KEEP SEMINAR: ATTORNEY'S FEES PANEL OUTLINE

1. Entitlement to Fees

a. The American Rule
   i. Under the American Rule, each party in federal court ordinarily pays its own attorney's fees, unless a statute provides otherwise, or the parties enter into a contractual fee-shifting provision.

b. Contract/Prevailing Party
   i. Parties can contract around the American Rule to permit the recovery of the prevailing party's attorney's fees if the contract is valid under applicable state law.

c. Statutory Awards: Discretionary and Mandatory
   i. Discretionary
      1. A court has discretion to award reasonable attorney's fees and costs to the prevailing party (other than the United States or EEOC) in actions under:
         a. Title VII, 42 U.S.C. § 2000e-5(k)
         b. The Civil Rights Attorneys' Fees Act, 42 U.S.C. § 1988
            i. Section 1988 is a one-way fee-shifting statute that allows courts to award attorney's fees to a prevailing party who brought suit to enforce various civil rights statutes. The Supreme Court has held that the plaintiff may only be assessed the defendant's attorney's fees in a § 1983 action where the court finds the plaintiff's claim "was frivolous, unreasonable, or groundless." *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980).
         c. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12205
            i. Reasonable fees include litigation expenses and costs
         d. ERISA, 29 U.S.C. § 1132(g)
         e. The Rehabilitation Act, 29 U.S.C. § 794a(b)
            i. Notably, the *party*—not the attorney—is eligible for fees under these statutes. However, this has no effect on the amount

payable under an attorney-client fee agreement. *See Venegas v. Mitchell*, 495 U.S. 82, 90 (1990).

f. The Copyright Act, 17 U.S.C. § 505.
    i. Fees are proper under this statute when either successful prosecution or successful defense of the action furthers the purposes of the Copyright Act.
    ii. Both prevailing plaintiffs and defendants are eligible for such an award. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).
g. The Lanham Act, 15 U.S.C. § 1117(a)
    i. Permits an award of reasonable attorney's fees to the prevailing party in "exceptional cases."

ii. Mandatory

1. Some federal statutes mandate a fee award to prevailing *plaintiffs*.
    a. ADEA – The ADEA incorporates provisions of the FLSA, including those pertaining to fee awards.
        i. 29 U.S.C. § 626(b) incorporates FLSA attorney fees provision
        ii. The Ninth Circuit has held that a prevailing defendant in a case under the ADEA may not be awarded attorney's fees. *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763, 797 (9th Cir. 1984) ("Congress limited the award of attorney's fees to the successful plaintiff-employee . . . carefully to foreclose the possibility of recovery of attorney's fees by an employer who has successfully defended himself against an accusation of age discrimination.").
    b. FLSA, 29 U.S.C. § 216(b)
    c. FMLA, 29 U.S.C. § 2617(a)(3)
        i. Provides that if a plaintiff recovers judgment, the court "shall award a

reasonable attorney's fee . . . to be paid by the defendant."

d. EAJA, 28 U.S.C. § 2412(d)
    i. Provides that "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to costs . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States . . ., *unless the court finds that the position of the United States was substantially justified*[.]"
    ii. *Pursuant to General Order 707, Social Security cases are randomly assigned to a Magistrate Judge (presiding role), unless the Plaintiff declines consent or the United States withdraws its consent. If the Plaintiff declines consent or the government withdraws consent, the Clerk's office will reassign the case to a District Judge in the presiding role, and the current Magistrate Judge in the referral role.
        1. Thus, Magistrate Judges may be dealing with EAJA statute and attorney's fees on a more regular basis.

e. FDCPA, 15 U.S.C. § 1692(k)(3)
    i. Provides that debt collectors are liable "in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court."
    ii. The court *may* award the defendant reasonable attorney's fees upon a finding that the action was brought in bad faith and for the purpose of harassment.

