

## Second Supplement to Memorandum 99-32

### **Award of Costs and Contractual Attorney's Fees to Prevailing Party: Additional Comments of Luther J. Avery**

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Attached is a letter from San Francisco attorney Luther J. Avery, commenting on the scope of the Commission's study. Instead of attempting to clarify the law on costs and contractual attorney's fees, Mr. Avery proposes to repeal the governing statutes (Code Civ. Proc. § 1032; Civ. Code § 1717), subject to the court's discretionary power to award fees and costs resulting from bad-faith actions, frivolous tactics, or acts solely intended to cause unnecessary delay (Code Civ. Proc. §§ 128.5, 128.6).

According to Mr. Avery, our society "would benefit if the rewards to lawyers through the present system were reduced and parties were forced to go back to the table and resolve their own differences." (Exhibit p. 2.) He further explains:

Assuming, as your memo does, "that the goal of section 1717 is full mutuality of remedy between parties to a contract, whether plaintiff or defendant, in the matter of attorney fees," my proposed solution accomplishes the objective. Think also of the benefit to the court system. Today court determination of attorney fees as an element of recovery involves the court and counsel in expensive and time-consuming activities that should have been resolved by the parties to the contract before they entered into the contract. Courts would be relieved of burdens they should avoid. Parties will be forced to negotiate their remedies as a part of making the deal when those who create the problem are better able to assess the risks.

Although Mr. Avery's proposed solution has benefits of simplicity, it also has downsides. The staff cautions against redirecting this study in the manner he recommends. Attempting to repeal the statutes governing costs and contractual attorney's fees would be highly controversial and likely unsuccessful. Revising the current statutory scheme to make it more fair and workable would be a better use of the Commission's resources. **The staff continues to believe that this study**

**should focus on clarification of technical issues relating to recovery of costs and contractual attorney's fees.**

Respectfully submitted,

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**Re: Award of Costs and Contractual Attorney Fees Supp. Mem. 99-32**

Dear Ms. Gaal:

This is my reaction to the above subject. I assume you are the author of the staff memorandum. I will respond to your memo rather than the letters attached.

Essentially, your memo and discussion of the issues is an expansion of the problems presented to accommodate the needs of lawyers. The proper solution, of course, is to repeal Civil Code §1717 and C.C.P. §1032, subject to the power of the court to award fees and costs pursuant to C.C.P. §§128.5-128.6.

That will force all small matters to be resolved without an attorneys' fee clause and discourage lawyers from handling small matters. Actually, in my opinion, it would benefit the Legal Services providers who will be using non-lawyers to handle most small matters, except those that are benefited from a volume solution to a common problem (in which the legal services lawyers can be harnessed and used). Most small contracts are contracts of adhesion with an attorney's fee clause thrown in to coerce the unrepresented customer.

Arguably, you could substitute for repeal of the offending sections mandatory alternative dispute resolution, although that might also be objectionable as an increase in cost to society (unless the procedures involved presumptions that forced the economic aggressor on the defensive). I recognize that repeal would affect the right to contract and would be opposed by most lawyers since the provisions are for the benefit of lawyers. I seriously doubt that contracts involving large matters will be inhibited by denial of attorney fees. It would simply challenge the ingenuity of lawyers and their wealthy clients to negotiate a price that would include the risk of dispute. The economics of that sort of planning is already included in the large deal and would be translated into other contract terms since it is rare that a large deal is controlled by a contract of adhesion. However, the financing documents, which in my opinion are normally contracts of adhesion, might require

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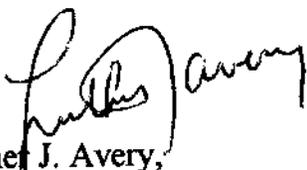
special drafting. Again, special drafting is not a problem with the large deal, but the small deal, such as auto purchasing or home purchasing might benefit from the repeal.

Assuming, as your memo does, "that the goal of section 1717 is full mutuality of remedy between parties to a contract, whether plaintiff or defendant, in the matter of attorney fees," my proposed solution accomplishes the objective. Think also of the benefit to the court system. Today court determination of attorney fees as an element of recovery involves the court and counsel in expensive and time-consuming activities that should have been resolved by the parties to the contract before they entered into the contract. Courts would be relieved of burdens they should avoid. Parties will be forced to negotiate their remedies as a part of making the deal when those who create the problem are better able to assess the risks.

You say "this study would not involve reassessment of the American and British rules for recovery of attorney fees." Why? More than half the world lives under the civil law regime and resolve disputes faster and cheaper than the common law system. Our society would benefit if the rewards to lawyers through the present system were reduced and parties were forced to go back to the table and resolve their own differences.

Your focus on "technical issues" involving fees and costs, which you believe is appropriate simply expands the problem. By analogy, I call your attention to our present federal income tax system where the plague of complexity is caused in part by the constant expansion of words in part seeking to enact "fairness" when the unfairness is in the fact of taxation. Here, you seek to expand the penumbra of unfairness in the court supervised dispute resolution system by expanding the present scope of unfairness in litigation fees and costs and develop more scope for dispute through economic benefits for lawyers through expanding remedies.

Very truly yours,

  
Luther J. Avery,  
Invited observer

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