VENTURA COUNTY BAR ASSOCIATION Est. 1928

VCBA MISSION STATEMENT
To promote legal excellence, high ethical standards and professional conduct in the practice of law;
To improve access to legal services for all people in Ventura County; and
To work to improve the administration of justice.

CITATIONS

JANUARY – TWO THOUSAND EIGHT

IN MEMORIAM: JUDGE JOHN HUNTER

By Karen Darnall

Page 9

MATTHEW P. GUASCO
BRIAN NOMI
VERNA R. KAGAN
GREG MAY
PANDA KROLL
LARRY HINES
EDWARD BUCKLE

STEVE HENDERSON

PRESIDENT'S MESSAGE	3
THE SOLO PRACTICE OF LAW	13
PRO-BONO HIGHLIGHTS	15
"PRO BONO ATTORNEY FEES" IS NOT AN OXYMORON	18
MORE THAN MOJITOS – A SERIES OF ARTICLES ON CUBA	21
A LAWYER'S HOMAGE TO THE CHILDREN OF KENYA'S SLUMS	23
COLLABORATIVE CORNER	27
CLASSIFIEDS	28
EXEC'S DOT... DOT... DOT...	30

"Pro Bono Attorney Fees" Is Not an Oxymoron

And other attorney fee lessons from Cruz v. Ayromloo

By Greg May

Don't ever be shy about asking for attorney fees. Don't be shy to ask for more than 100 times the suggested schedule in the local rules. Don't be shy to ask for an amount that far exceeds the amount of damages awarded to your client. Don't be shy about anything, including the fact that you're asking for several hundred thousand dollars in fees for a case you took on *pro bono*.

Had O'Melveny and Myers been more forward, they might have been awarded a lot more than the roughly $124,000 in fees approved by the trial court and affirmed by the Court of Appeal last October in *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270 [66 Cal.Rptr.3d 725]. Reviewing for abuse of discretion, the *Cruz* court not only rejects several challenges to the fees actually awarded, it suggests in *dictum* that had O'Melveny's clients cross-appealed regarding the amount of the award, they might have been awarded much closer to the $413,000 in fees they requested.

The Attorney Fee Award in *Cruz v. Ayromloo*

The landlord in *Cruz* was sued by more than 30 tenants on several causes of action arising from landlord's refusal to let the tenants return to their units after the tenants were evacuated by the city because the building was unsafe. The trial court awarded a per-rental-unit measure of damages, plus damages individual to each tenant, such as the return of security deposits, loss of personal property, and emotional distress.

Four of the tenants – apparently the only ones with written lease agreements that included an attorney fee provision – moved for attorney fees of approximately $413,000. They insisted this figure excluded fees unique to the other plaintiffs, such as fees for discovery relating only to other plaintiffs or for trial time related to issues exclusive to the other plaintiffs.

The trial court significantly trimmed the amount – reducing it by 50% right off the top, before applying any other reductions, because the engagement was "mildly pro bono" – but awarded nearly $124,000 in fees. The Court of Appeal affirmed in full.

The Rejected Challenges to the Attorney Fee Award

First, the fact that the award exceeds the amount set forth in the schedule of suggested fees in Los Angeles Superior Court Local Rule 3.2 – the amount of fees awarded, less than one-third the amount of the request, was still 39 times the guideline in the schedule – doesn't mean the court abused its discretion. The rule itself allows the court to depart from the guidelines and Civil Code section 1717 says fees shall be "fixed by the court." It was reasonable for the court to use a "lodestar" method of calculation: hours times hourly rates. (*Cruz, supra,* 155 Cal. App.4th at pp.1275-1276.)

Second, the court did not abuse its discretion in awarding fees greater than the damages:

> It is not uncommon to award attorneys' fees in an amount higher than the total damages awarded to a plaintiff or plaintiffs in a particular case. Appellant cites no authority for the proposition an award of attorneys' fees must always be less than the award of damages in a given case, and we are aware of none.
>
> *Cruz, supra,* 155 Cal.App.4th at p. 1276.

Third, the court did not err by awarding fees for the non-contract claims as well as the contract claim. The fee provision in this case applied to any action "in connection with" the lease. Since all the claims and damages, including those in tort, arose from the conduct constituting the breach of the lease, there was no need to apportion fees between contract and tort causes of action. (*Cruz, supra,* 155 Cal.App.4th at p. 1277.)

Fourth, the decision confirms that fees for work done regarding issues of fact or law common to all the plaintiffs do not have to be reduced to the requesting plaintiffs' pro rata share. "[T]he fact other tenants incidentally benefited from the legal work performed on behalf of respondents does not diminish respondents' contractual right to recover attorneys' fees litigating issues common to all." (*Cruz, supra,* 155 Cal.App.4th at p. 1278).

