the court when assessing the reasonableness of the requested amount:

- The time & labor required, the novelty & difficulty of the issues & the skill necessary to render the legal service properly;
- The likelihood that the acceptance of the employment will preclude other employment by the lawyer;
- The fee customarily charged in the community for similar legal services;
- The amount involved & the results obtained;
- The time limitations imposed by the client or by the circumstances;
- The nature & length of the professional relationship with the client;

- The experience, reputation, & ability of the lawyer performing the service and;
- Whether the fee is fixed or contingent.

*Ill. Sup. Ct. R. Prof'l Conduct, R 1.5(a)(1-8)(2015).*

**C. Prevailing Party**

The ability to recover fees under any of the above statutes or a fee-shifting contract is dependent on being the "prevailing party" in the litigation. This status is defined as the party "that is successful on a significant issue and achieves some benefit in bringing the suit." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill.App.3d 276 (5th Dist., 2001).*

Success on a "significant" issue does not mean full or complete victory on all claims. *Powers v. Rockford Stop-N-Go, Inc., 326 Ill.App.3d 511 (2d Dist., 2001).* It also does not mean that the ultimate judgment amount needs to reach a certain level or exceed the amount of requested attorney fees. *Id.* However, the fee petitioner must succeed in obtaining "some relief" from the party against whom fees are sought. *In re Marriage of Murphy, 327 Ill.App.3d 845 (4th Dist., 2002).* Notably, *de minimus* success will typically not suffice. *Doe v. Flava Works, Inc., 2014 IL App (1st) 121491-U, ¶ 21.* Additionally, if the case involves multiple claims and both parties won and lost on different claims, the court may appropriately find that neither party prevailed. *In re Marriage of Linta, 2014 IL App (2d) 130862, ¶ 19.*

**NOTE:** Success on a declaratory judgment action does not typically entitle a party to attorney's fees because "such actions declare but do not enforce a party's rights..." *Powers, supra.*

**D. Contingent Fee Agreements**

A contingent fee agreement is defined as "any fee arrangement under which the compensation is to be determined in whole or in part on the result obtained." *735 ILCS 2-1114(d)(West 2014). See also, Ill. Sup. Ct. R. Prof'l Conduct, R 1.5(c)(2015)("A fee may be contingent on the outcome of the matter for which the service is rendered," except where prohibited.)*

Although there is a strong history in Illinois of honoring the freedom to contract, the Illinois Supreme Court expressly held that the judiciary has a duty to safeguard the public from the collection of excessive attorney fees. *In re Doyle, 144 Ill.2d 451, 463 (1991).* As a result, even though contingent fee agreements specify the attorney's compensation, they are nonetheless subject to judicial review. The rationale for this oversight is the belief that "attorneys and their clients do not have equal bargaining power, [so] clients consequently need protection from the courts.***Thus, courts have the inherent power to supervise contingent fee agreements." *Guerrant v. Roth, 334 Ill.App.3d 259, 266 (1st Dist., 2002).* Not surprisingly, this supervision is

heightened when minors or disabled persons are involved. *See, Cook County Circuit Court Rule 6.4(b).*

As a result of the unequal bargaining positions between clients and attorneys, contingent fee agreements are construed strictly against the attorney as the drafter. Guerrant, *supra at 267.* Therefore, compensation may only be received for those services expressly mentioned in the agreement. Id.

**NOTE**: In addition to the case law on this subject, the supervision of contingent fee agreements is also expressly incorporated into the Code of Civil Procedure and Cook County Circuit Court Rules. *See, 735 ILCS 5/2-1114(a)(2014)(In medical malpractice cases, the "total contingent fee for plaintiff's attorney or attorneys shall not exceed 33 1/3% of all sums recovered") and Cook County Circuit Court Rule 6.4, which governs attorney's fees in minors' and disabled persons' personal injury and wrongful death cases. ("Except as otherwise limited by rule or statute, attorneys' compensation shall not exceed one-third of the recovery if the case is disposed of in the trial court by settlement or trial. If an appeal is perfected, the compensation to be paid to the attorney shall not in any event exceed one half of the recovery.")*

**CAUTION**: According to the Illinois Supreme Court, the writing requirement of Illinois Rule of Professional Conduct 1.5(c) "is mandatory and contains no exception." Id. *("A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated." Ill. Sup. Ct. R. Prof'l Conduct, R 1.5(c)(2015)).*

## II. Fee Petitions, Hearings & Collection

The party seeking attorney fees bears the burden of presenting specific evidence "from which the trial court can render a decision as to their reasonableness." Palm v. 2800 Lake Shore Drive Condominium Association, *401 Ill.App.3d 868, 879 (1st Dist., 2010).* While a written fee petition is a necessity, it needs to include more than "a mere compilation of hours multiplied by a fixed hourly rate or bills issued to the client." Id. Instead, the fee petition must include specific information about the precise service performed, identification of the person who performed it, the amount of time expended and the hourly rate charged. Estate of Price v. Universal Casualty Company, *334 Ill.App.3d 1010, 1012 (1st Dist., 2002).* "Ideally, the fee petitioners will present contemporaneously made, detailed time records as evidence..." In re Estate of Pinon, *2014 IL App (1st) 132713-U, ¶ 29.*

If a party requests an evidentiary hearing on attorney fees, the court must provide one. Cabrera v. First National Bank of Wheaton, *324 Ill.App.3d 85, 103 (2d Dist., 2001). But see,* Young v. Alden Gardens of Waterford, LLC, *2015 IL App (1st) 131887, ¶ 113. ("A fee petition warrants an evidentiary hearing only when the response of the party to be*

*charged with paying the award raises issues of fact that cannot be resolved without further evidence.").*

