

# How Do You Fee Today



## FACTORS TO CONSIDER WHEN REQUESTING ATTORNEYS' FEES

*At the end of a long divorce trial, the judge is presented with dual requests for attorney fees.*

*The plaintiff's attorney is from a super firm, seeking \$94,000.*

*The defendant's attorney is a local practitioner asking \$12,000.*

*Which is proper?*

Michigan trial court judges are faced with this difficult decision daily. Considering the substantial amounts at stake in many cases, the subject of attorney fees garners much attention, and may be hotly contested because of its potentially ruinous effect on the party ordered to pay. The trouble is, there exists no objective method by which to determine the reasonableness of attorney fee requests. This article will discuss the various criteria examined by courts when presented with a request for fees. In the interest of simplicity, our examination of this highly relevant issue will be limited to the realm of domestic relations actions.

### Can Attorney Fees Be Granted?

#### Statutes

There are statutes that mandate an award of fees under certain circumstances, but there is still the problem of how much to award

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**FAST FACTS:**

After reviewing all of the common law precedent in Michigan, it is evident that there is no objective “black or white” standard by which the court decides to award fees.

The court will normally limit its award of fees to include only those actions necessary to complete the case.

While the law is careful to prevent an award of fees merely based on ability to pay, courts are free to consider the economic status of the parties when evaluating the appropriateness of a fee request.



once the judge accepts the statutory mandate. Of the over 80 Michigan statutes that require the court to award fees of counsel,<sup>1</sup> the most oft-cited one in domestic relations proceedings is MCL 552.13(1), which requires the court to award “sums necessary to carry on or defend an action during its pendency.”<sup>2</sup> It is a relatively broad statute that seems to require an award of fees in the interest of balancing equities, whenever justice requires it. Yet, in domestic relations actions, it is usually difficult to discern where the finances and equities truly lie, so the court will often be required to base its determination on the more specific language provided in the Michigan Court Rules.

### Court Rules

Two court rules grant judges the vast and mighty power of discretion over fee requests, but they also fail to address how much to award a party whose request for fees is granted.

MCR 3.206 is very similar to MCL 552.13(1), listing three suggested factors that should be considered before attorney fees are awarded in a domestic relations proceeding under this rule: the moving party must be “unable to bear the expense of the action,” the opposing party must be able to pay, and the sums requested must be “necessary to carry on or defend the action.”<sup>3</sup>

MCR 2.114 is more of a blanket rule, meant to protect the integrity of the court from actions aimed primarily at frustrating the pursuit of justice and intimidating the financially-challenged party. When asked to award attorney fees pursuant to this rule, the court considers whether the actions were advanced in good faith, and whether the conduct of the opposing party was “unreasonable in the course of litigation.”<sup>4</sup> Since this rule teeters precariously near to punitive action, this is a difficult proof for the moving party, especially after the cunning counsel for the opposing party has established the presumption of good faith with some plausible justification. For this reason, fees are rarely recoverable by this rule from any competent attorney.<sup>5</sup>

### Contracts for Contingent Fees

Contingent fee arrangements are void as going against public policy in the realm of domestic relations.<sup>6</sup> Strong social policies weigh against the consummation of certain domestic legal procedures, which would bring legal conclusion to familial relationships that might otherwise be restored under the auspices of time and a sufficient “cooling off” period.<sup>7</sup>

### Evaluating a Fee Request— What is a Reasonable Fee Request?

After reviewing all of the common law precedent in Michigan, it is evident that there is no objective “black or white” standard by which the court decides to award fees, but generally, the court will allow reasonable fees: where the financial inequities between the parties require it for a fair administration of justice (by statute or rule), or where opposing counsel has forced an unreasonable expense to be incurred by overly vexatious litigation tactics (by rule).<sup>8</sup>