The *Pro Bono* Angle

The most interesting aspect of the case is its discussion regarding the availability of fees to attorneys who represent clients *pro bono*, which was prompted by the trial court's off-the-top reduction of the fee request by 50% because "counsel knew this was a mildly pro bono type of work." (155 Cal.App.4th at 1273). The landlord did not contest plaintiffs' entitlement to fees under the contract, and plaintiffs did not cross-appeal to contest the amount of the award. I'm sure O'Melveny now wishes plaintiffs had. In *dictum* that cites a dozen cases from other states and the federal courts, the court indicates it would have been willing to uphold an even higher award:

> Finally, we find it important to emphasize something we are not deciding in this case. Respondents elected not to appeal the trial court's ruling the fee award should be reduced in part because respondents' counsel had agreed to provide representation on a "pro bono" basis. This court's affirmance of the judgment should not be construed as signifying our approval of this particular element of that judgment. We do not find it self-evident a law firm's commendable willingness to provide its services on a pro bono basis to low income clients should necessarily justify a diminishment in the fee award when that pro bono representation proves successful. Because respondents did not directly challenge the court's decision to reduce the fee award based on the pro bono nature of the litigation, we had no reason to invite the parties to brief the issue. Our research indicates courts reduce a fee award to adjust, for example, for duplicative work, for lack of success on certain issues, or the like. However, our research uncovered no case in which a trial court reduced a fee award simply because of the "pro bono type of work" involved. Moreover, in the analogous situation of contingent fee and legal aid lawyers—where again the clients are not responsible for paying legal fees out of their own pockets—the majority of courts have approved awards at a full level of "reasonable" fees.
>
> (*Cruz, supra,* 155 Cal.App.4th at pp. 1278-1279 [footnotes omitted].)

It seems only fair to award full fees in *pro bono* cases, at least where a fee-shifting statute applies. Attorneys who undertake these engagements do so at significant risk. Indeed, by holding out the possibility of fee recovery, fee shifting statutes represent a public policy to encourage attorneys to take on such cases. Thus, public interest organizations, as well as law firms, commonly apply for such fees. *Cruz* cites three California cases upholding such awards. (*Cruz, supra,* 155 Cal.App.4th at p. 1279, fns. 22-23.)

In *Cruz*, however, fees were awarded pursuant to a contractual fee provision, not a fee-shifting statute. Oddly, the *Cruz* court was silent on this distinction.

The first court to face the issue of whether a party with *pro bono* representation has a right to recover fees under a contractual fee provision will have to examine whether Civil Code section 1717's reference to fees "incurred" in an action limits its applicability to cases where the party actually incurs fees. There is little to suggest that this would preclude recovery for *pro bono* attorneys.

In *PLCM v. Drexler* (2000) 22 Cal.4th 1084, the Supreme Court awarded fees to a party for the work of its in-house counsel, in an amount greater than the counsel's salary, even though the fee provision at issue was by its terms limited to fees "incurred." It reached this result because section 1717 "was originally enacted to establish mutuality of remedy." *Id.* at p. 1090. Additionally, the court noted that under section 1717, "'equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction.'" *Id.*, *quoting International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 224.

Awarding contractual attorney fees in pro bono cases would also be consistent with past awards of attorney fees under fee-shifting statutes that likewise, on their face, limit fee recovery to fees "incurred." *See Lolley v. Campbell* (2002) 28 Cal.4th 367, 374-375; *Rosenauer v. Scherer* (2001) 88 Cal.App.4th 260, 282-283; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136. Arguably, however, the fee-shifting statutes are distinguishable from contract provisions because they represent a public policy to encourage attorneys to take on otherwise non-remunerative cases, while a contractual fee provision is meant to memorialize the agreement of the parties and, in many cases, is probably intended to *discourage* litigation.

As noted above, however, contractual fee provisions are subject to the public policies underlying section 1717. Though these policies differ from the policies underlying fee-shifting statutes, if a litigant with *pro bono* representation is at risk of liability for his opponent's fees, mutuality dictates that litigant should also be able to recover them. (For a rare exception to this general rule, see *Trope v. Katz* (1995) 11 Cal.4th 274.) And in *PLCM v. Drexler,* equity has already overcome contract language limiting recovery to "incurred" fees.

The courts' past generosity in awarding fees in *pro bono* cases suggests they will be equally generous when such fees are requested pursuant to contractual fee provisions. It also reminds us that *pro bono publico* means "for the public good." It doesn't mean "free."

So I'll say it again. Don't be shy.

Greg May *is a lawyer in Ventura, and a member of the CITATIONS editorial board.*