

**Memorandum 2000-29****Award of Costs and Contractual Attorney's Fees to Prevailing Party**

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At the February meeting, the Commission reviewed a draft proposing to establish a uniform standard for determining the "prevailing party" for purposes of (1) awarding costs, (2) awarding contractual attorney's fees on a contract claim, and (3) awarding contractual attorney's fees on a noncontract claim. The Commission made a number of decisions, which the staff is in the process of implementing. (Minutes, February 2000, pp. 8-9.) The staff will distribute a new draft in a supplement to this memorandum early next week. We plan to discuss this new draft at the April meeting and prepare a first draft of a tentative recommendation for the June meeting. Before the staff prepares a draft tentative recommendation, however, the Commission still needs to resolve an important policy issue, as explained below.

**APPLICATION OF SECTION 1717 TO ATTORNEYS WHO DO NOT  
CHARGE A FEE OR CHARGE ONLY A NOMINAL FEE**

As is more thoroughly explained in a memorandum that a student legal assistant wrote for the Commission last summer (Exhibit pp. 1-13), attorney's fees must be "incurred" to be recoverable under Civil Code Section 1717. Because of this statutory requirement, it is unclear whether public interest organizations, pro bono attorneys, in-house counsel, and attorneys who charge nominal fees may recover attorney's fees pursuant to the statute.

Two organizations (Bet Tzedek Legal Services and Western Center on Law and Poverty, Inc.) have already requested that the Commission clarify how Section 1717 applies where attorneys do not charge a traditional fee. (First Supplement to Memorandum 99-32, Exhibit pp. 3-8.) The Commission needs to decide whether to address this matter in its proposal.

On the one hand, obtaining consensus on the topic may prove difficult. Interested parties may not agree on whether Section 1717 should apply where an attorney does not charge a traditional fee. Even if there is substantial agreement on this point, there may be disagreements over how to calculate the amount of

the fee award. Attempting to resolve this may jeopardize prospects for the Commission's other reforms.

On the other hand, it may prove impossible to revise the definitions of "prevailing party" in Civil Code Section 1717 and Code of Civil Procedure Section 1032 without getting embroiled in the problem. Given the degree of interest already expressed, the staff is dubious that the Commission could proceed with its proposed reforms without being pressured to clarify how Section 1717 applies to attorneys who do not charge a traditional fee.

**Rather than confronting the issue in the legislative process, it seems preferable to tackle it head-on in this study, as staff previously recommended.** (First Supplement to Memorandum 99-32, p. 4.) If the Commission opts to expand the scope of its study in this manner, the staff will further analyze the area for a later meeting.

Respectfully submitted,

Barbara S. Gaal  
Staff Counsel

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August 9, 1999

To: California Law Revision Commission

From: Julian M. Davis

Re: Recovery of contract attorney fees under Civil Code § 1717

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## **Introduction**

Civil Code Section 1717 (hereafter, “Section 1717”) allows parties to a contract to recover attorney fees when the contract specifies that at least one of the parties may recover attorney fees from litigation to enforce the contract. The intent of the statute is to provide a reciprocal right to recover when attorney fees are available for only one party to “prevent oppressive use of one-sided attorney fee provisions”<sup>1</sup>, particularly those used in adhesion contracts. *In International Industries Inc. v. Olen*, the court stated the purpose of Section 1717 is to build “a reciprocal right to attorney’s fees into contracts” which reflects “legislative intent that equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction.”<sup>2</sup>

The Western Center on Law and Poverty and Bet Tzedek Legal Services are concerned about language in recent court decisions construing Section 1717, which might (but need not necessarily) be interpreted to mean that *pro bono* and public interest attorneys and their clients are not entitled to recover attorney fees even though the other party to the contract may recover fees. The current state of public interest, *pro bono* and in-house attorneys’ ability to recover under Section 1717 is confused. The problem centers on the construction given to Section 1717 by the California Supreme Court in *Trope v. Katz*<sup>3</sup>. This memo discusses the state of the law before *Trope*, describes the decision in *Trope*,

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<sup>1</sup> *Milman v. Shukhat*, 22 Cal. App. 4<sup>th</sup> 538, 543, 27 Cal. Rptr. 2d. 526 (1994)(paraphrasing *Reynolds Metals Co. v. Alpherson*, 215 Cal. 3d. 124, 128, 158 Cal. Rptr. 1 (1979)).