If a request for fees pursuant to a fee shifting contract is denied, the attorney for the successful party can still obtain payment from his own client. *Ferrazzano v. Loffredi, 342 Ill.App.3d 453, 466 (1st Dist., 2003).* However, the attorney for the successful litigant does not have an individual right to seek payment from the losing party. *Wildman, Harrold, Allen & Dixon, supra.*

**NOTE:** Section 2-1114(c), which allowed enhanced attorney fees for "extraordinary services" in medical malpractice cases, was repealed, effective 1/18/13. Because the change applies "to actions commenced or pending on or after the effective date," the Code of Civil Procedure no longer contains a method by which attorneys in such cases can petition the court for enhanced compensation. Instead, the signed contingent fee contract shall control the amount of compensation, even if it only provides for the sliding scale measure of fees previously found in former section 2-1114(c). Attempts to obtain a full one-third fee after the case is settled or a verdict obtained may raise serious ethical concerns for the lawyer, as well as questions about lack of consideration to support modification of the original fee agreement.

**CAUTION:** The most recent version of the memorandum prepared by the Probate Division, Law Division & First Municipal District about settlement of Wrongful Death & minors' or disabled persons' personal injury cases may be misinterpreted due to its separate discussion about cases filed before and after the effective date of the above change to section 2-1114(c). *See, Memorandum, August 2014, pg. 4.* Practitioners should expect that this portion of the Memorandum will be updated to reflect the applicability of the repeal to pending cases.

### III. Costs & Expenses

Litigation costs and expenses are treated the same way as attorney fees, meaning they must be paid by the party who incurred them unless a statute or contract provides otherwise. *See, Myers v. Bash, 334 Ill.App.3d 369 (4th Dist., 2002)("At common law, a successful litigant was not entitled to recover from his opponent the costs and expenses of the litigation. The allowance and recovery of costs are therefore entirely dependent on statutory authorization.").* Moreover, the type of costs or expenses that are recoverable is variable because not every statute authorizes the same recovery and contract language should be specific to the particular case.

Nevertheless, numerous provisions within the Code of Civil Procedure authorize the recovery of some litigation costs & expenses by a prevailing party, including the following:

- *735 ILCS 5/1-105 Enforcement of Act & rules.*
- *735 ILCS 5/2-1009 Voluntary dismissals.*
- *735 ILCS 5/5-108 Plaintiff to recover costs.*
- *735 ILCS 5/5-109 Defendant to recover costs.*

- *735 ILCS 5/5-110 Judgment on motion.*
- *735 ILCS 5/5-111 Pleading several matters.*
- *735 ILCS 5/5-112 Several counts.*
- *735 ILCS 5/5-113 Several defendants.*
- *735 ILCS 5/5-114 Scire facias and prohibition.*
- *735 ILCS 5/5-116 Dismissals.*
- *735 ILCS 5/5-117 Actions by State.*
- *735 ILCS 5/5-118 Costs on dismissal.*
- *735 ILCS 5/5-120 Affirmance or reversal on appeal.*

Similarly, certain Illinois Supreme Court Rules authorize recovery of costs and expenses in a variety of circumstances, including the following:

- *Rule 137. Signing of Pleadings, Motions and Other Documents – Sanctions.*
- *Rule 208. Fees and Charges; Copies.*
- *Rule 209(a) & (b). Failure to Attend or Serve Subpoena; Expenses.*
- *Rule 219(a), (b), (c) & (e). Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences.*

Although recovery is dictated by the language of the specific statute or rule at issue, much of the case law interpreting these statutory provisions and rules was generated because the word "costs" is not defined in the statutes or Supreme Court Rules. *Galowich v. Beech Aircraft Corporation, 92 Ill.2d 157, 162 & 166 (1982).* Because none of the statutes or rules cover all types of litigations costs, it is helpful to begin by identifying, if possible, a commonly accepted meaning of the word "costs" and then examine specific statutes and rules for the costs that are recoverable.

In *Galowich, supra,* the Illinois Supreme Court held that costs have a "fixed and technical meaning in the law" and defined them as "allowances in the nature of incidental damages allowed by law to reimburse the prevailing party, to some extent at least, for the expenses necessarily incurred in the assertion of his rights in court." *Id. at 165.* Given the generic nature of this definition, specific examples provide better guidance.

### A. Depositions, Court Reporters & Videographers

Relying on Supreme Court Rule 208(d), the *Galowich* court held that a trial court may, in its discretion, award the cost of depositions "necessarily used at trial." *Id. at 166.* Of course, this holding merely raised the obvious question of what depositions are "necessarily" used at trial? Unfortunately, the Supreme Court did not directly answer this question in *Galowich;* instead, it provided only indirect guidance by noting that discovery depositions would not typically qualify. *Id.*

The Supreme Court did not provide a direct answer until its decision in *Vicencio v. Lincoln-Way Builders, Inc., 204 Ill.2d 295 (2003).* Although its analysis was specific to section 5-108 of the Code and Supreme Court Rules 204 and 208, it declared that a

deposition is necessarily used at trial "only when it is relevant and material and when the deponent's testimony cannot be procured at trial..." *Id. at 308.* Thus, mere significance in terms of its evidentiary value is insufficient. *Id.*

While the subpoena or statutory witness fees are recoverable if the deposition was necessary at trial, the professional fee of a physician for giving the deposition is NOT a recoverable cost. *Id. See also, Dicosola v. Bowman, 342 Ill.App.3d 530 (1st Dist., 2003).* Instead, it is considered a non-recoverable "litigation cost." *Vicencio, supra.*

