

Memo

To: All Attorneys
From: TSR
Date: October 3, 2008
Re: Lawyers Weekly Article: Gauging the going rate - *New steps at the heart of MSC's fine-tuned approach to calculating a 'reasonable attorney fee'*

In the recent decision of Smith v. Khouri, the Michigan Supreme Court changed its rule for determining what constitutes a reasonable attorney fee. Prior to Smith, the standard for reasonable attorney fees was set forth in Wood v. Detroit Automobile Inter-Insurance Exchange. The new approach begins with determining “the reasonable hourly or daily rate customarily charged in the locality for similar legal services...by lawyers of reasonably comparable skill, experience and reputation.” Then, that figure is multiplied by the “reasonable number of hours expended.” The court may then make adjustments up or down based on the factors listed in Wood and MRPC 1.5(a). The factors listed in Wood include:

1. “The professional standing and experience of the attorney”
2. “The skill, time and labor involved”
3. “The amount in question and the results achieved”
4. “The difficulty of the case”

5. “The expenses incurred”
6. “The nature and length of the professional relationship with the client.”

In Smith, the winning attorney requested his fees as part of a case evaluation sanction. Included in his request was his resume and previous attorney fee judgments he received over the past 20 years. After the Court of Appeals affirmed, the Supreme Court disagreed with the technique used to determine his fees. Chief Justice Taylor said that “[I]n addition to the attorney’s own affidavit, testimony or empirical data found in surveys and other reliable reports” may be presented. Taylor also specified that “judicial notice” and anecdotal statements are types of evidence to avoid. As for “previous awards”, Taylor said they must be scrutinized to make sure they were “justified by the particular circumstances of the earlier cases, such as the complexity and skill required.”

Since Smith, the new standard has been applied in Augustine v. Allstate Insurance Company, in which the Court of Appeals vacated an attorney fee award under the No Fault Act because the trial court did not scrutinize the award under the test set forth in Smith. The court stated “although the trial court did first arrive at the hourly rate, [it] did not follow the Smith analysis because it did not first look to what was customarily charged in the locality for similar work.” The court emphasized that while the trial court based its fee on an average fee in the area, it did not indicate what evidence was used to determine that figure. It should be noted that such “reasonable fee” calculations are not the only situation in which a trial court may be overruled for its fee determinations.

TRS/prm