d. Rule 68

i. Rule 68 allows a party "defending against a claim," at "least 14 days before the date set for trial," to make an offer to settle the case and allow judgment to be taken against it. *See* Fed. R. Civ. P. 68. If the offer is accepted, either party can file the offer and acceptance with the clerk of court, and judgment will be entered against the defending party. *See id.* However, if the opposing party does not accept the Rule 68 offer, and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. *See id.*

ii. In effect, Rule 68 shifts post-offer costs from a non-prevailing defendant to a prevailing plaintiff who obtained a judgment smaller than the settlement offer.

iii. The Ninth Circuit has declined to award a non-prevailing defendant attorney's fees when Rule 68 is triggered if the underlying statute awards attorney's fees as "costs" to the prevailing party. *See Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1027-28 (9th Cir. 2003).

2. Attorney's Fees in the Settlement Context

a. Settlement Conferences

i. Attorneys should be prepared and bring billing records to ENE conferences and MSCs to negotiate disputes regarding attorney's fees.

b. Ethical Considerations

i. Civil Local Rule 83.4.b provides in part:

1. Every member of the bar of this court and any attorney permitted to practice in this court must be familiar with and comply with the standards of professional conduct required of members of the State Bar of California, which are now adopted as standards of professional conduct of this court.

ii. California Rule of Professional Conduct 1.5(a):

1. "A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee."

iii. California Rule of Professional Conduct 1.4(b):

1. "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

iv. Individual settlement at the ENE stage in an action filed as a class action

1. Who does the lawyer represent?
2. Can a class representative settle individually before certification?
3. Do class representatives have a duty to other class members?
4. Conflict between plaintiff's counsel and settlements for individual class representatives before certification
5. Are agreements between plaintiff's counsel and class representative enforceable? Ethical?
6. Is Court approval required for individual settlement by class representatives before certification? FRCP 23(e)

c. Claims Involving Minors

i. Civil Local Rule 17.1 describes the Court's special review of settlement proposals to protect the interests of involved minors: "No action by or on behalf of a minor ..., or in which a minor ... has an interest, will be settled, compromised, voluntarily discontinued, dismissed or terminated without court order or judgment. All settlements and compromises must be reviewed by a magistrate judge before any order of approval will issue." CivLR 17.1. This rule implements the Court's special duty to safeguard the interests of minor litigants, derived from Rule 17(c) of the Federal Rules of Civil Procedure. *See Robidoux v. Rosengren*, 683 F.3d 1177, 1181 (9th Cir. 2011).

ii. Federal Tort Claims Fee Statute. Federal Law in these cases provides for 20% of administrative settlements and 25% of settlements after commencement of an action. See 28 U.S.C. § 2678.

iii. Local Custom and Practice. In general, fees in cases involving minors have historically been limited to 25% of the gross recovery.

iv. At one time this was codified in San Diego Superior Court Civil Rule 2.4.6. B. The rule has been amended however and now reads:

> "At the time of the (Minors Compromise) hearing, the court will determine the amount of costs, expenses, and attorney's fees to be allowed from the proceeds of the settlement."

v. The amount of fees is viewed on the same basis as any other case, with the court having discretion to determine what is reasonable and necessary.
vi. For a comprehensive review, see Judge Battaglia's "Bench Book on Settlement of Claims Involving Minors and Incompetents" on the Court's website.

d. Sanctions Pursuant to Federal Rules of Civil Procedure
   i. Rule 11(c):
      1. "(1) *In General*. **If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.** Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." Fed. R. Civ. P 11(c)(1).
      2. "(2) *Motion for Sanctions*. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. **If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion**." Fed. R. Civ. P. 11(c)(2).
      3. "(4) *Nature of a Sanction*. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. **The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation**." Fed. R. Civ. P. 11(c)(4).

ii. Rule 26
    1. "(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." Fed. R. Civ. P. 26(g)(3).

iii. Rule 37
    1. Rule 37(a): Motion for an Order Compelling Disclosure or Discovery
        a. "(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court **must**, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to **pay the movant's reasonable expenses incurred in making the motion, including attorney's fees**. But the court must not order this payment if:(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A).
        b. "(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and **must**, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to **pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees**. But the court must not order this payment if the motion was substantially justified or other circumstances make

an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(B).

c. "(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and **may**, after giving an opportunity to be heard, apportion the reasonable expenses for the motion." Fed. R. Civ. P. 37(a)(5)(C).