If the deposition qualifies as necessary at trial, fees for the court reporter, videographer and the cost of transcription are also recoverable costs. *Id.* "The charges referred to in paragraphs (a) and (b) of Rule 208 include the reasonable and necessary charges of the recorder or stenographer, charges for transcription and filing and the statutory fees of the officer taking and certifying the deposition." *Id. at 305. But see, Moline v. Vyas, 373 Ill.App.3d 1098, 1103 (3d Dist., 2007)(error to award videographer's fees).*

**B. Professional Fees of Physicians & Costs of Section 2-622 Report**

As noted above, the fees charged by a physician for giving a deposition are not recoverable. The rationale supporting this conclusion extends to the costs of obtaining the requisite section 2-622 report in medical malpractice cases. This expense is NOT recoverable under any statute or rule. *Moller v. Lipov, 368 Ill.App.3d 333 (1st Dist., 2006).*

**C. Computerized Legal Research/Legal Newspaper Subscriptions**

Unless specifically mentioned in a contract, computerized legal research & subscriptions for legal publications are typically considered part of the attorney's overhead, for which recovery beyond the attorney's fee is not allowed. *Kaiser v. MEPC American Properties, Inc., 164 Ill.App.3d 978, 989 (1st Dist., 1987). Accord, Guerrant v. Roth, supra.*

**D. Filing/Appearance/Subpoena Fees & Jury Demand Fee**

These are accepted as "court costs" that are taxable to the losing party under sections 5-108 & 5-109. In fact, the Supreme Court held that "it is undisputed that section 5-108 *mandates* the taxing of costs...such as filing fees, subpoena fees, and statutory witness fees, to the losing party." *Vicencio, supra at 295.* These costs are also recoverable under section 2-1009 (voluntary dismissals).

**E. Overhead**

Overhead costs such as photocopying, check processing, and telephone charges are not recoverable as costs unless expressly delineated in a contract. *Kaiser, supra.*

## F. Voluntary Dismissals & Summary Judgment Affidavits

It is well established that a plaintiff may voluntarily dismiss an action any time before trial or hearing begins, contingent on certain conditions, including "payment of costs." *735 ILCS 5/2-1009(a)(West 2014).* This has been interpreted to include only statutory costs. However, a defendant presented with a motion to voluntarily dismiss may also be able to recover litigation costs if the court concludes that the request to voluntarily dismiss is made in order to avoid discovery compliance. *Valdovinos v. Luna-Manalac Medical Center, Ltd., 328 Ill.App.3d 255 (1st Dist., 2002).*

The rationale supporting such a recovery is premised on the amendment to Supreme Court Rule 219 which occurred after the *Galowich* decision. Specifically, paragraph (e) was added and provides that the court may, "in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage and phone charges. *Ill. Sup. Ct. R. 219(e)(West 2014).*

**NOTE**: While the right to voluntarily dismiss a case may be conditioned upon the payment of costs, the right to refile pursuant to section 13-217 cannot be conditioned upon such payments. *Jones v. Chicago Cycle Center, Inc., 391 Ill.App.3d 101, 110 (1st Dist., 2009)("No court may infringe upon this statutory right to refile.")*

In the context of summary judgment motions, paragraph (f) authorizes the imposition of "reasonable expenses, including reasonable attorney's fees," if the trial court concludes that an affidavit was presented "in bad faith or solely for the purpose of delay." *735 ILCS 5/2-1005(f)(West 2014).* In fact, the section expressly provides that the court "shall" enter such an order "without delay." *Id.* Of course, the expenses and attorney fees must have been incurred as a result of the offending affidavit. *Id.* The section further states that court "may" find the offending party guilty of contempt in such a situation. *Id.*

# SECTION B

- *Fee Shifting Contracts, by Judge Mary A. Mulhern (Ret.), April 2015.*

# FEE-SHIFTING CONTRACTS

By
Judge Mary A. Mulhern (Ret.)
April 2015

## I. General Considerations

As stated earlier in these materials, the "American Rule" regarding attorney's fees is that the unsuccessful litigant in a civil action is not responsible for an opponent's attorney's fees and when there is an agreement contrary to that rule, courts strictly construe the terms of that agreement. *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 IllApp.3d 590 (1st Dist. 2000), *Guerrant v. Roth*, 334 Ill.App.3d 259 (1st Dist. 2002).

## II. Strict Scrutiny

Poor drafting can make contractual fee-shifting provisions unenforceable. For instance, it has been held that the phrase "all collection costs" does NOT include attorney's fees because it didn't specify "attorney's fees". *Negro Nest, LLC. v. Mid-Northern Mgmt.*, 362 Ill. App. 3d 640, 651 (4th Dist., 2005). In *Board of Directors for Countryside Condominium Assoc.II v. Davis*, 2013 IL App (1st) 130165-U, the Appellate Court held that the fee-shifting provision which read: "LESSOR shall be responsible for reasonable Attorney's fees, court costs, and witness fees incurred by LESSEE in *enforcing this lease* agreement, or for any costs incurred, by LESSEE, for defense of this lease Agreement", (emphasis added) didn't apply because the litigation in which the Lessee incurred were part of a declaratory judgment action rather than an action involving the enforcement or defense of the lease agreement itself.

It is common in leases to include fee-shifting language. In *Franks v. Broder*, 2013 IL App (1st) 113311-U, ¶22, the tenant sued the landlord under three theories of recovery and was unsuccessful on all of them. The defendant landlord then filed a motion for attorney's fees and costs pursuant to the lease's fee-shifting provision which read: ""Lessee shall pay upon demand all Lessor's costs, charges and expenses, including fees of attorneys, agents and others retained by Lessor, incurred in enforcing any of the obligations of Lessee under this lease or in any litigation, negotiation or transaction in which Lessor shall, without Lessor's fault, become involved through or on account of this lease." The landlord was found to have been involved in this litigation "without fault" because all the plaintiff's claims failed and recovered his fees and costs.