There are, however, several factors provided by the Model Rules of Professional Conduct, 1.5(a) that the courts have consistently considered to determine what the amount of awardable fees should be. Once fees are considered awardable, the basic objective formula for amount of attorney fees is: *reasonable average rate of pay X reasonable average amount of hours necessary to complete the action.*<sup>9</sup> It is upon this apparently objective formula that the factors are applied by the court to arrive at an acceptable fee award. Think of these factors as catalysts that influence a shift in the continuum of allowable attorney fees for a given case. The major factors are:

### Professional Standing and Expertise of Counsel

The most obvious explanation for the disparity of requests in the scenarios above is that one attorney may have been a sole practitioner, while the other may be a partner at a larger, perhaps more reputable, firm. Ostensibly, the attorney with more expertise and experience would be more valuable, and would merit a higher fee accordingly. However, that explanation ignores the counter-balancing nature of this factor. Would not a partner in a large firm counter-balance her higher wage rates with savings on the number of hours necessary to complete the action, given his or her experience and available resources? Furthermore, might the partner be in a position to delegate the simpler tasks to clerks and paralegals (at a reduced hourly rate),<sup>10</sup> whereas the sole practitioner might be required to personally tend to each task? As a result of this apparently paradoxical relationship, this factor is probably overrated.

*In the hypothetical divorce case above, this factor may explain away some of the great disparity in fee requests, though not necessarily all of it.*

### Skill, Time, and Labor

The court will normally limit its award of fees to include only those actions necessary to complete the case.<sup>11</sup> This factor is inversely intertwined with the previous factor, since the experienced attorney should be able to maximize his or her time use (except to the extent that an experienced attorney may be aware of more methods of protracting a comparatively trivial issue). On the other hand, the young attorney, in his or her desire to avoid courtroom embarrassment for lack of preparation, might be compelled to over-prepare, thus incurring exorbitant billable hours. To best address these factors before the court, an attorney should keep particularly copious records of billable hours with descriptions of the work performed, because the court will likely consider more than just *time expended* when fashioning the appropriate attorney fee award.<sup>12</sup> This factor might also counter-balance itself.

When faced with a dispute over a fee request, the judge may order an evidentiary hearing, wherein the attorneys will be expected to substantiate their requests with documentation of appropriate hours expended and hourly rates charged.<sup>13</sup>

### Amount in Question and Result Achieved

This factor is much more relevant in domestic relations matters than other types of litigation.<sup>14</sup> While the law is careful to prevent

an award of fees merely based on ability to pay, courts are free to consider the economic status of the parties when evaluating the appropriateness of a fee request.<sup>15</sup> Since it requires a deeper examination of the particular facts and circumstances of the case, it may be

## DECISION TREE

### Can attorney fees be granted?

1. MCR 3.206(C)—Gross inequity in financial resources
  - a. Is the party unable to bear the expense of the action (without invading judgment assets)?
  - b. Is the other party able to pay?
  - c. If “yes” to (a) and (b); then ask: Are the sums requested necessary to carry on or defend the action?
2. MCR 2.114(E)—Sanctionable Conduct
  - a. Was the party forced to incur the costs as a result of the other party’s unreasonable conduct in course of litigation?
  - b. Was the action brought in good faith?
3. MCL 552.13(1)—Equity in divorce proceedings
  - a. Is the award “necessary to enable the party to carry on or defend the action, during its pendency”?<sup>16</sup>
4. Contract
  - a. Was the award of fees specifically contracted for (contingent fee)?
  - b. Are there countervailing public policy considerations (MRPC 1.5) against enforcement of such an agreement?