2. Rule 37(b): Failure to Comply with a Court Discovery Order
   a. "(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to **pay the reasonable expenses, including attorney's fees**, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).
3. Rule 37(c): Failure to Disclose, To Supplement an Earlier Response, or to Admit
   a. "(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) **may order payment of the reasonable expenses, including attorney's fees, caused by the failure**; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi)." Fed. R. Civ. P. 37(c)(1).
   b. "(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, **the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that**

proof. The court must so order unless: (A) the request was held objectionable under Rule 36(a); (B) the admission sought was of no substantial importance; (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or (D) there was other good reason for the failure to admit." Fed. R. Civ. P. 37(c)(2).

4. Rule 37(d): Party's Failure to Attend its own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection
    a. "(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to **pay the reasonable expenses, including attorney's fees**, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3).
5. Rule 37(f): Failure to Participate in Framing a Discovery Plan.
    a. "If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to **pay to any other party the reasonable expenses, including attorney's fees**, caused by the failure." Fed. R. Civ. P. 37(f).

iv. Monetary sanctions are payable to the Miscellaneous Fines, Penalties and Forfeitures, Not Otherwise Classified, fund of the United States Treasury.

v. Court's inherent authority to sanction:
    1. Federal courts possess certain "inherent powers," not conferred by rule or statute, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). That authority includes "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991). One

permissible sanction is an "assessment of attorney's fees"—an order instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side. *Id.* at 45.

2. The Supreme Court recently explained that "such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017). "That means, pretty much be definition, that the court can shift only those attorney's fees incurred because of the misconduct at issue." *Id.* Thus, a complaining party may recover "only the portion of his fees that he would not have paid but for the misconduct." *Id.* at 1187.

3. Fee Petitions

a. Motion Practice Generally

i. Fee-shifting statutes authorize recovery of reasonable attorney's fees. The "lodestar" method is the most widely accepted approach for determining the amount of a "reasonable" fee award. There is a "strong presumption" that the lodestar—i.e., the number of hours worked multiplied by the prevailing hourly rates—represents the "reasonable" fee. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

b. Lodestar Basics

i. Hourly Rate

1. "Fee applicants have the burden of producing evidence that their requested fees are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Chaudhry v. City of L.A.*, 751 F.3d 1096, 1110-11 (9th Cir. 2014). The relevant legal community is "the forum in which the district court sits." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205-06 (9th Cir. 2013).
2. "That other attorneys may think that a given rate is 'reasonable' does not necessarily say what the prevailing market rates actually are. That is especially true when the opinion[s] are expressed by attorneys whose own professional interests might motivate them to favor higher rates." *Sam K.*

v. State of Haw. Dep't of Educ., 788 F.3d 1033, 1041 (9th Cir. 2015).

3. A court, however, must "base its determination on the *current* market rate." *United States v. $28,000 in U.S. Currency*, 802 F.3d 1100, 1107 (9th Cir. 2015) (emphasis in original); *see Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) ("[A] district court abuses its discretion to the extent it relies on cases decided years before the attorneys actually rendered their services.").