## III. Prevailing Party

Many statutory fee-shifting provisions mandate or permit attorney's fees and costs to the prevailing party. A "prevailing party" is one who is successful on any significant issue in the action and achieves some benefit in bring suit, receives a judgment in his favor, or obtains some affirmative recovery. *Naperville South Commons, LLC v Nguyen*, 2013 IL App (3d) 120382, ¶16. However, when there are multiple claims

between the parties and both parties have won some and lost some, it is appropriate to find neither is a prevailing party. Brown & Kerr, Inc. v. American Stores Properties, Inc., 306 Ill.App.3d 1023, 1034 (1st Dist. 1999).

If the fee-shifting provision uses the term "enforce" as it does in many contracts, and does not expressly require that the party seeking fees be the "prevailing party", Illinois courts will find that it is necessarily implied that the petitioning party must be a prevailing party because the word "enforce" means "to compel obedience to", and only the prevailing party will have obtained that relief. City of Harvard v. Elvis J. Henson Trust, et al., 2012 IL App (2d) 120091-U, ¶21.

In a case decided by the 7th Circuit Court of Appeals, it is stated that " we have found no Illinois contract cases dealing with the phrase ["substantially prevailing party"]; more often litigated is the simpler phrase "prevailing party." ... Illinois case law incorporates a substantiality requirement into its interpretation of contractual attorneys' fees provisions awarding fees to the prevailing party. In this context, a "prevailing party" is one who "is successful on any *significant* (emphasis added) issue in the action and achieves some benefit in bringing suit, when it receives a judgment in its favor, or when it achieves an affirmative recovery." (citations omitted). Tax Track Systems Corp. v. New Investor World, Inc., 478 F.3d 783, 789 (7th Cir. 207)

In *Med + Plus Neck & Back Pain Ctr., S.C. v. Noffsinger*, 311 Ill. App. 3d 853 (2nd Dist. 2000), an employer sued its chiropractor employee for breach of the employment agreement and sought to enforce (1) the liquidated damages provision of the contract which related to early termination of the agreement, (2) lost profits and training costs associated with defendant's departure, and (3) attorney's fees per the contract. The employer was successful in getting a judgment against the employee under its breach of contract claim, but defendant successfully defended the claims for actual damages and for liquidated damages. The trial court's finding that the employer was not a prevailing party was affirmed because both parties were successful on significant issues.

## QUANTUM MERUIT

### I. General Considerations

The concept of quantum meruit is familiar to all of us – it means "all that is deserved". It frequently appears in situations that involve a client who is party to a contingent fee agreement fires the attorney and hires another and the contingent fee owed must be allocated between the discharged attorney and the current attorney. The quantum meruit analysis is also relevant when a court must award attorney's fees by either the lodestar or the percentage-of-fund method; that will be discussed later in these materials.

The general rule is that when an attorney is discharged from a case in which he/she has a contingent fee contract with the client, the contract ceases to exist and the discharged attorney will be entitled to fees based on quantum meruit, and those fees will be

subtracted from the subsequent attorney's fee. However, there are cases in which it is appropriate to award the *contract* fee to the discharged attorney, less the amount to be awarded the subsequent attorney on a quantum meruit basis. DeLaPaz v. Selectbuild Construction, Inc., etc., 394 Ill.App.3d 969, 975 (1st Dist. 2009); Serpico v. Spinelli, 2013 IL App (1st) 120898-U, ¶8.

### II. Factors Considered

There are several factors a court must consider in awarding appropriate fees under a quantum meruit analysis:

a. The services performed and the time expended thereon;
b. The skill and standing of the attorney;
c. The hourly rate requested;
d. The nature of the case;
e. The novelty and difficulty of the subject matter;
f. The degree of the petitioning attorney's involvement in managing the case;
g. The usual and customary charge for that type of work in the community; and
h. The benefits to the client.
i.

Kaiser v. MEPC American Properties, Inc., 164 Ill. App. 3d 978 (1st Dist. 1987).

### III. Evidence

Contemporaneous and detailed time records are not essential to support the petition, Anderson v. Anchor Organization for Health Maintenance, 274 Ill.App.3d 1001, 1008 (!st Dist. 1995), and the court hearing the petition is permitted to use his/her own experience is determining the reasonable value of the legal services rendered. Id.; Will, et al. v. Northwestern University, et al., 378 Ill.App.3d 280, 304 (citations omitted) (1st Dist. 2007).

## COMMON FUND

### I. Definition

Under the common fund doctrine, an attorney who performs services creating, protecting, or preserving a fund commonly held for the benefit of others may be compensated out of the fund. Brundidge v. Glendale Federal Bank, 168 Ill. 2d 235, 238 (1995). The concept of a common fund is an exception to the general rule that unless there is a contractual or statutory obligation to do so, an unsuccessful litigant is not required to pay attorney fees or costs of the successful litigant, and because it is an exception to the general rule, it must be strictly construed. In re Estate of Dyniewicz, 271 Ill.App.3d 616, 628 (1st Dist., 1995). It occurs most often occurs in funds recovered

in class action suits and to funds recovered by subrogees (citation omitted). *Village of Clarendon Hills v. Mulder*, 278 Ill.App.3d 727, 732-733 (2d Dist., 1996).

The underlying justification for this rule is that some beneficiaries would be unjustly enriched if the costs of litigation were not shared by all beneficiaries of the fund. (citation omitted). *Country Mutual Insurance Co. v. Birner*, 293 Ill.App.3d 452, 456 (3d Dist., 1997).

The common fund doctrine is NOT applicable to debtor/creditor situations, for example, hospitals and other medical providers. *Wendling v. Southern Illinois Hospital Services, etc.*, 242 Ill.2d 261, 265 (2011)

## II. Elements of common fund claim

In order to be entitled to fees under the common fund doctrine, an attorney must show:

a. The fund was created as the result of legal services performed by the attorney;
b. The subrogee did not participate in the creation of the fund; and
c. The subrogee will or has benefited from the creation of the fund.

