

How To Fight Plaintiff's Attorney's Fees in Civil Rights Cases

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- When You Get Caught With Your Pants Down - - Don't Look For A Fig Leaf.
 - One - - face up to the problem quickly.
 - Two - - rectify it immediately.
 - Three - - reach out and have a written trail making reasonable offers.
 - Four - - reach out and urge early mediation.
 - Five - - file an offer of judgment as soon as possible.
 - Tricky offer of judgment issues.
- Settlement negotiations may be considered by the court in determining attorney's fees. See Ingram v. Oroudgian, 647 F.3d 925 (9th Cir. 2011).
 - Pl's demand \$425,000.
 - Settled \$30,000.
 - Attorney's fees reduced from \$88,857 to \$30,485.
- Congress did not intend "to reward attorneys for burdening federal courts with unnecessary litigation when they have not even attempted to remedy their client's grievances by talking out their differences...." Naprstek v. City of Norwich, 433 F.Supp 1369, cited with approval in Sethy v. Alameda County Water District, 602 F.2d 894, 898 note 5 (9th Cir. 1979).

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- Is prevailing party status without more sufficient basis on which to award fees?
 - No. Benton v. Oregon Student Association and Commission, 421 F.3d 901, 905 (9th Cir. 2005).
 - Nominal damage bears on whether attorney's fees should be awarded. Farrar v. Hobby, 506 U.S. 103 (1992).
 - The litigation accomplished little beyond giving plaintiff "the moral satisfaction of knowing that a federal court concluded their rights had been violated."
 - "When a [plaintiff] recovers only nominal damages because of a failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."
- Are there other tangible results in addition to the nominal damage award?
 - Voluntary aspect of the change cuts against being a prevailing party for purposes of awarding attorney's fees. Buckhannon Board & Care Home, Inc. v. West Virginia, 532 U.S. 598, 605 (2001).
- We also challenged the lodestar computation.
 - Look to the hourly rate for attorneys of comparable experience in the district where the case sits. See PLN v. Schwarzenegger, 608 F.3d 446 (9th Cir. 2010)

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- Does Rule 68 Offer of Judgment Apply When Defendant Prevails?
 - Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).
 - Plaintiff sued Delta Air Lines for race discrimination pursuant to Title VII.
 - Early in the litigation, Defendant made a Rule 68 Offer of Judgment for \$450.
 - Plaintiff did not accept the offer and proceeded to trial.
 - Jury rendered a verdict for the Defendant.
 - Defendant moved for an order for Plaintiff to pay its costs.
 - **HOLDING:** Rule 68 does not apply where judgment is entered in favor of Plaintiff.
 - **RATIONALE:** The clear language of Rule 68 confines its effect to cases in which Plaintiff has obtained a judgment that is less favorable than the offer. This means, there **MUST** be a judgment for Plaintiff for Rule 68's cost-shifting provision to be fully effective.

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- Can Rule 68 Offer of Judgment Include Conditions?
 - Lang v. Gates, 36 F.3d 73 (9th Cir. 1994).
 - Police officers conducted raid on Plaintiffs' home.
 - Plaintiffs filed suit against Police Chief, the City and several individual officers for civil rights violations pursuant to 42 U.S.C. § 1983.
 - Prior to trial, Defendants made a Rule 68 Offer of Judgment for \$600,000 plus reasonable attorney's fees and costs incurred.
 - The Offer included the following language "[a]cceptance by less than both Plaintiffs shall be deemed a rejection of this offer."
 - One Plaintiff accepted the offer and one rejected it.
 - Nine months later, the district court approved a settlement of \$600,000 plus attorney's fees to be determined at a later time.
 - Plaintiffs' dismissed the lawsuit with prejudice.
 - Plaintiffs then filed a motion for \$1,288,275 in attorney's fees.
 - The district court awarded \$247,368 in fees, stating that Plaintiffs were not entitled to recover attorney's fees incurred after Defendant's Rule 68 Offer of Judgment.
 - **HOLDING:** An offer conditioned upon joint acceptance by all Plaintiffs is valid under Rule 68.

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- Offers With Disclaimers of Liability
 - Mite v. Falstaff Brewing Corp., 106 F.R.D. 434, 435 (N.D. Ill 1985).
 - Fisher v. Kelly, 105 F.3d 350, 352 n. 1 (7th Cir. 1997).
- Does An Accepted Rule 68 Offer of Judgment Have Preclusive Effect In Subsequent Litigation?
 - There are no published cases where a federal court has determined, in civil rights litigation, whether a previous offer of judgment could have preclusive effects in subsequent litigation.
 - Based on an analysis of federal court requirements for collateral estoppel, an argument can be made that an accepted offer of judgment does not have preclusive effect because:
 - The issue was not **actually litigated**; and
 - A determination of the issue was **not essential to the final judgment**.