ii. Hours Expended

1. "The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). A district court "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Chaudhry*, 751 F.3d at 1111 (citing *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). The Court "should exclude from [the] initial fee calculation hours that were not 'reasonably expended.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Hours are not "reasonably expended" if they are "excessive, redundant, or otherwise unnecessary." *Id*.
2. The district court can reduce the hours in a fee application through one of two methods. "First, the court may conduct an hour-by-hour analysis of the fee request, and exclude those hours for which it would be unreasonable to compensate the prevailing party." *Gonzalez*, 729 F.3d at 1203 (internal quotation marks omitted). Second, "when faced with a massive fee application the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from a fee application." *Gates*, 987 F.2d at 1399 (internal quotation marks omitted).

iii. Common Fund/Percentage of Recovery

1. The Supreme Court has consistently recognized that "a litigant or lawyer who recovers a common fund for the benefit

of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

2. Unlike statutory fee-shifting cases, where the winner's attorney's fees are paid by the losing party, fees in common fund cases are not paid by the losing defendant, but by members of the class who are paying their own counsel out of the common fund.
    a. The Ninth circuit's benchmark is 25% of the settlement value. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).
    b. Courts often cross-check the reasonableness of a percentage fee award against the lodestar-multiplier method.

iv. Multipliers

1. After making its initial lodestar calculation by multiplying an attorney's reasonable hourly rate by the number of hours reasonably expended, a "court may adjust the lodestar upward or downward using a 'multiplier' based on [the *Kerr*] factors not subsumed in the initial calculation of the lodestar." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).
    a. The *Kerr* factors consist of "the novelty and difficulty of the issues involved in a case, the skill required to litigate those issues, the preclusion of other employment, the customary fee, relevant time constraints, the amount at stake and the results obtained, the experience, reputation, and ability of the attorneys, the nature and length of their professional relationship with the client, the 'undesirability' of a case, and awards in similar suits." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).
2. With respect to the results obtained, the Ninth Circuit has held that an award of attorneys' fees "*must* be adjusted downward where the plaintiff has obtained limited success on his pleaded claims, and the result does not confer a meaningful public

benefit." *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009) (emphasis added).

v. Nonmonetary achievements
    1. Importantly, the Ninth Circuit has explained that "results may not be measured solely in terms of damages, and 'in determining a reasonable fee award . . ., the district court should consider not only the monetary results but also the significant nonmonetary results [the plaintiff] achieved for himself and other members of society.'" *Id.* at 1104 (quoting *Morales v. City of San Rafael*, 96 F. 3d 359, 365 (9th Cir. 1996)). "Such nonmonetary victory may constitute 'excellent results' for the purpose of calculating attorney's fees." *Id.*
    2. The Supreme Court has similarly indicated that when a decision has "served the public interest by vindicating important constitutional rights" an award of attorney's fees that is disproportionate to the actual damages may be appropriate. *City of Riverside v. Rivera*, 477 U.S. 561, 572 (1986).

vi. Costs
    1. Taxable Costs
        a. Taxable costs are limited to those listed in the general cost statute, 28 U.S.C. § 1920, including expenses for court reporters, witnesses, copies of papers, and other items. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987); *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988). The Court has discretion to fix the amount of costs that will be shifted to the losing party. *Pursche v. Atlas Scraper & Eng'g Co.*, 300 F.2d 467, 489 (9th Cir. 1961). Items that are customarily taxed in this District are set forth in Civil Local Rule 54.1(b).
    2. Non-Taxable Costs
        a. Non-taxable costs can be requested in a motion for attorneys' fees. Fed. R. Civ. P. 54(d)(2) (describing motion for "attorney's fees and related nontaxable expenses"). The Ninth Circuit has held that non-taxable costs "can include reimbursement for out-of-

pocket expenses including . . . travel, courier and copying costs." *Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010). Other recoverable expenses include expenses related to discovery and expenses related to computerized research. *See Harris v. Marhoefer*, 24 F.3d 16, 19-20 (9th cir. 1994) (noting that "expenses related to discovery" are recoverable); *Trs. Of Constr. Indus. & Laborers' Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-59 (9th Cir. 2006) (holding that "reasonable charges for computerized research may be recovered.").