*Id.*

Two issues typically emerge in cases involving claims under this doctrine. The first issue is whether the insurance company clearly and promptly gave notice to the attorney that it would protect its interests without the attorney's services. If the insurance company promptly (e.g., nine months before plaintiff's attorney filed the lawsuit) and unequivocally advises the plaintiff and plaintiff's attorney of its intention to represent its own interests, the plaintiff's attorney will not be award fees from the common fund. *Tenney v. American Family Mutual Insurance Co.*, 128 Ill.App.3d 121 (4th Dist., 1984). See also, *Perez v. Kujawa*, 234 Ill.App.3d 957 (1st Dist., 1992).

Note, however, that in the case of worker's compensation liens, constructive notice of the employer's lien is sufficient notice based on the protection given employers under the Worker's Compensation Act. *Chubb v. Carri Zolez*, 375 Ill.App.3d 537, 543 (1st Dist., 2007)

The second issue that arises in common funds cases is whether the insurer participated meaningfully in the litigation, because if it did, then the attorney seeking fees from the common fund performed services to an unwilling recipient and so would not be entitled to those fees. *Tenney*, supra at 124. This "participation" must be more than just a letter that it is protecting its own interests; it must be some real, substantial action in creating the fund, e.g., participating in settlement negotiations, joining as a plaintiff, or filing an interpleader counterclaim. *Wajnberg.v. Wunglueck*, 2011 IL App (2d) 110190, ¶20.

## METHODS OF COMPUTING ATTORNEY'S FEES

There are two methods used to compute a reasonable attorney's fee in class action litigation – the percentage-of-the-award method and the lodestar method. "When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved. [citation]. The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved." *Brundidge v. Glendale Federal Bank FSB*, 168 Ill.2d 235, 244 (1995).

The decision to choose one or the other method is within the sound discretion of the court. *Id.* Each method has its shortcomings, i.e., depending on the circumstances of the cases. Each method could result in a windfall to class counsel if the damages awarded are high but the costs and length of the litigation were relatively short. *Id.*, at 242. The court must take into consideration whether the method chosen will result in either over-compensating or under-compensating class counsel. The percentage method is thought sometimes to lead to excessive compensation, i.e., that the hourly rate that results from use of this method is too high. For example, in *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998), using the percentage of award method would have resulted in paying more than twice the usual hourly rate of the most expensive attorney involved in this litigation, and that was taken into consideration when the court decided to use the lodestar method instead.

The lodestar method is the alternative choice, then, if the percentage of award method appears to over-compensate counsel. This method multiplies the reasonable number of hours billed by lawyers and paralegals by their respective hourly rates, and then if the court finds that the there was a risk ,as measured at the outset of litigation, that the attorney might not get paid because a positive result was not likely, the court may apply a multiplier to the figure arrived at. *Cook*, supra, at 1005. *Cook* discusses extensively the benefits and limitations of each of these two methods.

In statutory fee-shifting cases, only *parties* (usually plaintiffs) may seek reimbursement whereas in common fund cases *attorneys* may seek compensation. For example, Congress has created exceptions to the American Rule by inserting fee-shifting provisions in certain statutes, such as the Magnuson-Moss Act, the Civil Rights Act of 1964, and the Securities Exchange Act of 1934. If the plaintiff prevails in one of these statutory actions, the plaintiff recovers the amount of its attorney's fee from the defendant.

In contrast, when a case results in the creation of a common fund for the benefit of a plaintiff class, the defendant deposits a specified amount with the court for the benefit of the class in exchange for release of its liability and the court allocates those funds between the plaintiffs and the plaintiffs' attorneys. The attorneys' fee award is then taken as a share of the fund, thereby diminishing the sum ultimately retained by the plaintiff class. Similar to the way a plaintiff's attorney may be compensated by a contingent fee, a plaintiff class pays its attorneys by sharing its recovery with them.

## SECTION 155 FEES

Section 155 of the Illinois Insurance Code, 215 ILCS 5/155, provides:

> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $ 60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.
>
> (2) Where there are several policies insuring the same insured against the same loss whether issued by the same or by different companies, the court may fix the amount of the allowance so that the total attorney fees on account of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies.

This statute provides a remedy to insureds who encounter unnecessary difficulties due to the unreasonable and vexatious refusal by an insurance company to honor its contract with the insured. *Korte Construction Co. v. American States Insurance Company, et al.* 322 Ill.App.3d 451, 459 (5th Dist., 2001). The fees that can be awarded include attorney's fees and costs for the defense of the original litigation and the Section 155 action, as well as penalties as set forth in paragraph (1) above.

The most frequent scenario in the cases on Section 155 fees centers on an insurance company's response to a request by its insured to defend it in litigation. If the action filed against the insured alleges facts that are or *potentially* are within the scope of the insurance policy coverage, the insurer as two choices: (1) it can defend the insured under a reservation of rights, or (2) seek a declaratory judgment that there is no coverage.

If the insurer fails to take either of these two steps, it will be estopped from raising noncoverage as a defense to any action seeking the proceeds of the policy. *Korte Construction Co.*, id at 457.

In *Employers Insurance of Wausau v. Ehlco Liquidating Trust, et al.*, 186 Ill.2d 127 (1999), the insurance company was found to have vexatiously and unreasonably refused to defend its insured because it waited more than a year after it received notice of the lawsuit filed against the insured, and four months after the suit was concluded, to file a declaratory action on the policy.

