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# TRIAL



# REPORTER

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## Attorneys' Fees

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# New Rules for Attorneys' Fees and Limited Representation

By Barton D. Moorstein

The Maryland Rules adopted changes effective January 1, 2014, related to awarding attorneys' fees as an element of damages in a contract action<sup>1</sup> or as a prevailing party<sup>2</sup>. Additionally, effective July 1, 2015, the Maryland Rules now allow for an attorney to make a limited appearance in civil litigation and administrative proceedings<sup>3</sup>. This Article addresses the practical effect of these Rule changes<sup>4</sup> and provides a guidepost for assuring that the civil practitioner<sup>5</sup> is aware of the pitfalls to be encountered if the Rules are not followed.

1 MRP 2-704 states that the "...Rule applies to a claim for attorneys' fees in an action in a circuit court that are allowed by a contract as an element of damages for breach of that contract. It does not apply to a claim for an award of attorneys' fees to the prevailing party pursuant to a fee-shifting provision in a contract.

2 MRP 2-705 states that the "...Rule applies to a claim for an award of attorneys' fees to attributable to litigation in a circuit court pursuant to a contractual provision permitting an award of attorneys' fees to the prevailing party in litigation arising out of the contract. It does not apply to a claim for attorneys' fees allowed by contract as an element of damages for breach of the contract or to a claim for attorneys' fees authorized by statute or other law.

3 MRP 2-131 (b) states that "...An attorney, acting pursuant to an agreement with a client for limited representation that complies with Rule 1.2(c) of the Maryland Lawyers' Rules of Professional Conduct, may enter an appearance limited to participation in a discrete matter or judicial proceeding. The notice of appearance (A) shall be accompanied by an Acknowledgment of Scope of Limited Representation substantially in the form specified in subsection (b)(2) of this Rule and signed by the client, and (B) shall specify the scope of the limited appearance, which (i) shall not exceed the scope set forth in the Acknowledgment but (ii) unless otherwise ordered by the court, shall include the performance of any procedural task required by law to achieve the objective of the appearance.

4 The standards for awarding attorneys' fees in family law cases (see Trial Reporter, Journal for the Maryland Association of Justice, Winter 2015 Issue, "Attorneys Fees and Costs and When They Are Awarded") or in discrimination litigation (See, e.g., Md. Code Ann., State Gov't, § 20-1202 (2011)) are unaffected by this Rule change and are not addressed in this article.

5 This article is focused on civil litigation only, and does not address either criminal or administrative proceedings.



## Attorneys' Fees in Contract Actions

The new Rules attempt to clarify when, under what circumstances and how much may be awarded in attorneys' fees. The rules generally adopt the approach set forth in *Monmouth Meadows v. Hamilton*, 416 Md. 225, 7 A. 3d 1 (2010) for contractual fee shifting cases, but minimizes the analysis required in those matters where the attorneys' fee request is minimal<sup>6</sup>. In all other cases, both rules mandate that the Court must consider those factors identified in MRP Rule 2-703.

Rule 2-703, which is the backbone to both Rules 2-704 and 2-705, adopts the 'Lodestar Method' in setting the amount of attorneys' fees. The Lodestar Method was described by the Court of Appeals in *Monmouth*, supra, as requiring a trial court to "undertake an inquiry into the reasonableness of any proposed fee before settling on an award [and]... trial courts are required to... examine the prevailing party's fee request for reasonableness... The party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request..."*Monmouth Meadows*, supra, 416 Md., at 333, 7 A. 3d, at 5.

[A] court that uses the Lodestar Method<sup>7</sup> to calculate a fee award begins by multiplying the number

6 The Court may avoid consideration of the factors identified in MRP 2-703 where the claim for an award of attorneys' fees does not exceed the lesser of 15% of the principal amount found to be due or \$4,500.

7 For an excellent discussion of the Lodestar factors, and how they are applied, the Court of Special Appeals issued an unreported decision in *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP.*, which can be found at <http://www.courts.state.md.us/appellate/unreportedopinions/2016/0376s14.pdf>. This opinion affirmed a written decision awarding \$3,520,000 in attorneys' fees entered by the Business and Technology Track in the Circuit Court for Montgomery County, found at <http://www.courts.state.md.us/businesstech/pdfs/mbdt1-14.pdf>.

of hours reasonably spent pursuing a legal matter by “a reasonable hourly rate” for the type of work performed. See *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), abrogated in part on other grounds, *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002). This amount is then adjusted by the court, depending on the effect of numerous external factors bearing on the litigation as a whole.