<sup>2</sup> *International Industries Inc. v. Olen*, 21 Cal. 3d. 218, 224, 145 Cal. Rptr. 691, 577 P.2d 1031 (1978).

<sup>3</sup> 11 Cal. 4<sup>th</sup> 274, 45 Cal. Rptr. 2d 241, 902 P.2d 259 (1995).

and then analyzes the more recent cases, concluding with recommendations on Section 1717.

### **Pre-Trope Cases**

Civil Code Section 1717 was enacted in 1968. It has been amended four times, yet “all courts agree that the purpose of the statute when it was enacted, after the amendments and now is to establish mutuality of remedy when the contract makes recovery of attorney fees available to only one party.”<sup>4</sup> Since its inception, Section 1717 had been construed expansively to insure a reciprocal right to recover where at least one of the parties has such a right under the contract.<sup>5</sup> However, the law was unclear on whether Section 1717 applied to attorneys appearing *in propria persona*.

California courts had previously denied attorneys representing themselves a recovery of attorney fees under analogous fee shifting provisions.<sup>6</sup> The question of whether attorney fees were recoverable under Section 1717 for attorneys appearing *in propriapersona* was answered affirmatively in *Renfrew v. Loysen*<sup>7</sup>. *Renfrew*'s holding was based on a footnote in *Consumer's Lobby Against Monopolies v. Public Utilities Commission*.<sup>8</sup> The issue in *Consumer's Lobby* was whether the Public Utilities Commission could award attorney fees in an administrative proceeding to a non-attorney who obtained a favorable ruling that created a public benefit. Opponents of the award argued that past precedents were against awarding of attorney fees to non-attorneys as well as attorneys representing themselves. Although not on point in the decision, the Court stated in a footnote that “although such an attorney does not pay a fee or incur any financial liability therefor to another, his time spent in preparing and presenting his case is not somehow rendered less valuable because he is representing himself rather than a third

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<sup>4</sup> Deborah K. Orlick, *Renfrew v. Loysen: Birth, Life and Death of an Erroneous Decision*, 31 Beverly Hills B.A.J. 19, winter/ spring (1997).

<sup>5</sup> *See e.g.*, *Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 158 Cal. Rptr. 1, 599 P.2d 536 (1979)(nonsignatory to contract may recover attorney's fees under Section 1717).

<sup>6</sup> *See Patterson v. Donner*, 48 Cal. 369 (1874); *City of Long Beach v. O'Donnell*, 91 Cal. App. 760 (1928); *O'Connel v. Zimmerman*, 157 Cal. App. 2d 330 (1958).

<sup>7</sup> *Renfrew v. Loysen*, 175 Cal. App. 3d 1105, 222 Cal. Rptr. 413 (1985).

<sup>8</sup> 25 Cal. 3d 891, 603 P.2d 41, 160 Cal. Rptr 124 (1979).

party.”<sup>9</sup> The footnote went further stating, “it would appear he [the attorney] should be compensated when he represents himself if he would otherwise be entitled to such compensation.”<sup>10</sup> *Renfrew* and *Leaf v. City of San Mateo*<sup>11</sup> together elevated this footnote into precedent.

In *Leaf*, the First District Court of Appeal broke from the general rule of no recovery of attorney fees for *pro per* attorneys established in past precedents. The court cited the *Consumer Lobby* footnote as evidence that a majority of the justices of that court questioned the logic of past decisions.<sup>12</sup> *Leaf* then held that a *pro per* could recover reasonable attorney fees in an inverse condemnation proceeding.

