Study J-901 July 19, 2000

Memorandum 2000-54

Award of Costs and Contractual Attorney's Fees to Prevailing Party: Terminology, Pro Se Litigants

In its study of costs and contractual attorney's fees, the Commission has been working towards a draft of a tentative recommendation. The staff had hoped to have a complete draft ready for consideration at the July meeting. The task proved more ambitious than the staff originally anticipated, however, so we are deferring that step to the next meeting. Instead, this memorandum (1) explains a terminology problem that the staff is attempting to resolve, and (2) analyzes the pros and cons of applying Civil Code Section 1717 to pro se litigants (including pro se attorneys), as directed by the Commission at its June meeting.

TERMINOLOGY

In attempting to prepare a draft tentative recommendation, the staff spotted new issues warranting attention, which we are working to address in the draft. A recurring concern relates to terminology, particularly the use of the word "costs." Under Code of Civil Procedure Section 1033.5(a)(10), allowable costs include attorney's fees authorized by contract, statute, or law. Because these attorney's fees are allowable costs, they can be claimed through the costs procedure, instead of being pleaded and proved at trial. In common usage, however, costs and attorney's fees are understood to be distinct concepts: attorney's fees are fees paid to an attorney, whereas costs are certain statutorily specified out-of-pocket expenses recoverable by the prevailing party (e.g., filing fees).

This dual usage of the term "costs" can create confusion. The staff is still exploring how consistently the term is intended to include attorney's fees in the codes. Adding to the potential for confusion are the different categories of costs. Recovery of certain items, including reasonable attorney's fees authorized by contract, statute, or law, is mandatory. Code Civ. Proc. § 1033.5(a). Certain other out-of-pocket expenses (e.g., fees of experts not ordered by the court) are not allowable as costs except where expressly authorized by law. Code Civ. Proc. § 1033.5(b). Still other out-of-pocket expenses may be allowed or denied in the

court's discretion. Code Civ. Proc. § 1033.5(c)(4). Out-of-pocket expenses that are not allowed as costs (either because they are not allowable, or because they are discretionary and the court denies recovery) may still be recoverable pursuant to contract, depending on how the contract is worded. We have been using the term "nonstatutory litigation expenses" to refer to such expenses, and have proposed that such expenses be recoverable through the costs procedure, instead of being pleaded and proven at trial. Thus, under the draft considered at the June meeting, nonstatutory litigation expenses awardable pursuant to contract would be an element of costs. (See First Supplement to Memorandum 2000-29, Attachment pp. 15-16.)

The staff is searching for a simple, or at least effective, means of clarifying this situation, so that litigants and courts readily understand what items are being referred to in each statutory provision. We welcome suggestions, including comments on whether attempting to provide greater clarity is a worthy or realistic goal. We do not have a specific proposal to offer the Commission at this time, but will do so in the draft tentative recommendation.

PRO SE LITIGANTS

At the June meeting, the Commission decided that Civil Code Section 1717 should be revised to clarify that it applies regardless of whether the prevailing party's attorney charged a traditional fee. (Minutes, p. 11.) This would codify *PLCM Group, Inc. v. Drexler,* __ Cal. 4th __, __ P.2d __, 95 Cal. Rptr. 2d 198 (2000) (Section 1717 applies where party is represented by in-house counsel), and *Beverly Hills Properties v. Marcolino,* 221 Cal. App. 3d Supp. 7, 270 Cal. Rptr. 605 (1990) (Section 1717 applies where party is represented on pro bono basis), and extend the principle of those cases to other situations where the prevailing party's attorney does not charge the prevailing market rate for comparable services.

Recognizing that it is a difficult question, the Commission did not resolve whether pro se litigants (litigants who represent themselves instead of hiring an attorney) should be able to recover attorney's fees under Section 1717. Instead, the Commission requested further discussion and analysis of this point.

We first examine existing law, then discuss the relevant policy considerations and possible alternative approaches.

Existing Law on Pro Se Recovery Under Section 1717

In *Trope v. Trope,* 11 Cal. 4th 274, 902 P.2d 259, 45 Cal. Rptr. 2d 241 (1995), the Supreme Court held that a pro se attorney cannot recover attorney's fees under Section 1717. The Court based its decision largely on an analysis of precedent and legislative intent, reasoning that pro se attorneys do not "incur" an "attorney fee" within the meaning of the statute, because they do not become liable to pay an attorney for representing them. *Id.* at 279-84. This reasoning is clearly applicable to pro se nonattorneys, as well as pro se attorneys. We do not repeat the details of the analysis here, because it has little bearing on whether pro se litigants *should be* eligible for attorney's fees under Section 1717, as opposed to whether they *are currently* entitled to such recovery.