The “numerous external factors bearing on the litigation” are those factors identified in 2-703(f)(3):

- (a) The time and labor required
- (b) The novelty and difficulty of the questions
- (c) The skill required to perform the legal service properly
- (d) The customary fee for similar legal services
- (e) Time limitations imposed by the client or the circumstances
- (f) The amount involved and the results obtained
- (g) The experience, reputation, and ability of the attorneys
- (h) The undesirability of the case
- (i) The nature and length of the professional relationship with the client
- (j) Awards in similar cases
- (k) Whether acceptance of the case precluded other employment by the attorney
- (l) Whether the fee is fixed or contingent

Although consideration of all these factors are mandated when attorneys’ fees are sought pursuant to MRP 2-704 or 2-705, the pleading requirements and procedures differ based upon whether the claim for attorneys’ fees are an element of damages (2-704) or as a result of a prevailing party clause in a contract (2-705).

## Similarities between MRP 2-704 or 2-705

Whether a party seeks fees as an element of damages for breach of contract or as a prevailing party, a litigant has many of the same procedural obligations and evidentiary requirements.

## Pleading Requirements

If a party anticipates requesting attorneys’ fees in the litigation, or if the claim arises after the initial pleading is filed, promptly after the party discovers the grounds for requesting fees, that party must include the claim for fees in the initial pleading,

## Scheduling Conference

If a party requests attorneys’ fees in the initial pleading, the court is obligated to conduct a scheduling conference in conformance with MRP 2-703 (c).

## Evidentiary Requirements

In presenting the claim for attorneys’ fees, the litigant is required to present evidence at trial of the issues identified by the factors set forth in MRP 2-703 (f) (3) and listed above.

## The Judgment for Fees

If fees are awarded, the award of attorneys’ fees must be included in the judgment on the underlying cause of



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action, but are separately stated as indicating that the amount represents an award of attorneys' fees.

## Differences between MRP 2-704 and 2-705

The timing, methodology and determination of attorneys' fee awards are specific depending on which Rule the litigant asserts a claim for attorneys' fees.

### MRP 2-704

If attorneys' fees are sought as an element of damages, then the claim for fees must be presented in the party's case in chief. If fees are sought in accordance with a confessed judgment claim consistent with MRP 2-611, the evidence establishing entitlement to the fees, and reasonableness, must be included in the affidavit required by that rule. The determination of the award depends upon whether the trial is a bench trial or a jury trial. If the trial is a bench trial, the court finds that an award is required, it must determine the amount; however, if the court finds that an award is permitted, but not required, the court

determines whether to award fees and the amount of the award. The court must apply the Lodestar factors of MRP 2-703 and explain why fees were awarded and justify the amount of the award. If the trial is a jury trial, the trial judge must give jury instructions setting forth the factors to be considered in whether to award attorneys' fees. If the determination is made by the jury to make such an award, the instructions must contain the MRP 2-703 factors to consider in awarding attorneys' fees. If the jury enters an award, either party has the right to file a motion with the court seeking a review of whether the jury award was reasonable. If, after filing such a motion, the court determines that the amount awarded was not reasonable, the court shall modify the award accordingly. The rule does not prohibit post-trial motions on the issue of attorneys' fees, and does not limit a court's ability to grant other relief under MRP 2-532, 2-533 or 2-535. Regardless of whether the trial is a jury trial or a bench trial, if the factfinder determines that no attorneys' fee award is made, the judgment that is finally entered must include a determination that the award for attorneys' fees were denied.



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In a breach of contract case where attorneys' fees are part of the alleged damages, this procedure preserves to the jury the right to determine whether an award should be made and, if so, in what amount. It also preserves to the trial court the right to determine whether the award is reasonable. Under this approach, in the event of an appeal, the appellate court will have available both the jury's and the trial court's determination of reasonableness.

### MRP 2-705

If attorneys' fees are sought in accordance with a "prevailing party" clause in a contract, the determination of attorneys' fees is reserved solely to the judge overseeing the trial, regardless of whether the underlying claim was heard by a jury or by the bench.

The determination of the award must be measured based upon the Lodestar factors identified in MRP 2-703 (f). In addition to considering these factors, the court must also consider the principal amount in dispute in the litigation. However, the court has the discretion to

consider the agreement between the party seeking the award and that party's attorney and any other factor reasonably related to the fairness of an award. Any award must be included in the judgment on the underlying cause of action and is separately stated as an attorneys' fee award. Additionally, the court must either state on the record, or detail in a written memorandum, the basis for its findings and conclusions regarding the denial or issuance of the award.