*Renfrew* was the first case to decide the issue of recovery of attorney fees for *pro per* attorneys under Section 1717. *Renfrew* relied heavily on the reasoning contained in the *Consumer’s Lobby* footnote to hold that attorneys representing themselves may recover reasonable attorney fees under Section 1717. In abandoning the general rule against *pro per* recovery, the *Renfrew* court stated “the soundness of this rule has been seriously questioned by the California Supreme Court”, citing *Consumer’s Lobby*.<sup>13</sup> *Renfrew* served as precedent for fee recovery under Section 1717 for almost a decade before the *Trope* decision. Following *Renfrew*, most litigants, with the exception of *pro se* non-attorneys, could recover reasonable attorney fees under Section 1717 as long as at least one party to the contract could recover fees.

Six years after *Renfrew*, Section 1717 was construed to give the right of recovery of attorney fees to a litigant tenant who was represented *pro bono*. In *Beverly Hills Properties v. Marcolino*<sup>14</sup> the court rejected the notion that fees had to actually be incurred by the party. The court stated: “Section 1717 does not expressly require the prevailing party to incur legal expenses”. Rather, “the statute simply provides that a prevailing party is

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<sup>9</sup> *Id.* at 915 n. 13.

<sup>10</sup> *Id.*

<sup>11</sup> 150 Cal. App. 3d 1184, 198 Cal. Rptr. 447 (1984).

<sup>12</sup> *Id.* at 449-450.

<sup>13</sup> *Renfrew*, 175 Cal. App. 3d at 1108.

<sup>14</sup> 221 Cal. App. 3d Supp. 7, 270 Cal. Rptr. 605 (1990).

entitled to attorney fees and costs” related to the enforcement of the contract, but for no other litigation between the parties.<sup>15</sup> The court felt the statute was ambiguous because it “does not state who, the prevailing party or the attorney representing him, must incur the legal fees and costs.”<sup>16</sup> The *Marcolino* court interpreted the statute as providing a reciprocal right to recover attorney fees based on equitable principles. To effectuate the purpose of the statute (providing a reciprocal right of recovery for parties in unequal bargaining positions) the court concluded that it is the litigant’s attorney who must incur costs and fees. According to *Marcolino*, the statute allows recovery for a prevailing party “whose attorneys have incurred costs and expenses in defending the prevailing party on the underlying agreement.”<sup>17</sup>

Underlying the decision was the realization that the landlord would have been able to recover attorney fees from the tenant had the landlord won the unlawful detainer action. This factor weighed heavily in favor of the court’s ruling. Under the ruling it mattered little whether a party achieved representation under a contingent fee, through *pro bono* representation, or had sufficient resources to retain counsel. So long as the attorney was put to expense in litigating the claim, there was a right to recover under Section 1717.

While *Marcolino* did not rely on *Renfrew* in the holding, a later case would rely on both *Renfrew* and *Marcolino* to extend Section 1717 recovery to in-house counsel. In *Garfield Bank v. Folb*,<sup>18</sup> the Second District Court of Appeal found that Stanley Folb, represented by in-house counsel Bradley Folb, could recover attorney fees against Garfield Bank for the bank’s unsuccessful suit of Stanley involving a lease agreement. The court reasoned that since attorneys could recover for representing themselves, in-house counsel should be allowed to recover under the same statute. Further, since *Marcolino* reasoned that Section 1717 does not “expressly require the prevailing party to incur legal expenses”, it is not critical to recovery that the defendant would have not incurred great expense from the

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<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 25 Cal. App. 4<sup>th</sup> 1804, 31 Cal. Rptr. 2d 239 (1994).

use of in-house counsel.<sup>19</sup> The court also relied on similar cases in other states as well as federal cases that allowed recovery for non-profit legal services and in-house counsel. As in *Renfrew* and *Marcolino*, the statute was construed to effectuate its purpose that the right to recover be “reciprocal and reasonable.”<sup>20</sup>

Thus, before *Trope*, Section 1717 was construed to give litigants a reciprocal right to recover whether they were charged fees or not. The determination was based on an effort to keep fees reciprocal between litigants when at least one of the parties would be liable, as well as a desire to allow recovery to attorneys whose clients may not be able to pay for legal representation. As a result, in-house counsel, *pro se* attorneys, *pro bono* attorneys and public interest firms could all recover reasonable attorney fees under Section 1717. Only *pro se* non-attorneys were not included in the statute’s protection.

