CARLTON FIELDS

Completing the Fee-Shifting Puzzle

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Lawyers, legislators, and contracting parties have helped erode the general “American Rule” that a "prevailing party may not recover attorneys’ fees as costs or otherwise.” To take advantage of (or defend against) this paradigm shift, it is imperative that lawyers know how the four pieces of the fee-shifting puzzle fit together. **The “Front-End” Piece**

Do your homework to find a legal basis for fee-shifting before you file your pleading. Fee-shifting basis fall into either a “benefit of the bargain” bucket (contracts containing fee-shifting provisions) or a “policy” bucket (statutes and rules). If a basis exists, notify the other side that you seek fees in your complaint or answer. If a basis arises mid-lawsuit, you may need to amend the pleading or reference the fee request in a midcase motion. A front-end notice failure can become a back-end failure to shift fees. One need not identify the specific basis in the pleading — only that a basis exists. But consider letting opposing counsel know the specific basis. Armed with the details, opposing counsel can better serve their clients and the profession by doing more effectively what Elihu Root once said should be “half the practice of a decent lawyer” — i.e., telling “clients that they are damned fools and should stop.” A frank front-end conversation about the possible economic impact of a viable fee-shifting claim may help knock some settlement sense into the warring parties before fee-shifting becomes a driving force that subsumes the merits of a dispute. Finally, front-end work should include a conscious commitment to accurate time-keeping habits. Every time you log time, you are doing what every trial lawyer dreams of — creating your own evidence. So make sure it will help and not hurt your cause later on. In the words of Spiderman and the Supreme Court, “with great power there must also come — great responsibility.” Records of tasks and time spent must be detailed and contemporaneously kept. You may think lumping into a single 8.0 hour entry a description of 14 different tasks is efficient. But courts can reject such entries and will reduce your award if you cannot detail the time expended on each disparate task. And if you have a fee-shifting basis under only one of multiple claims, make sure your time entries for the fee-shifting claim identifiably tie into that claim. That will help the court later determine the reasonableness of your fee-shifting request at the back end. **The “Perfection” Piece**

Pleading a fee-shifting basis is not enough. Florida Rule of Civil Procedure 1.525 imposes a 30-day

bright-line deadline to perfect your right to have the court decide if you are entitled to fees. To perfect a fee claim, you must file a separate post-judgment motion for fees, unless the final judgment itself determines entitlement. To perfect a claim to appellate fees, a like motion must be served before the deadline for the reply brief. **The "Proof of Entitlement" Piece**

A hearing on entitlement is a trial. The respondent is entitled to an evidentiary hearing. Come to court with admissible evidence that proves entitlement — i.e., that your client was the "party prevailing on the significant issues in the litigation which achieves some of the benefit the parties sought in bringing suit." Proving prevailing party status may be as simple as judicial notice of a voluntary dismissal or a final judgment. But prevailing party status can be complicated in lawsuits involving multiple claims, counterclaims, and third-party claims and less than total victory for one side. Entitlement proofs can seem surreal in seeking fee-shifting sanctions under Florida Statutes section 57.105 or other similar statutes. Not only must you prove your client prevailed, but you must prove the losing party or the losing party's attorney "knew or should have known that a claim or defense" was "not supported" by the material facts needed or by the application of then existing law to those facts. Or you must prove some action or assertion was "taken primarily for the purpose of unreasonable delay" and caused damages to the moving party. Counsel on both sides may end up cross-examining one another about counsel-to-counsel communications or factual or legal research done during the case. This is not for the faint of heart. Proving entitlement under an offer of judgment turns on strict compliance with a statute (Fla. Stat. § 768.79), rule (Fla. R. Civ. P. 1.442), and an ever-developing body of case law. This is mostly about legal issues involving many variables. The complexity of applying these variables expands exponentially in multiparty, multi-count, multi-remedy cases. Seemingly compliant offers can be cast into doubt by later published cases. **The "Proof of Amount" Piece**

Consider stipulating to the reasonableness of the time spent on a claim or defense. Otherwise, the sum of fees paid to you for fighting over the reasonableness of time expended plus the amount awarded could substantially exceed the original request. If an evidentiary fight over the reasonableness of hours occurs, both sides can end up opening their respective Kimonos. Invoices or time entries of the movant will need to be admitted into evidence, anomalies should be explained with testimony, and an expert should opine as to the reasonableness of rates and hours. Generally, there are no "fees for fees," but exceptions exist, both under broadly worded fee-shifting contracts and statutes, and in certain sanctions circumstances. In sanctions cases, fees are generally awarded from the date when it was known (or should have been known) that the claim had no basis in fact or law, and are assessed until the date the trial court determines entitlement. Applying each piece of the fee-shifting puzzle, from your client's perspective on a fee-shifting claim, will increase your client's chance of success in obtaining, or avoiding, a shifting award. Failing to do so will create unintended — and unhappy — consequences. *Original published in Paraclete, Issue September/October 2015.*

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