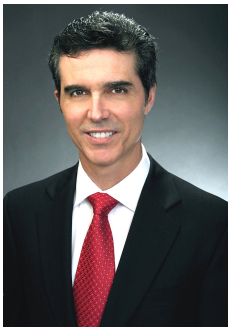

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One Word "Actually" Matters

In *Glaviano v. Sacramento City Unified School District* (2018) 231 Cal.Rptr.3d 849, the issue was whether the phrase "reasonable attorney's fees incurred" limits a fee award to fees *actually* charged. The Court of Appeal said no, and awarded fees based on the prevailing rates in the community, instead of the reduced hourly rate actually charged by counsel.

Glaviano, a school teacher, prevailed at hearing on a disciplinary matter, and applied to recover his attorney's fees under a statute that allowed recovery of "reasonable attorney's fees incurred by the employee." Glaviano and his attorneys had a modified contingent fee arrangement, with a reduced hourly billing rate, but requested fees based on the prevailing hourly rate for similar work in the community, which were higher. The trial court was prepared to award fees for the reduced hourly rate counsel actually charged. When Glaviano refused to disclose the actual rate charged, claiming it was privileged and irrelevant, the trial court denied his request for attorney's fees.

The Court of Appeal reversed and remanded with instructions for the trial court to use the "lodestar" method to calculate the fee award. Under the lodestar method, the trial court must first determine the lodestar figure (the reasonable hours spent multiplied by the reasonable hourly rate), based on a compilation of the time spent and reasonable hourly compensation of each attorney involved in the case. The reasonable hourly rate is that prevailing for private attorneys in the community conducting non-contingent litigation of the same type. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1133.)

The school district argued that the word "incurred" in the statute refers to attorney's fees that Glaviano was actually liable to pay "and in the actual amount paid." However, the statute does not prescribe how "reasonable attorney's fees incurred" are to be calculated and the Legislature did not limit recoverable fees to those stated in the fee agreement or at the hourly rate charged by the attorney. The court concluded that the use of the word "actually" is dispositive, and the word "actually" is not present here. The word "incurred," without more, does not overcome the presumption favoring the lodestar method and market rates.

What's in a word? This case illustrates how omitting one word in an attorneys' fees clause or a fee-shifting statute can make a big difference in the outcome of the fee award. Keep this in mind when drafting or facing these clauses. One word actually matters.

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