### ***Trope***

After *Renfrew*, *pro per* attorneys could recover fees under Section 1717 but still could not under similarly worded fee-shifting statutes. Further, in early 1994 the Third District Court of Appeal ruled that non-attorneys could not recover under Section 1717 where the contract specified that the party could recover only “attorney fees” as opposed to “legal services fees”.<sup>21</sup> The law in California under Section 1717 was not settled, although it was clear that the trend was for inclusiveness to effectuate the reciprocity purpose behind the statute.

In *Trope*, the California Supreme Court was asked to revisit the issue of attorney fee recovery for *pro per* attorneys under Section 1717. The law firm of Trope & Trope filed suit to recover fees from defendant Katz for services rendered during Katz’s divorce proceedings. Katz cross-complained, maintaining that Trope & Trope charged excessive fees for representation. The trial court ruled in favor of Trope & Trope but also found that the fees were excessive. The firm’s overall recovery was reduced from \$163,000 to

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<sup>19</sup> *Id.* at 1807 (quoting *Marcolino*, *supra* note 14, at 11).

<sup>20</sup> *Id.* at 1809.

<sup>21</sup> See *Jacobson v. Simons Real Estate*, 23 Cal. App. 4<sup>th</sup> 1285, 28 Cal. Rptr. 2d 699 (1994).

\$44,500. Trope & Trope then moved for an award of attorney fees pursuant to its fee agreement with Katz. The law firm had represented itself throughout the litigation. A special referee found against Trope & Trope on the issue of recovery of attorney fees. The special referee found *Patterson* and its progeny persuasive and declined to follow *Renfrew*. The referee's decision was affirmed by the court of appeal, thus establishing two lines of cases, those that followed *Renfrew* and those that followed the old rule from *Patterson*.

The California Supreme Court decided the conflict by looking to legislative intent, giving the terms in the statute their "usual and ordinary" meaning.<sup>22</sup> The court focused on the terms "incurred" and "attorney fee". The court found "incur a fee" to mean "to become liable for it" or "to become obligated to pay it".<sup>23</sup> Similarly, the court found "attorney fee" to mean "the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation".<sup>24</sup> The court found that a *pro se* attorney "pays no such compensation" and thus cannot recover under Section 1717. The court reaffirmed *Patterson* and its progeny holding that attorneys appearing *in propria persona* cannot recover attorney fees "under either a statutory exception to the American rule or under a contractual attorney fee provision".<sup>25</sup>

The court reasoned in *Renfrew* that the *Consumer's Lobby* footnote called into question the logic of *City of Long Beach v. Sten*<sup>26</sup> and *Patterson*. *Renfrew* declined to follow the older cases and charted a new course for *pro se* fee recovery under Section 1717. *Trope* pointed out that *Sten* and *Patterson* were binding precedent in *pro se* fee recovery suits. The *Consumer's Lobby* footnote was mere dicta that did not have the force of law necessary to overturn past precedent. Thus, the *Trope* court reasoned, it was error for *Renfrew* and *Leaf* to decline to follow precedent.

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<sup>22</sup> *Id.* at 280.

<sup>23</sup> *Id.* [quoting from Webster's New International Dictionary (3d ed. 1961)].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 281.

<sup>26</sup> 206 Cal. 473, 274 P. 968 (1929) (holding that an attorney representing himself in a condemnation proceeding cannot recover attorney fees under Civil Procedure section 1255a, thus extending ban on *pro se* recovery of attorney fees to cover statutory cases as well as contractual cases [See *Patterson*, *supra* note 6]).

The Court's reliance on the *Sten* and *Patterson* line of cases is significant, because they stand for the proposition that "the usual and ordinary meaning of the phrase 'reasonable attorney's fees' is the consideration that a litigant pays or becomes liable to pay in exchange for legal representation."<sup>27</sup> Since a *pro per* attorney does not become liable to pay an attorney fee to another, the attorney may not recover under the statute.