In *Korte Construction Company*, supra, the Appellate Court stated that unless it is clear from the face of the complaint that the claim is not covered under the terms of the policy, the insurer cannot justifiably refuse to defend its insured. Supra, at 769. This principle makes the facts in *Richardson v. Illinois Power Company*, 217 Ill.App.3d 708 (5th Dist. 1991) rather remarkable. The insurer's lack of response resulted in an award of Section 155 fees to the insured despite the provision in the policy at issue that the insurer "shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury ... even if any of the allegations of the suit are groundless, false or fraudulent..."

## FEES UNDER THE NURSING HOME CARE ACT

Section 3-602 of the Nursing Home Care Act, 210 ILCS 45/3-602, provides that the "licensee [nursing home] shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part I of Article II of this Act, are violated."

Note that this fee-shifting provision is for the benefit of a nursing home resident, not the resident's heirs, and so an action for wrongful death will not result in fees paid pursuant to Section 3-602, but fees pursuant to Section 3-602 can be sought in an action brought under the Survival Act, 755 ILCS 5/27-6. *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill.App.3d 1043, 1050 (1st Dist. 2002).

## SANCTIONS

### I. SCR 137 sanctions

Supreme Court Rule 137 states: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

SCR 137 is penal and so must be strictly construed (citation omitted), and its purpose is to prevent parties from abusing the judicial process." *Foy v. Safeco Ins. Co*, 2013 IL App (1st) 121875-U, ¶ 41. "Courts are instructed to use an objective standard in evaluating what was reasonable under the circumstances as they existed at the time of filing." *Sterdjevich v. RMK Management, Corp.*, 343 Ill. App. 3d 1, 19 (1st Dist., 2003). "It is not sufficient that the plaintiff 'honestly believed' that the allegations raised were grounded in fact or law." *Id.* Whether the signing party made a reasonable inquiry before filing his pleadings is based on the circumstances that existed at the time of filing. *Foy*, supra at ¶ 43. The trial court's decision on a question of Rule 137 sanctions is entitled to great weight and may not be disturbed absent an abuse of discretion. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 579 (2000). A reviewing court's primary consideration when considering the propriety of a ruling on a motion for Rule 137 sanctions is "whether the trial court's decision was informed, based

on valid reasoning, and follows logically from the facts. [Citation.]'" *Whitmer v. Munson*, 335 Ill. App. 3d 501, 514 (1st Dist. 2002).

The purpose of the rule is not to penalize litigants merely because they were not successful in the litigation. *Id.* Sanctions "are not warranted simply because the facts ultimately determined are adverse to those set forth in the pleadings." *Rubino v. Circuit City Stores, Inc.*, 324 Ill. App. 3d 931, 946, (1st Dist., 2001)

An SCR 137 motion for sanctions may be filed at any time within 30 days of the entry of final judgment. *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339 (2001).

A party seek sanctions under SCR 137 has the burden of proving that he/she actually incurred fees and expense because of the untrue filings. The petition for fees must specifically identify both the statements falsely made and the fees that resulted from those false statements. See *Berkin v. Orland Park Plaza Bank*, 191 Ill. App. 3d 1056, 1063-64 (1st Dist. 1989). These principles are consistent with the plain language of the statute, which allows recovery of fees actually incurred by the other party by reason of the untrue pleading. If untrue portions of the pleading would not actually affect the outcome of the case, recovery of fees unrelated to the specific untrue statements is not allowed. The general rule that the fees sought must be tied to specific untrue statements does not apply when those untrue statements are the cornerstone of an entire baseless lawsuit. *Dayan v. McDonald's Corp.*, 126 Ill. App. 3d 11, 23-24, 466 N.E.2d 945, 81 Ill. Dec. 143 (1984). *Patton v. Lee*, 406 Ill.App.3d 195, 19-200 (2d Dist. 2010).

If a reasonable inquiry into the facts to support the filing has not been made to ensure that the facts stated are well grounded, the party, the party's attorney, or both are subject to an appropriate sanction that may include an order to pay the other party's attorney fees and costs. *Chicago Title & Trust Co. v. Anderson*, 177 Ill. App. 3d 615, 621, (1st Dist. 1988).

When the pleadings and trial evidence are clear, an evidentiary hearing on the motion for sanctions is not required. *Williams v. Pincham-Benton*, 2012 IL App (1st) 112645-U.

If you read the opinions in *Nottage V. Desjardins*, 409 Ill.App.3d 1146 (1st Dist., 2011), *Skywalker Outdoor, Inc. v. Van Wagner Comunications, LLC*, 407 Ill.App.3d 1190 (1st Dist. 2011), and *Schneider v. Schneider*, 408 Ill.App.3d 192 (1st Dist. 2011), you will get a very good flavor of what conduct will result in granting a request for SCR 137 sanctions.

## II. SCR 219 sanctions

Supreme Court Rule 219(c) provides in relevant part:

> (c) Failure to Comply with Order or Rules. If a party ... unreasonably fails to comply with any provision of part E of article II of the rules of this court

(Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) That further proceedings be stayed until the order or rule is complied with;

(ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue.

SCR 219 sanctions may only be imposed for violations of discovery orders and pretrial orders, and the purpose of imposing sanctions is to coerce compliance with court rules and orders, not to punish the dilatory party... That is to say, the sanction imposed should bear some reasonable relationship to the information withheld in defiance of the discovery request. Sander v. Dow Chemical, et al., 166 Ill. 2d 48, 68 (1995).

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty." Reyes v. Menard, 2012 IL App (1st) 112555, ¶24. SCR 219(c) does not provide the trial court with the statutory authority to bar the plaintiff's own testimony, although plaintiff can "be debarred from maintaining any particular claim." Ill. S. Ct. R. 219(c)(iii). Reyes, supra at ¶30.