As explained in greater detail below, the Court also rejected various policy arguments for extending the statute to pro se attorneys. *Id.* at 289-93. In so doing, however, the Court pointed out that its role was not to examine the policy justifications in a vacuum. Rather, the Court only assessed whether its interpretation of the words "incur" and "attorney fee" would conflict with the legislative purpose of the statute, yield absurd results that the Legislature could not have intended, or be improper for some other compelling reason. *Id.* at 288.

In its recent *PLCM* decision, the Court discussed *Trope* at length, reiterating the reasoning of the case with approval and distinguishing the situation of in-house counsel from that of a pro se attorney. 95 Cal. Rptr. 2d at 203-04. It is thus abundantly clear that pro se litigants are not currently entitled to recover attorney's fees under Section 1717.

Pro Se Recovery Under Other Statutes

Although it is clear that a prevailing pro se litigant may not recover attorney's fees under Section 1717, recovery of attorney's fees by pro se attorneys and other pro se litigants is controversial. In construing other statutes that are silent on the issue, courts have generally denied fees to prevailing pro se nonattorneys. *See, e.g., Mayerson v. De Buono,* 181 Misc. 2d 55, 59-60, 694 N.Y.S.2d 260 (1999) ("where attorney's fees are provided by statute, a pro se litigant who is not an attorney is not entitled to an award of such fees"); *Gonzalez v. Kangas,* 814 F.2d 1411 (9th Cir. 1986) (pro se nonattorney not entitled to fees under Civil Rights Attorneys Fees Awards Act ("CRAFAA")). A few courts have allowed recovery, however, and some commentators also favor recovery. *See, e.g., Crooker v. U.S. Dep't of Treasury,* 663 F.2d 140 (D.C. Cir. 1980) (pro se litigant entitled to attorney's fees under

Freedom of Information Act); Spector, *Awarding Attorney's Fees to Pro Se Litigants Under Rule 11,* 95 Mich. L. Rev. 2308 (1997); (pro se litigants should receive attorney's fees as sanctions under Rule 11); Waldman, *Pro Se Can You Sue?: Attorney Fees For Pro Se Litigants,* 34 Stan. L. Rev. 659 (1982). Opinion on fee recovery by pro se attorneys is divided. *Compare Kay v. Ehrler,* 499 U.S. 432 (1991) (pro se attorney not entitled to fees under CRAFAA); *Argaman v. Ratan,* 73 Cal. App. 4th 1173, 86 Cal. Rptr. 2d 917 (1999) (pro se attorney not entitled to attorney's fees as sanctions under Code Civ. Proc. § 128.5); *with Abandonato v. Coldren,* 41 Cal. App. 4th 264, 48 Cal. Rptr. 2d 429 (1996) (pro se attorney entitled to attorney's fees as sanctions under Code Civ. Proc. § 128.5); Barbee, *Attorney's Fee Awards to Pro Se Attorney Litigants After Kay v. Ehrler: No Fees. It's Simple. But Is It Absolute?,* 69 S. Cal. L. Rev. 1795 (1996) (pro se attorneys should receive fees under CRAFAA); Bagley, *Attorney Fees: Compensating the Attorney Pro Se Litigant in Civil Rights Cases,* 44 Okla. L. Rev. 695 (1991) (same); Weinstein, *Attorneys Fees — Award of Attorney Fees to Pro Se Litigant Who Is An Attorney,* 63 Temp. L. Rev. 865 (1990) (pro se attorneys should receive attorney's fees under Equal Access to Justice Act); Mednick, *Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act,* 53 Geo. Wash. l. Rev. 291 (1984) (pro se attorneys should receive fees under Freedom of Information Act).

Policies Underlying Section 1717

In deciding whether Section 1717 should be revised to permit pro se litigants to recover attorney's fees, it is appropriate to start with an examination of the policies underlying the statute.

Section 1717 was originally enacted in 1968 to address abusive use of unilateral attorney's fee clauses:

> It is common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include attorney fee clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims.