The *Renfrew* decision was based in part on the notion that, if the court had ruled otherwise, one of the parties would be entitled to attorney fees but the other party would not. In *Trope*, however, the Court expressed concern about allowing *pro per* attorneys to recover and not non-attorneys. This would create an imbalance between attorney *pro se* litigants and other non-attorney *pro se* litigants "and grant different rights and remedies to each."<sup>28</sup> In addition, *Trope* seems to imply that the *party* incur the fee as opposed to the *attorney*, a significant distinction for *pro bono* litigants. The overruling of *Renfrew* meant cases relying on its reasoning were now suspect in light of *Trope*.

### **Post-*Trope* decisions**

*Trope* specifically declined to decide the issue presented in *Garfield Bank*: whether in-house counsel could recover reasonable attorney fees under Section 1717. Also left undecided was whether *pro bono* and public interest firms that did not charge their clients fees could recover reasonable attorney fees under Section 1717. The reasoning of *Trope* suggests that if the client did not pay or become liable to pay attorney fees to the attorney, reasonable attorney fees could not be recovered. The decision suggests that it is the client that has the right to recover and not the attorney. Though *Trope* professed to decide the narrow issue of *pro per* recovery, in fact its language has proven to be sweeping, affecting all parties under Section 1717.

In 1996, the Bankruptcy Appellate panel of the Ninth Circuit had to decide whether an attorney who represented himself before the *Trope* decision could be barred from

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<sup>27</sup> *Id.* at 282.

<sup>28</sup> *Id.* at 277.

recovery through retroactive application of *Trope*. The panel not only concluded that *Trope* could be applied retroactively, but also reasoned that “the fact that [the *pro per* attorney] did not bill the other defendants (whom he claimed he represented) is critical because the California Supreme Court based its decision on strict statutory construction of the words ‘incur’ and ‘attorney fees’.”<sup>29</sup> Since the other defendants “were not contractually obligated to pay”, the panel declined to award attorney fees under Section 1717.<sup>30</sup>

The *pro per* attorney (Albertini) contended that since he used associates in his law firm to litigate part of the case, he could recover under an in-house counsel theory based on *Garfield Bank*. While acknowledging that *Trope* was intentionally silent on the issue of in-house counsel, the panel stated that it was not at all clear whether *Trope & Trope* had any employees other than its partners to whom it was liable for fees. The panel also said that “Albertini is Albertini & Gill” and “no distinction can be made between them.”<sup>31</sup> The court rested its final determination based on reasoning from the “binding portion” of the *Trope* decision:

Albertini has incurred an obligation to pay his associates, but that duty arises out of the fact that he hired them to work for his firm, not because he specifically hired them in this litigation. ...The fact that Albertini chose to divert his associates from work for his clients to work for himself does not change his obligation to his associates and therefore does not cause him to have incurred attorney’s fees to his associates.<sup>32</sup>

The panel in *In re Job* thus took a literal reading of *Trope*, and extended *Trope*’s reasoning in denying recovery under *pro per* and in-house arguments. In doing so, *In re Job* called into question the holding of *Garfield Bank*.

Another case, *San Dieguito Partnership v. San Dieguito River Valley Regional Open Space Park Joint Powers Authority*,<sup>33</sup> has called into question *Marcolino* and may well bar recovery for public interest firms and *pro bono* attorneys that do not charge at least

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<sup>29</sup> *In re Job*, 198 B.R. 763, 767 (1996).

<sup>30</sup> *Id.* at 768.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 769.

<sup>33</sup> 61 Cal. App. 4<sup>th</sup> 910, 72 Cal. Rptr. 2d 91 (1998).

a nominal or contingent fee. In *San Dieguito*, the San Dieguito River Valley Regional Open Space Park Joint Powers Authority (JPA) successfully defended an action against it. The JPA moved for attorney fees under a settlement agreement entered into prior to the underlying suit. The underlying agreement provided that the prevailing party may recover “an award in the amount of attorneys’ fees and costs incurred in connection with the prosecution or defense of such action.”<sup>34</sup> Attorneys for JPA only billed JPA \$110 per hour in attorney fees when the going rate for their services was \$180-\$190.<sup>35</sup>

The court denied JPA’s request for both an enhancement of the fees and a lodestar determination of reasonable attorney fees. Citing *Trope*, the court reasoned that the purpose of recovery of reasonable attorney fees under Section 1717 “is to reimburse a party for attorney fees the party has paid, or to indemnify the party for fees the party has become liable to pay, provided the fees so paid or incurred are reasonable.”<sup>36</sup>

As interpreted in *San Dieguito*, Section 1717 only allows recovery by parties who were actually charged an attorney fee for representation, because only such a party would be in need of reimbursement or indemnification. Section 1717, under the *San Dieguito* interpretation, does not allow recovery for fees the court considers to be unreasonable.