### What is a reasonable fee request?

1. Does the figure seem reasonable considering . . .
  - a. the attorney’s professional standing and experience?
  - b. the skill, time, and labor required?
  - c. the amount in question and the result achieved?
  - d. the difficulty of the case?
  - e. the actual expenses incurred by counsel?
  - f. local rates for similar legal services?
  - g. the nature/duration of the attorney-client relationship?
2. Does the fee vary substantially from what might customarily be charged in the locale for identical services?
3. Has the opposing party disputed the amount of fees requested?
  - a. Is an evidentiary hearing necessary?
4. Has the moving party included only services necessary to the litigation at hand?
5. Has the moving party kept meticulous records of expenses incurred and billable hours?
6. Do the fees requested seem to be punitive?

more useful to courts in determining a reasonable value for fees, especially in domestic relations actions, where there is a focused emphasis on equity of resources between litigants.<sup>17</sup> The court must determine how the two aforementioned factors agree with the amount in question at trial and the result achieved in the judgment. Obviously, where there is more at stake, it is reasonable to assume that the case would be more hotly contested; hence, more skillful counsel may be required. A client with a multi-million dollar interest at risk is more likely to seek out a highly reputable attorney with substantial experience and a history of success in similar cases. On the other hand, it seems less reasonable for a client to seek the same expensive attorney for a case worth only a couple hundred dollars, since the cost might outweigh the benefits of victory. Furthermore, the court has been unwilling to require a party to invade their judgment assets to pay attorney fees,<sup>18</sup> so the financial status of the parties prior to the judgment is usually the basis for examination of this factor.

### Difficulty of the Case

Certainly, the relative difficulty of the case has an appreciable effect on the number of hours required to complete it. This is why high hours on simple procedures will raise a judicial brow after a request for attorney fees.<sup>19</sup> For example, the plaintiff’s attorney fee request may be substantially greater because the defendant controlled the finances, making it more difficult for plaintiff’s counsel to ferret out all the financial records created during the marriage. The judge presiding over the case is usually the most capable person to evaluate the difficulty of the case from a legal and procedural standpoint. This is probably a major factor judges would consider in evaluating the reasonableness of a fee request, because it may substantiate the number of hours billed.<sup>20</sup>

### Expenses Incurred

Typically related to the extent of discovery employed, the amount of legal expenses incurred by the conscientious attorney may affect the fee figure allowed by a judge. Especially where the exhibits were helpful to the court in fact-finding, the judge would be more inclined to allow a higher fee award to cover expenses already incurred.

### Local Rates

The courts are not limited to an itemized bill of costs when assessing the reasonableness of a fee award.<sup>21</sup> In making final award of attorney fees, courts should determine a reasonable fee based on particular facts of the case and local community legal practice.<sup>22</sup> Myriad socio-economic factors are inherent in the locality consideration, so this factor provides a means by which to understand some hourly rate disparities when examining the rest of the factors mentioned here. For instance, if a party wishes to retain counsel from a metropolitan area two hours away, it is reasonable to expect that the hourly rate for his attorney might be greater than that of the opposing counsel. Both the socioeconomic and geographical influences are accounted for by this factor.

## Other Considerations

When assessing the appropriateness of a fee request, courts have also factored in the nature and duration of the attorney-client relationship, the opportunity cost to attorneys with regard to time invested, whether the fees requested seem to be punitive, and the completeness of the billing records kept by counsel over the course of the representation.<sup>23</sup>

These factors are not exhaustive, nor are they mutually exclusive. In fact, they are merely a compilation of the more relevant factors considered by Michigan courts in varying combinations when judging the appropriateness of a fee request figure. Using these factors and the limited commentary available in common law dictum, the decision tree on page 31 is recommended to the Michigan trial court judge faced with a fee request in a domestic relations action.

## Conclusion

Which fee, \$94,000 or \$12,000, is proper? The answer is not very satisfying. The judge may grant one, the other, both, or neither at his discretion, but now we have a little better idea about how that decision will be made. Once the judge determines that the fee is warranted by rule or by statute, the judge has authority to adjust the award amount according to his discretion, given the particular circumstances of the litigation. ♦



*Cummiskey Pro Bono Award.*

Hon. Daniel V. Zemaitis was elected November 2002 to the Family Division of the 17th Judicial Circuit Court in Kent County. He received a B.A. in History from Marquette University and his Juris Doctor degree from Case Western in 1977. Judge Zemaitis was a sole practitioner for 25 years, Magistrate for the 59th District Court from 1990 to 2002, and became a Multi-District Court Magistrate by joining the 62A District Court in 1995. Judge Zemaitis was the 1999 recipient of the John W.