Coast Bank v. Holmes, 19 Cal. App. 3d 581, 596, 97 Cal. Rptr. 30 (1971). The provision was "designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through

the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail." *Id.* at 597 n.3. By making a unilateral attorney's fee clause reciprocal and precluding waiver of this protection, the statute establishes mutuality of remedy and prevents oppressive use of one-sided fee provisions. *PLCM,* 95 Cal. Rptr. 2d at 202.

To further the goal of mutuality of remedy, the statute has also been construed to apply where a person sued on a contract with an attorney's fee clause successfully defends the claim by arguing the inapplicability, invalidity, unenforceability, or nonexistence of the contract. "If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral — regardless of the reciprocal working of the attorney fee provision allowing attorney fees to the prevailing attorney — because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. *Santisas v. Goodin,* 17 Cal. 4th 599, 611, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998); *see also Reynolds Metals Co. v. Alperson,* 25 Cal. 3d 124, 128, 599 P.2d 83, 158 Cal. Rptr. 1 (1979).

The goal of mutuality of remedy would also be undermined if a party with superior bargaining strength could limit an attorney's fee provision to certain aspects of a contract (e.g., providing attorney's fees to the prevailing party if the general contractor sues for nonpayment, but not if the homeowner sues for construction defects). *Myers Bldg. Industries v. Interface Technology, Inc.*, 13 Cal. App. 4th 949, 971, 17 Cal. Rptr. 2d 242 (1993). Thus, the statute states that an attorney's fee provision within its scope "shall be construed as applying to the *entire* contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." Civ. Code § 1717(a) (emphasis added).

Equitable considerations are critical in applying Section 1717. The statute "reflects legislative intent that equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction." *International Industries, Inc. v. Olen,* 21 Cal. 3d 218, 224, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978). "The history of the statute 'consistently adheres to the theme of equity in the award of fees ….'" *PLCM*, 198 Cal. Rptr. 2d at 203, *quoting Sears v. Baccaglio,* 60 Cal. App. 4th 1136, 70 Cal. Rptr. 2d 769 (1998). Although the original focus of the statute was on protecting weaker, less-sophisticated parties, it now reflects "the legislative purpose 'to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee

provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract.'" *PLCM, quoting Santisas,* 17 Cal. 4th at 616. In other words, the provision is intended to "ensure that contractual attorney fee provisions are enforced even-handedly." *Trope,* 11 Cal. 4th at 289.

Policies Favoring Fee Awards To Pro Se Litigants Under Section 1717

Policy arguments for awarding attorney's fees under Section 1717 to prevailing pro se litigants include:

Promotes mutuality of remedy

The statutory goal of mutuality of remedy would be best-served by allowing *all* prevailing litigants to recover attorney's fees under Section 1717, regardless of whether they represent themselves. Any other approach leaves open precisely the possibility that the statute is intended to preclude: One-sided availability of contractual attorney's fees.

Deters oppressive use of fee provisions

As explained above, Section 1717 was originally enacted to protect weak, unsophisticated parties from oppressive use of one-sided fee provisions, such as forcing a settlement of a dubious claim. Awarding attorney's fees to the prevailing party in an action covered by a fee provision helps to deter such conduct. The deterrent effect would be greater, however, if fee awards were available to the people most in need of the statutory protection: Those unable to obtain an attorney. Extending Section 1717 to pro se litigants would achieve this end, but would also make fee awards available to prevailing pro se litigants who could have hired an attorney yet chose not to do so.

Encourages litigation of meritorious claims

The potential availability of a fee award under Section 1717 encourages litigation of meritorious claims that parties might otherwise not be able to assert. Even with this potential recovery, however, some people with meritorious claims might not be able to find a lawyer to take their case (e.g., a person associated with an unpopular social movement, an attorney who seems likely to second-guess another lawyer's judgment, or a headstrong or otherwise difficult client). Permitting pro se litigants to recover attorney's fees under Section 1717 would thus promote assertion of meritorious claims that might otherwise not be litigated.

No windfall to wrongdoer

Because a prevailing pro se litigant cannot recover attorney's fees under Section 1717, the losing party receives a windfall. Due to the happenstance that its opponent proceeded pro se, the losing party's liability is much less than it would have been if its opponent had been able to hire an attorney. A wrongdoer should not enjoy such a windfall while a pro se litigant receives no compensation for time and effort spent prosecuting a meritorious claim. Barbee, *supra*, 69 S. Cal. L. Rev. at 1816.