*San Dieguito* states that *Marcolino* “is not persuasive” because *Marcolino* reasoned that the determination of whether fees were incurred should focus on whether the fees were incurred by the attorney, as opposed to the litigant. According to the court in *San Dieguito*, the *Marcolino* argument “was repudiated by the California Supreme Court in *Trope*” because that court read Section 1717 as specifying that attorney’s fees “are the consideration that a *litigant* actually pays or becomes liable to pay”, not the *litigant’s attorney*.<sup>37</sup> *San Dieguito* thus suggests, although in dicta, that *Trope* has disapproved of *Marcolino’s* reasoning and holding, leaving no protection for *pro bono* or public interest attorneys to recover fees.

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<sup>34</sup> *Id.* at 914.

<sup>35</sup> *Id.* at 916.

<sup>36</sup> *Id.* at 918.

<sup>37</sup> *Id.* (emphasis added).

In *PLCM Group Inc. v. Drexler*<sup>38</sup>, the Second District Court of Appeal recently revisited the issue of fees for in-house counsel, this time with respect to corporate in-house counsel. The court allowed the plaintiff subsidiary of a larger parent corporation to recover reasonable attorney fees, principally because it used the larger corporation's in-house counsel department to litigate the case. The court found that although *Trope* disapproved of aspects of *Garfield Bank*, *Trope* specifically left undisturbed the question of whether in-house counsel may recover attorney fees under Section 1717.<sup>39</sup> However, the court also concluded that "under our Supreme Court's definition of 'incurred' and 'attorneys fees', expenses for work in-house legal counsel performs are recoverable as attorney fees under Civil Code Section 1717 to the extent they constitute consideration that the litigant became liable to pay in exchange for counsel's representation."<sup>40</sup>

The in-house recovery allowed in *PLCM* differs from the in-house representation discussed in *In re Job* and *Trope*, in that *PLCM* involves corporate in-house counsel and not the in-house counsel of a law firm. The distinction is significant because the parent corporation of *PLCM* establishes costs and billing for its in-house services to each subsidiary on the basis of the number and complexity of the subsidiary's usage of the legal services department. There is a correlation between the compensation the subsidiary must pay to in-house counsel and the amount of billable hours in-house counsel works on a particular case. This arrangement closely mirrors that of a separate law firm. It was not a stretch to determine that the litigant, *PLCM*, incurred a fee for the legal services of its parent corporations in-house counsel. Such a billing arrangement may not be the norm, however, particularly for smaller corporate firms or law firms. It is unlikely that the recovery of fees for in-house counsel will be uniform.

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<sup>38</sup> 1999 Daily Journal D.A.R. 5126 (1999).

<sup>39</sup> *Id.* at 5128.

<sup>40</sup> *Id.*

## **Current State of Section 1717**

This survey of cases and trends reveals growing ambiguity and uncertainty under Section 1717. At first it was hardly doubted that public interest and *pro bono* litigants could recover attorney fees. A literal interpretation of *Trope* would preclude recovery by any organization or individuals providing free legal representation, unless they charge a nominal fee or their clients enter into a contingency fee agreement. The legislative intent of Section 1717 to aid persons in unequal bargaining positions by providing a reciprocal right to recover is arguably in doubt. Several difficulties now exist with the application of this statute.

1. There is difficulty in defining in-house counsel and acknowledging whether a firm's corporate structure allows it to recover attorney fees under Section 1717.
2. There is a disincentive to provide public interest agencies with discounted legal fees because, under the current construction of the statute, only the fees actually charged are recoverable.
3. The statute no longer protects those who are in need of free legal service, but these individuals are usually most in need of protection from attorney fee shifting contracts and most often find themselves in an unequal bargaining position.
4. It is difficult to distinguish between an attorney appearing *in propria persona* and in-house counsel for a law firm.