In particularly egregious violations of SCR 219, the court has the authority to dismiss a party's claim or defense with prejudice, though this is a drastic measure and is justified only when the party dismissed has shown a deliberate and contumacious disregard for the court's authority and the court believes that no other sanction has been effective. Sander, supra at 67-68. Notably, even apart from SCR 219(c), a court has the power to dismiss a cause of action with prejudice for violations of court orders since a court has the power to control its own docket. (citations omitted). Sander, supra at 65. The ultimate sanction is default or dismissal pursuant to SCR 219(c) (v). This sanction should be used sparingly and only against the "most recalcitrant and unyielding parties. Shimanovsky v. General Motors Corp., 181 Ill. 2d 112, 123 (1998). Shimanovsky requires the court to consider six factors in its determination of an appropriate sanction: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Shimanovsky* supra, at 124. No single factor is dispositive. Only after having considered these six factors and determining that sanctions are appropriate, the

# ATTORNEY FEES, COSTS & EXPENSES: HOW TO RECOVER

*Judge Lynn M. Egan*
*Judge Mary A. Mulhern (Ret.)*

*April 16, 2015*

# STARTING POINTS:

- Generally, parties are responsible for their own attorney fees & litigation expenses.
- Illinois follows the "American rule," that states a successful litigant cannot recover attorney fees or the ordinary expenses of litigation or trial preparation.
- The only exception to this rule is when fees, costs or expenses are **EXPRESSLY** authorized by statute or agreement of the parties.

# PREVAILING PARTY

Even if a statute or contract authorizes recovery of attorney fees, the petitioner must demonstrate that it is the "prevailing party" in the litigation. This means the following:

1. The party is successful on a "**significant**" issue & achieves some benefit in bringing the suit.

2. The petitioner succeeded in obtaining "some relief" from the party against whom fees are sought.

**NOTE**: "Significant" issue does not mean complete victory or that the judgment exceeds a certain level or even equals the amount of attorney fees.

# STATUTORY RECOVERY

Statutory provisions that allow recovery of attorney fees are STRICTLY CONSTRUED, which means the following:

1. There must be express language in the statute authorizing fees; and

2. The party seeking fees must prevail in precisely the manner specified by the plain language of the statute.

**NOTE:** Courts will not resort to extrinsic aids of statutory construction to find such authorization.

# EXAMPLE

Illinois Hospital Records Act subjects health care providers to attorney fees "incurred in connection with any court ordered enforcement" of the Act's requirement of providing patients with copies of their medical records within 30 days of a written request.

Prisoner in Pontiac Correctional Center made a written demand for his records. No compliance, prompting prisoner to file suit. After suit filed, defendant's attorney produced copies of the medical records. Was plaintiff entitled to attorney fees?

**NO.** Even though defendants admitted lack of compliance with the Act & plaintiff obtained the records as a result of filing suit, they were produced before the Court ruled so there was no "court ordered enforcement" of the Act.

# TOP TIPS

- Read the statutory language *very* carefully to ensure you fully understand the scope of the authorized recovery & any requisite triggering events; and

- Understand your burden of persuasion: some statutes automatically allow attorney fees to the prevailing party, while others leave it to the discretion of the trial judge.

# CONTRACT PROVISIONS

Fee shifting contract clauses are also strictly construed, which means the language needs to be precise. No recovery unless the specific terms of the contract allow it.

**CAUTION:** A different burden of proof & standard of review applies to fee petitions against a losing party & those by an attorney seeking payment from a former client. The rationale includes an ethical consideration:

- Stricter scrutiny of petitions against a losing party because the petitioning attorney "has no fiduciary relationship with the party…liable for payment." *Wildman, Harrold, Allen & Dixon v. Gaylord, 317 Ill.App.3d 590, 594-595 (1st Dist., 2000).*

# CONSTANT RULE

- Regardless of how attorney fees are recovered, they must be **REASONABLE**.
- This is an ethical requirement of Ill.Sup.Ct.R. Prof'l Conduct, 1.5 (2105):

"A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

# REASONABLENESS

Ill. Sup. Ct. R. Prof'l Conduct, R. 1.5 sets forth the following factors to be considered when assessing the reasonableness of attorney fees:

- Time & labor required, novelty & difficulty of the issues & the skill necessary to render appropriate legal service;
- The likelihood that acceptance of the employment will preclude other employment by the lawyer;
- The fee customarily charged in the community for similar legal services;
- The amount involved & the results obtained;
- Any time limitations imposed by the client or the circumstances;
- The nature & length of the professional relationship with the client;
- The experience, reputation & ability of the lawyer; and
- Whether the fee is fixed or contingent.

# CONTINGENT FEE AGREEMENTS

Even though contingent fee agreements are contracts & Illinois honors the freedom to contract, they are subject to judicial review. **WHY?**

- Attorneys & their clients do not have equal bargaining power so clients "need protection from the courts." *Guerrant v. Roth, 334 Ill.App.3d 259, 266 (1st Dist., 2002);* and
- The judiciary has a duty to safeguard the public from the collection of excessive attorney fees. *In re Doyle, 144 Ill.2d 451, 463 (1991).*

# DO NOT FORGET!

- The writing requirement of Ill.Sup.Ct.R.Prof'l Conduct 1.5(c) is mandatory & specific:

*"A contingent fee agreement shall be in writing signed by the client & shall state the method by which the fee is to be determined, including the percentage…that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation & other expenses to be deducted from the recovery; & whether such expenses are to be deducted before or after the contingent fee is calculated."*

# SPECIAL CASES

- **Medical malpractice** cases: the total contingent fee cannot exceed 33⅓% of all sums recovered. *735 ILCS 5/2-1114(a).*

- **Minors & disabled persons**: attorney fees in PI & wrongful death cases cannot exceed one-third of the recovery if disposed of by settlement or trial. If appeal perfected, fees cannot exceed one half of the recovery. *Cook County Circuit Court Rule 6.4*

# FEE PETITIONS

The party seeking attorney fees bears the burden of presenting **specific evidence** to support the request. This means:

- A written petition that specifies the precise service performed, identity of person who performed it, the amount of time expended on specific tasks & the hourly rate charged for each person.
- The petition should include or be based upon contemporaneously made time records.