Conserves attorney litigant's resources

A nonattorney litigant must acquire litigation skills to proceed pro se, but an attorney litigant may already have the necessary skills. If the attorney litigant hires another attorney to litigate the case, that attorney will have to learn the facts of the case at the client's expense. In contrast, the attorney litigant is already intimately familiar with the circumstances. As the pro se attorney argued in *Trope*, 11 Cal. 4th at 290, it may thus be far more efficient for the attorney litigant to proceed pro se than to hire another attorney. Permitting pro se attorneys to recover attorney's fees under Section 1717 would promote such efficiency.

Policies For Denying Fee Awards Under Section 1717 To Pro Se Litigants

Policy arguments for denying attorney's fees under Section 1717 to prevailing pro se litigants include:

Encouraging litigants to seek effective representation for their own benefit and the benefit of the legal system

Section 1717 is meant to do more than just encourage prosecution of meritorious claims. It is meant to encourage "*effective* and *successful* prosecution of meritorious claims." *PLCM*, 198 Cal. Rptr. 2d at 204 (emphasis added).

Because of their lack of legal skills, pro se nonattorneys are obviously hampered in presenting their cases. Even where a pro se nonattorney prevails, the degree of success may be less than if the party had been represented by counsel. Because attorney's fees are available under Section 1717 only to a prevailing party who hires an attorney, a litigant in an action covered by a unilateral fee provision benefiting the other side has an incentive to retain counsel. This furthers the goal of encouraging effective and successful presentation of meritorious claims, as well as defenses.

As the pro se attorney pointed out in *Trope*, 11 Cal. 4th at 289, however, this policy argument is less compelling with regard to pro se attorneys than with

regard to pro se nonattorneys. Unlike nonattorneys, pro se attorneys have legal skills and are bound by the ethical rules governing attorneys. *Id.*

Still, as the United States Supreme Court observed in denying attorney's fees to a pro se attorney under the Civil Rights Attorney's Fees Awards Act, a pro se attorney may not be an effective advocate:

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

Kay v. Ehrler, 499 U.S. 432, 437-38 (1991); *see also PLCM,* 198 Cal. Rptr. 2d at 204; *Trope,* 11 Cal. 4th at 292.

Moreover, the lack of effective representation may not only harm the pro se litigant, but may also impose burdens on the legal system. For example, judicial resources may be wasted on a pro se litigant's prosecution of a meritless claim, *see, e.g., Kay,* 499 U.S. at 435, or on disputes stemming from a pro se attorney's overzealous pursuit of discovery. By permitting fee awards to prevailing parties who hire attorneys but not to pro se prevailing parties, Section 1717 encourages litigants to obtain effective representation, to their benefit and the benefit of the legal system.

Difficulty in calculating the award

Determining the proper amount of a fee award can be challenging even where the award is to an attorney hired at the prevailing market rate. *See, e.g., Reynolds Metals,* 25 Cal. 3d 124. The issue becomes more complicated where an attorney proceeds pro se, because the attorney may not be familiar with the area of practice. Should the court discount the attorney's normal billing rate to account for this, or should it use the full rate because that is what the attorney could have earned otherwise? Does it matter whether the attorney had to forego other legal work to proceed pro se, or had a dearth of other legal business?

Where a pro se nonattorney seeks fees for performing legal work, calculating the award raises many issues. For example, should a doctor and a janitor receive

the same amount for achieving the same litigation outcome, even though the doctor's opportunity costs are much higher than the janitor's? If the prevailing pro se litigant is unemployed, what compensation rate should be used in the calculation? Denying fee awards to pro se litigants spares the courts from having to resolve issues such as these. *See, e.g.*, Mednick, *supra,* 53 Geo. Wash. L. Rev. at 308.

The fee-calculation issues are not insurmountable, however. *See, e.g.*, Spector, *supra,* 95 Mich. L. Rev. at 2327-30 (1997); Waldman, *supra,* 34 Stan. L. Rev. at 677-83. The question is not whether courts are capable of developing guidelines for calculating fee awards to prevailing pro se litigants, but whether that undertaking is worth the effort it would require, and whether the guidelines could truly be fair and logical.

Options

Given the competing policy considerations as outlined above, what approach should the Commission take to pro se litigants under Section 1717? There are a number of different options:

(1) *Deny attorney's fees under Section 1717 to all pro se litigants.* This would codify *Trope.*

(2) *Deny attorney's fees to all pro se litigants, but permit pro se litigants to recover out-of-pocket litigation expenses covered by a contractual fee provision.* This would codify *Trope*, but address an issue that was not resolved in *Trope*: The extent to which a prevailing pro se litigant may recover out-of-pocket litigation expenses covered by a contractual fee provision. Where a unilateral fee provision authorizes recovery of such expenses, a pro se litigant should be entitled to reciprocal recovery of those expenses just like any other litigant.