It seems ironic that *pro bono* and public interest litigants would not be able to recover reasonable attorney fees while the other party to the contract may, since the other party is far more likely to hold the bargaining advantage in the underlying contract. Section 1717 was intended to rectify this imbalance. It should be mentioned that *Trope* was intended to apply to the contentious issue of *pro per* attorney's fee recovery. It is unfortunate that the language the court chose to preclude *pro per* recovery has also made it difficult for *pro bono* and public interest litigants to obtain recovery.

## Reasonable Attorney Fees

Determining how to calculate reasonable attorney fees has grown more uncertain following *Trope*. Previously, when recovery was allowed for *pro per*, *pro bono*, in-house, and public interest attorneys, the court had to decide how to calculate reasonable attorney fees. *Sternwest Corp. v. Ash* held that cases decided under Section 1717 must use the lodestar method.<sup>41</sup> The lodestar figure represents “the number of hours reasonably expended multiplied by a reasonable rate” in that area.<sup>42</sup> Some courts add to the lodestar calculation on the basis of the difficulty of the issues involved in the case or the extraordinary relief the attorney was able to obtain. The focus in calculating the lodestar is to approximate what a practicing attorney would charge a fee-paying client.

*Trope*'s focus on fees “incurred” has shifted the determination of reasonable attorney fees away from a lodestar determination. Two lines now emerge. Some courts follow a literal interpretation of the *Trope* decision in assessing fees, as well as in determining if a party may recover at all. In *San Dieguito*, for example, the court allowed the JPA to recover only those fees actually charged to the client in the litigation and the firm's costs. This method would be a simple calculation based on the books.

In contrast, *PLCM* read *Trope* as only deciding the narrow issue of whom should recover stating:

[T]he holding of *Trope* is not that Civil Code Section 1717 requires a fee award to equal the exact amount of dollars paid by a litigant; rather it is that to be eligible for a fee award, a litigant must become liable to pay some consideration for legal representation....<sup>43</sup>

The court went on to hold that “[i]n California, any fee-setting inquiry begins with the lodestar”<sup>44</sup> based on the prevailing market rate for the area.

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<sup>41</sup> 183 Cal. App. 3d 74, 227 Cal. Rptr. 804 (1986); see also Richard M. Pearl, California Attorney Fee Awards, September 1998, §11.2.

<sup>42</sup> *PLCM Group Inc v. Drexler*, 1999 D.A.R. 5129, 5126 (1999).

<sup>43</sup> *Id.* at 5129.

<sup>44</sup> *Id.* at 5129, quoting from *Mangolin v. Regional Planning Commission*, 134 Cal. App. 3d 999, 1004 (1982).

## **Conclusion**

While *Trope* decided the contentious issue of *pro per* recovery of attorney fees under Section 1717, it has caused uncertainty and unease with respect to other parties. It is clear that the intent of Section 1717 was to provide a reciprocal right to recover when a contract specifies recovery for at least one party. It is also clear that the chief motivation for this statute was the protection of consumers who were in unequal bargaining positions. A literal interpretation of *Trope* would leave these individuals unprotected if they could not afford to retain an attorney. Further, an attorney who offers a reduced fee to represent such clients will be penalized for this charity by not being allowed to recover market value for the attorney's services. In all cases, however, the drafter of the fee shifting agreement will be allowed full recovery should the drafter win in the litigation. The result may be either a chilling effect on litigating meritorious claims because of the prohibitive cost of retaining an attorney, or coercive settlements because the poorer litigant cannot afford to go to trial.

Bet Tzedek Legal Services and the Western Center on Law and Poverty request that the Law Revision Commission look into amending or revising Section 1717 to better effectuate its intent and to protect *pro bono* and public interest attorneys that rely on fee recoveries to finance the cost of litigating in the public interest. The Commission should also look into the issue of recovery by in-house counsel. I recommend revising Section 1717 to explicitly cover in-house counsel, public interest, and *pro bono* attorneys and firms, though defining in-house counsel may be challenging.