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## Footnotes

1. Kalmink, Mary A., *Attorney Fee Awards*. Clark Hill PLC; presented at Michigan Judicial Institute Annual Judicial Conference; March 29, 2004.
2. *Schoensee v Bennett*, 228 Mich App 305 (1998); *Hawkins v Murphy*, 222 Mich App 664 (1997); *Ianitelli v Ianitelli*, 199 Mich App 641 (1993); *Lockhart v Lockhart*, 149 Mich App 10 (1986); *Radway v Radway*, 81 Mich App 328 (1978).
3. *Gates v Gates*, 256 Mich App 420 (2003); *Schoensee v Bennett*, 228 Mich App 305 (1998); *Maake v Maake*, 200 Mich App 184, 189 (1993); *Chisnell v Chisnell*, 99 Mich App 311, 316 (1986).
4. *Hanaway v Hanaway*, 208 Mich App 278, 298 (1995); *Stackhouse v Stackhouse*, 193 Mich App 437, 445 (1992).
5. Cf *Eureka Inv Corp, NV v Chicago Title Ins Co*, 240 US App DC 88 (DC Cir, 1984); *Lockhart v Lockhart*, 149 Mich App 10 (1986); *Schoensee v Bennett*, 228 Mich App 305 (1998).
6. Model Rules of Professional Conduct 1.5(d)(1).
7. Cf *Young v Young*, 196 Mich 316 (1917); *McCurdy v Dillon*, 135 Mich 678 (1904).
8. *Burke v Burke*, 169 Mich App 348 (1988); *Warren v McLouth*, 111 Mich App 496 (1981).
9. Based upon Model Rules of Professional Conduct 1.5(a)(1) and (3); *Eureka Inv Corp, NV v Chicago Title Ins Co*, 240 US App DC 88 (DC Cir, 1984).
10. Sullivan, Daniel F., *Amount of Allowance for Attorney Fees in Domestic Relations Action*. 45 AMJUR POF 2d 4,9,10; *Donnelley v Donnelley*, 80 Ill App 3d 597 (1980).
11. *Lockhart v Lockhart*, 149 Mich App 10 (1986).
12. *Swanson v Swanson*, 48 Ohio App 2d 85 (1976); *Francois v Francois*, 444 US 1021; 599 F2d 1286 (1980); *Donnelley v Donnelley*, 80 Ill App 3d 597 (1980).
13. *B & B Investment Group v Güter*, 229 Mich App 1 (1998).
14. Sullivan, Daniel F., *Amount of Allowance for Attorney Fees in Domestic Relations Action*. 45 AMJUR POF 2d 699.
15. *Donnelley v Donnelley*, 80 Ill App 3d 597 (1980).
16. *Schoensee v Bennett*, 228 Mich App 305 (1998); *Hawkins v Murphy*, 222 Mich App 664 (1997).
17. Rossi, Robert L., *Attorneys' Fees* (11:11 "Right to Allowance"). Citing *O'Shea v O'Shea*, 93 NY2d 187 (1999).
18. *Gates v Gates*, 256 Mich App 420 (2003); *Ozdoglar v Ozdoglar*, 126 Mich App 468, 473 (1983).
19. *Rizzo v Rizzo*, 95 Ill App 3d 636 (reducing an attorney fee award from \$15,000 to \$10,000).
20. *Donahue v Donahue*, 134 Mich App 696 (1984); *Arnholt v Arnholt*, 129 Mich App 810 (1983).
21. *Sturgis Savings & Loan Ass'n v Italian Village, Inc*, 81 Mich App 577 (1978).
22. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30 (1983).
23. Model Rules of Professional Conduct 1.5(d)(1).