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The Golden Rule of Attorney Fees

The “lodestar” method is commonly used by judges and arbitrators to determine attorney fees for a prevailing party. The lodestar is calculated by multiplying the reasonable number of hours by a reasonable hourly rate. However, may the court consider lack of civility as a reason to reduce an attorney fee request? The answer is “yes,” according to *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734.

Karton, an attorney, paid Ari, a contractor, \$92,651 for construction to remodel the Kartons’ home. Karton suspended the project upon learning that Ari lacked a contractor’s license and proper insurance. The Kartons had overpaid for the work performed to that point, and the parties were unable to resolve the refund difference of only \$22,096. The Kartons sued, and recovered the full \$92,651, which they were entitled to receive because Ari was an unlicensed contractor.

The Kartons requested \$271,530 in attorney fees, plus discovery sanctions. The court continued the fee hearing to receive more evidence for the fee request. At the second fee hearing, the court commented on the Kartons’ lack of civility in their briefing which was “replete with attacks on defense counsel.” The court also noted that the Kartons’ supplemental briefing with hundreds of pages “vastly exceeded” the scope of the court’s 10-page limit order, and was “emblematic of the vast over-litigating of this matter.” The court awarded total fees of \$90,000. The Kartons appealed.

The Court of Appeal found that the trial court gave five good reasons to limit the Kartons’ attorney fees to \$90,000. Three reasons stemmed from incivility: (1) the Kartons over-litigated a \$23,000 dispute with their contractor; (2) some of the over-litigation was attributed to Karton’s personal embroilment in the matter; and (3) Karton’s briefing lacked civility. The court noted that attorney skill is a traditional touchstone for deciding whether to adjust a lodestar. “Civility is an aspect of skill. Excellent lawyers deserve higher fees, and excellent lawyers are civil.”

Here, Karton’s behavior of “[c]alling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies.” By contrast, the court observed that civility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions. “It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook.” The court concluded that Karton’s “embroilment undermined objectivity about the appropriate scale of litigation.”

The Takeaway

Under California law courts may exercise discretion, including increasing or decreasing a lodestar calculation, to ensure that the fee award is reasonable. Civility as an aspect of skill to be considered in awarding attorney fees. David S. Karton, a plaintiff and an attorney of record in this case, commented that the Kartons will request the California Supreme Court to depublish Part One of the opinion concerning the criteria to determine an attorney fee award. According to the Judicial Council of California 2020 Court Statistics Report, in fiscal year 2019 the California Supreme Court depublished 22 opinions. Stay tuned.