Attorney Fee Motions and Judicial Notice of "Customary Fee for Like Work"

As civil litigators in North Carolina know, in order to support most motions for attorney fees (pursuant to statutes that authorize them), a party must present evidence as to the time and labor expended, the skill required, the experience and ability of the attorney, and the customary fee for like work. *See, e.g.,* Cotton v. Stanley, 94 N.C. App. 367 (1989). In turn, a court's order awarding a fee must make findings on these issues. It is typical for the moving party to present evidence of the first three factors through affidavits from the attorneys who did the work. These affidavits often will include hourly billing statements, invoices, and similar documentation. As for the fourth factor—"customary fee for like work"--parties often present affidavits from other attorneys confirming that the fee being sought is in line with the relevant market. In recent years, however, it seems it has become more common (albeit not yet *typical*) for parties to forgo acquiring these outside attorney affidavits and opt instead to ask the judge to take *notice* of a reasonable fee. The idea is that surely a judge—having observed years of billing rates in motion after motion—will be at least as good a source as a practicing lawyer. But is resorting to the court's own expertise a permissible way for a party to demonstrate "customary fee"?

In a 2011 opinion of the Court of Appeals in a custody action, the answer was yes. More on that case below. But last month, in WFC Lynnwood I LLC v. Lee of Raleigh, Inc., the Court of Appeals may have dialed that notion back. In *Lynnwood*, the trial court awarded about $45,000 in attorney fees to the prevailing party, a commercial landlord seeking liquidated damages from its former tenant. The landlord had presented an attorney affidavit to support the first three factors, and the trial court made findings accordingly. The affidavits did not, however, address "customary fee." The trial court's finding on that issue stated that, "*The Court is aware of* the range of hourly rates charged by law firms in Wake County as well as in North Carolina for litigation of business contracts like this." (emphasis added). The court then noted that the rates at issue "are fair and reasonable and conform to or are less than" customary fees.

On appeal, the tenant argued that there was no evidence in the record to support a finding regarding customary fees. A majority of the Court of Appeals panel agreed, noting it was "clear" that the evidence was insufficient because the attorney's affidavit "offer[ed] no statement with respect to comparable rates in this field of practice" and that counsel did not "offer comparable rates at the hearing on attorney fees." In effect, the majority did not accept that the judge's own experience with comparable fees was sufficient evidence on the subject. The Court of Appeals thus remanded for reconsideration of the fee amount, noting that the trial court could in its discretion either rely on the existing record or receive further evidence.

The dissenting judge would have affirmed the attorney fee award based on that 2011 opinion I mention above: Simpson v. Simpson, 209 N.C. App. 320 (2011). The judge observed that in *Simpson* the court held that "a district court considering a motion for attorneys' fees…is permitted,

although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience." [Indeed, the court in *Simpson* remanded the matter to the trial judge after concluding that he had been under the "misapprehension" that he could not take judicial notice of customary fees.] The dissenting judge acknowledged that *Simpson* was a child custody modification case, but he was "unable to discern any valid reason why a trial court should not be permitted to similarly invoke the judicial notice doctrine in connection with [the present case.]." *To be clear, the majority in Lynnwood never explicitly characterizes the trial judge's statement about customary rates as "judicial notice" nor discusses whether it is error for a judge to take judicial notice of customary rates.* But to the dissent, it appears the majority's approach amounted to the same thing.

As I write this blog post, I can find no record that the plaintiff in *Lynnwood* has opted to have the attorney fee matter reviewed by the North Carolina Supreme Court. For now, therefore, *Lynnwood* may stand in opposition to the idea that parties (at least in non-custody cases) can rely solely on a finding based on that judge's awareness of customary rates.

Going forward, to avoid the issue encountered in *Lynnwood*, attorneys in civil cases should *at least* include statements about customary fees in their own fee affidavits, as the *Lynnwood* court suggests. Better still, where practical, attorneys should return to (if they ever left) the practice of getting colleagues from the Bar to submit supporting affidavits. It's more work, sure, but it's also more convincing. Not every judge will take an attorney's own word for it. And somewhere down the line an appellate court may decide that the attorney's own opinion on the matter is not enough.

[Note: In *Lynnwood*, the Court of Appeals affirmed the underlying determination that the trial court was *authorized* by statute to award a fee. In other words, the point of contention was not whether the fee-shifting itself was proper, but whether there was sufficient evidence to support the *amount* of that fee. The statutory basis for the fee award was G.S. 6-21.6, a relatively new statute that governs reciprocal attorney fees in business contracts. For more information about how that statute works, see this bulletin and this blog post.]