Typically, however, a pro se litigant will not incur out-of-pocket expenses that are large enough to deter oppressive use of one-sided fee provisions or effectively promote mutuality of remedy. If the litigant cannot afford to hire an attorney, the litigant is unlikely to retain an expert or spend substantial sums on other optional litigation expenses. Nonetheless, the amounts involved may be very important to the prevailing pro se litigant.

(3) *Allow all prevailing pro se litigants to recover attorney's fees under Section 1717.* This would reject *Trope.*

(4) *Allow prevailing pro se attorneys to recover attorney's fees under Section 1717, but not prevailing pro se nonattorneys.* On the one hand, treating pro se attorneys and pro se nonattorneys differently "would constitute disparate treatment, inimical to a statute designed to establish mutuality of remedy." *PLCM*, 198 Cal. Rptr. 2d at 203-04; see also *Trope*, 11 Cal. 4th at 285-86. The approach may be harshly criticized for favoring attorneys over people in other occupations. Such favoritism may not only generate ill will towards the legal profession, but may also undermine the public perception of fairness in the legal system. *Id.* at 286.

On the other hand, the policy considerations at stake apply differently to attorneys than to nonattorneys. Differentiating between attorneys and nonattorneys with respect to recovering attorney's fees is not unprecedented in California law, *see* Code Civ. Proc. § 386.6 (pro se attorney may recover reasonable attorney's fees for interpleader), nor is it unreasonable to limit recovery of attorney's fees to officers of the court.

(5) *Allow prevailing pro se attorney defendants to recover attorney's fees under Section 1717, but not other prevailing pro se attorney plaintiffs and other prevailing pro se litigants.* Arguably, pro se attorney defendants should be treated differently from pro se attorney plaintiffs, because a fee award to a prevailing pro se attorney defendant serves to deter meritless litigation. Barbee, *supra*, 69 S. Cal. L. Rev. at 1813. This approach would sharply conflict with the equitable purposes of Section 1717 and policy of promoting mutuality of remedy. *See id.*

(6) *Leave it up to the agreement of the parties.* A further option would be to let the parties decide in drafting their contract whether to permit pro se recovery of attorney's fees. *See generally Jacobson v. Simmons Real Estate*, 23 Cal. App. 4th 1285, 28 Cal. Rptr. 2d 699 (1994) (pro se nonattorney not entitled to fees because contract provided for recovery of attorney's fees, not legal services fees). This approach could lead to abuse, because it may be obvious even at the time of contracting that the party with greater bargaining strength is likely to be able to hire an attorney, whereas the weaker party would have to proceed pro se. In such a situation, a clause limiting recovery to attorney's fees, as opposed to legal representation fees, would in effect be the kind of one-sided fee provision Section 1717 was designed to deter.

(7) *Remain silent on the issue.* This probably would be viewed as legislative acquiescence in *Trope*.. The Commission or the Legislature might be criticized for failing to address a point that is certain to be litigated.

(8) *Include a note soliciting input on the issue in the tentative recommendation.*

(9) *Take a position on the issue in the tentative recommendation, but also include a note soliciting input on the issue.*

Conclusion

Whether to revise Section 1717 to permit recovery by pro se litigants, particularly pro se attorneys, is a hard question. From the diversity of opinion on pro se fee recovery in other contexts, it is clear that the issue is potentially divisive. The Commission needs to consider whether it is worth jeopardizing the other reforms it is proposing (e.g., establishing a uniform standard for determination of the prevailing party; extending Section 1717's reciprocity requirement to tort claims) to take what might be an unpopular stance on this issue.

Unfortunately, remaining neutral on the point is not really an option. Even silence on the point in amending Section 1717 is likely to be construed as legislative acquiescence in *Trope*. We could attempt to neutralize that implication by including a statement of legislative intent, however.

Fortunately, the Commission does not have to take a firm position on the issue at this point in its study. **For now, it may be best to solicit input in the tentative recommendation** and perhaps also tentatively advocate one of the more moderate approaches (e.g., denying attorney's fees to all pro se litigants, but permitting pro se litigants to recover out-of-pocket litigation expenses).

Respectfully submitted,

Barbara S. Gaal
Staff Counsel