**BEWARE:** Copies of bills issued to the client or a mere compilation of hours multiplied by a fixed hourly rate are insufficient.

# FEE PETITION HEARINGS

- If a party requests an evidentiary hearing on attorney fees, the court must provide one. *Cabrera v. First National Bank of Wheaton, 324 Ill.App.3d 85, 103 (2d Dist., 2001).*

**BUT, MAYBE NOT…**

- "A fee petition warrants an evidentiary hearing only when the response of the party to be charged with paying the award raises issues of fact that cannot be resolved without further evidence." *Young v. Alden Gardens of Waterford, LLC, 2015 IL App (1st) 131887, ¶ 113.*

# REPEAL ALERT!!

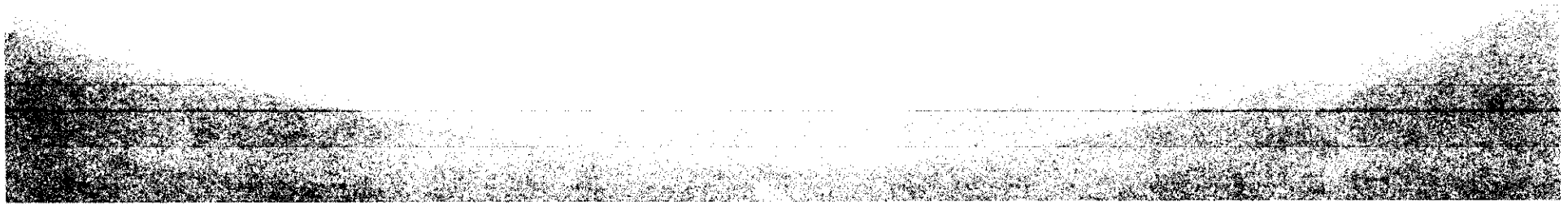
- *735 ILCS 5/2-1114(c),* which allowed enhanced attorney fees in medical malpractice cases for "extraordinary services" was repealed, effective January 18, 2013. The change applies to cases filed or pending on or after the effective date.

- As a result, the contingent fee contract will control, even if it only provides for the reduced, sliding scale measure of fees previously found in former section 2-1114(c).

**CAUTION:** Attempts to collect a full one-third fee after the case is settled or a verdict obtained may raise serious ethical issues for the lawyer, as well as questions about lack of consideration.

# FEE SHIFTING CONTRACTS

*Judge Mary A. Mulhern*



# COSTS & EXPENSES

Just like attorney fees, litigation costs & expenses must be paid by the party who incurred them unless a statute, rule or contract provision provides otherwise.

- The type of costs & expenses that can be recovered vary, depending on the statute, rule or contract language.
- Most vexing issue has been: **WHAT DOES "COSTS" MEAN???**

# SUPREME COURT SPEAKS

**Costs** = "allowances in the nature of incidental damages allowed by law to reimburse the prevailing party, to some extent at least, for the expenses necessarily incurred in the assertion of his rights in court." *Galowich v. Beech Aircraft Corporation, 92 Ill.2d 157, 162 (1982).*

## What does this mean?

- For depositions, the Court held it meant those "necessarily used at trial." *Id.*

# TAKE 2

- The Supreme Court clarified the *Galowich* definition in *Vicencio v. Lincoln-Way Builders, Inc., 204 Ill.2d 295 (2003).*
- "**Necessarily used at trial**," as it relates to depositions, is a deposition that "is relevant and material and when the deponent's testimony cannot be procured at trial…" *Id. at 308.*
- Mere significance in terms of evidentiary value is insufficient. *Id.*
- If the deposition was "necessary," then fees for the court reporter, cost of transcription & videographer may also be recovered. *Id.*

# OTHER COSTS/EXPENSES

- **Physician's professional fee** for giving deposition: NOT recoverable.
- **Cost of section 2-622 report**: NOT recoverable.
- **Computerized legal research**: NOT recoverable.
- **Legal newspaper subscriptions**: NOT recoverable.
- **Overhead** (photocopying/telephone/check processing charges): NOT recoverable.
- **Filing/Appearance/Jury Demand/Subpoena Fees**: YES – all are recoverable.

# VOLUNTARY DISMISSALS

- *735 ILCS 5/2-1009* permits a plaintiff to voluntarily dismiss an action any time before trial or hearing begins, contingent on the payment of statutory costs, i.e., filing & appearance fees, subpoena fees.

- However, litigation costs may also be recovered if the record demonstrates that the request to voluntarily dismiss is made in order to avoid discovery compliance. Basis is Sup.Ct.R. 219(e).

**NOTE**: Although the ability to voluntarily dismiss can be conditioned upon payment of costs, the right to refile a previously dismissed case CANNOT be conditioned upon such payments. *Jones v. Chicago Cycle Center, Inc., 391 Ill.App.3d 101, 110 (1st Dist., 2009).*

# SUMMARY JUDGMENT

- *735 ILCS 5/2-1005(f)* authorizes the imposition of "reasonable expenses, including reasonable attorney fees" if an affidavit is presented in the context of a summary judgment motion "in bad faith or solely for the purpose of delay."
- The statute uses the word "SHALL" & directs the Court to do so "WITHOUT DELAY" in an appropriate case.
- The statute also states the Court may find the offending party guilty of contempt!