### Key Points for Trial Counsel

The most important considerations for trial counsel are as follows:

- If attorneys' fees are going to be requested, the request must be made at the inception of the litigation
- Counsel should be prepared to present evidence at the trial

- Counsel must maintain detailed records of services rendered and time expended and should seriously consider retention of an expert to testify regarding reasonableness because any request for attorneys' fees must include proof of the factors included in MRP 2-703

## Limited Scope Representation

Effective July 1, 2015, attorneys in either the District Court or Circuit Court may now enter an appearance for a client and provide limited and discrete services for a client without generally entering an appearance and being obligated to represent the client in all aspects of a case. The rule change responds to the acknowledgment that attorneys' fees and the costs of litigation can be substantial; providing legal advice should not be an all or nothing proposition. Under previously existing rules, which obligate counsel to zealously represent the client, attorneys have been hesitant to participate in only a limited fashion for fear of violating the Rules of Professional Responsibility. By adopting the rule change, the Rules Committee has attempted to obviate the unintended consequence of the limiting access to court representation for those unable to afford fees by enabling attorneys to limit representation to specific matters. It addresses the concern that many people need legal help, and would benefit from legal guidance, but lack the resources to retain counsel for all purposes<sup>8</sup>.

The intended effect of this rule is to "unbundle" providing legal services so that the client can determine at each step of representation, whether to obtain and pay for legal advice. The rule protects counsel from being generally responsible for all aspects of representation, as it enables an attorney to clearly define the parameters of the limited scope of representation. Thereby, limiting liability and by assuring that counsel will be paid for those services being rendered for the client.

## Procedural Requirements

In order to obtain the benefits of a limited appearance, certain obligations must be fulfilled. First, the description of the services to be rendered by the limited appearance must be detailed in a written agreement signed by the

<sup>8</sup> Serious consideration of implementation of limited scope representation has long been in the works and was a subject of a "White Paper" authored by the Maryland Access to Justice Commission in 2009. See <http://mdcourts.gov/mdatjc/pdfs/08climitedscopewhitepaper.pdf>.



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client. In fact, MRP 2-131 (b) (2)<sup>9</sup> details a form to be used by attorney and client when commencing limited representation. Second, when entering an appearance for limited scope representation, the line of appearance must recite the limited scope of the services to be rendered and must be accompanied by a copy of the acknowledgment of scope of limited representation agreement containing the client's signature. The line of appearance and the written agreement describing the limited scope of engagement must be the same. Third, when the services required by the limited engagement have been fulfilled, the attorney's appearance is stricken simply by filing a notice of withdrawal indicating that the particular proceeding or matter for which the limited appearance was entered as concluded. MRP 2-132 (a)<sup>10</sup>.

<sup>9</sup> For District Court matters, the requirements which govern the entry of an attorney's limited appearance in a civil case are set forth in MRP 3 – 131 (b).

<sup>10</sup> For District Court matters, the requirements which govern concluding an attorney's limited appearance in a civil case are set forth in MRP 3 – 132 (a).

## Ethical Responsibilities

An attorney's obligations to the client do not end simply with the striking of the attorney's appearance. Under the rules<sup>11</sup>, if counsel receives any notices from the court during the pendency of the matter, even if counsel's appearance is no longer in the case, it is the attorney's responsibility to forward to the client notifications pertaining to matters not within the scope of the limited appearance. This obligation recognizes that operating systems of a clerk's office does not always permit the sending of notification to both the party and the attorney.

## Practical Consideration

The prudent attorney who considers participation in limited scope representation needs to anticipate that counsel's responsibilities do not end when the limited scope representation concludes. Forwarding services require some time and organization. The failure to fulfill the obligations to forward court notices will constitute a violation of the rules of professional responsibility. Additionally, the court has the right to reject a limited scope appearance or to require an attorney's continued representation if the scope is unfairly or impractically limited to the detriment of the client. Finally, the time to be expended in performing discrete services should take into consideration anticipated delays such as continuances or rescheduling or by way of example, with respect to depositions, adjournments or extended periods of examination.

The new limited scope representation rules are intended to enable those with limited financial means to obtain representation on those most important matters for which the client seeks representation, without generally retaining counsel. The rules, if followed, protect counsel from undertaking representation without being paid and limiting the attorney's potential for not being compensated for services rendered and exposure to liability for unanticipated participation in providing legal services. In fact, this goal appears to be working, as some Maryland attorneys are now providing price sheets on websites for discrete services in, among other causes, family law cases. Additionally, attorneys are now specifying the cost of entering in a limited appearance for preparation for and attendance at motions hearings, consultations regarding mediation, attorney attendance at scheduling conferences, and the like.

<sup>11</sup> MRP 1 – 324(b)

## Biography:

**Barton D. Moorstein** is the managing partner of Blank, Moorstein & Lipshutz, LLP located in Montgomery County, Maryland. Mr. Moorstein graduated from the University of Michigan and the George Washington University Law School. He has been a member of the Maryland and District of Columbia bars since 1979. He has extensive trial and appellate experience in both jurisdictions. His broad practice encompasses domestic law, employment law and business and contract disputes. He has been qualified, and has testified in court and in deposition, as an expert in civil litigation, family law and employment law attorneys' fees, as well as in reasonable appellate attorneys' fees. He has been recognized as a "Super Lawyer" in Maryland and the District of Columbia since 2008.

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