RECOMMENDATION: Include a disclaimer of liability and language that the offer is not to be used for any other action as evidence of an admission of liability, *res judicata*, issue preclusion or collateral estoppel.

CAVEAT: Including a disclaimer of liability **MAY** alter whether a trial judgment is more favorable than an offer. *See Lish v. Harper's Magazine Found.*, 148 F.R.D. 516, 518 (S.D.N.Y.1983) (judgment in plaintiff's favor for \$0 on copyright claim deemed more favorable than \$250 offer of judgment disclaiming liability because vindication of plaintiff's copyright was more favorable than the nominal money offer.)

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ATTACHMENT 1

WHEN YOU GET CAUGHT WITH YOUR PANTS DOWN...DON'T LOOK FOR A FIG LEAF

**By: Georgia A. Staton
Michele Molinario**

The title is catchy but the topic is serious. On September 7, 2011, Pinal County Arizona was served with a lawsuit alleging that the county jail violated Prison Legal News'¹ constitutional rights.

Unknown to jail administrators, Prison Legal News (PLN) had been mailing its magazines and other materials to inmates for over 7 months. However, the magazine was not being distributed to the inmates. Jail staff assigned to gather and distribute mail had either returned the magazine and other materials to PLN or, in some cases, threw them away on the mistaken belief that the publications violated jail policy.

Publishers and inmates have First Amendment rights to communicate with each other, subject only to limitations that are required by legitimate security concerns. See, *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011). The First Amendment prohibits unreasonable restrictions on publishers' right to send materials to inmates. See, *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986); *Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1987); *Crofton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999). Furthermore, the due process clause requires that when a correctional facility refuses to deliver incoming mail it must provide both the inmate and sender with notice and an opportunity to challenge with an appeal to a person other than the staff member who made the decision. See, *Procurier v. Martinez*, 416 U.S. 396, 417-19, (*overruled on other grounds by Thornburgh v.*

¹ Prison Legal News is a project of the Human Rights Defense Center, a non-profit organization that publishes a monthly journal entitled "Prison Legal News".

Abbot, 490 U.S. 401 (1989); *Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (9th Cir. 2001).

Jail administrators, upon learning of the lawsuit, did not bury their heads in the sand or spend time trying to concoct a rationale for what had happened². Instead, they immediately recognized that there was a problem and that it needed to be fixed as soon as possible.

PLN was contacted almost immediately and informed that they should resend the magazines to the inmates at no expense to PLN. They were also told that jail administrators were taking steps to rectify the situation. And, that is precisely what jail administrators did. Within two months of receiving the lawsuit, the policy had been completely rewritten to clarify what type of publications were permitted.³ During these two months, all staff (mail staff as well as line detention officers) were trained on the revised policy.

So what is the point of this article? Two-fold: one, if you have a problem...fix it, and two... think strategically. A quick search of federal district court cases across the country revealed that PLN made some money from the sale of its magazines, and made money on from another -- arguably lucrative source of funding -- lawsuits. The beneficiary of those lawsuits was not only PLN but their attorneys. As is often in cases such as this, legal expenses far exceed damages. And, when dealing with constitutional claims, a prevailing plaintiff has the right to seek costs which, by definition, include attorney's fees. See 42 U.S.C. § 1988.

² Jail administrators worked closely with the Executive Director of the Arizona Counties Insurance Pool, William Hardy, to quickly resolve the issues and the lawsuit.

³ The existing policy did not specifically allow or disallow magazines/newspapers categorically. Unfortunately, mail staff thought that there was a blanket prohibition against newspapers or magazines being received into the jail.

The strategy was simple. The decision was made to reach out early to PLN and offer to settle for a small amount which would include a discussion regarding reasonable attorney's fees. Although that offer was soundly rejected, the County documented from the very beginning that it was acting reasonably and responsibly to correct any real or perceived deficits in its policies and training. And, the County pushed for an early mediation - - before any significant formal discovery was undertaken. As the years went by, and given the outcome, this approach was a smart one.

When the answer was filed on November 20, 2011, it was accompanied by a reasonable Offer of Judgment. Essentially, we looked at the number of times mail had been rejected by jail staff, looked at the magazine subscription rate, assumed that all the inmates who received the magazine would subscribe, and then added a little extra on top for mailing costs and office expenses incurred by PLN. And, we offered to pay reasonable attorney's fees incurred by PLN to the date of the offer. At that point we felt reasonably confident that if pushed to trial, the County could beat the offer and take advantage of the sanctions imposed upon a party who rejects and fails to beat an offer of judgment under Rule 68, Fed.R.Civ. Pro.

PLN rejected the Offer of Judgment and took a hard line. They did everything they could to convince Pinal County the trial would result in tens of thousands, if not hundreds of thousands of dollars in damages, and that attorney's fees would also be in the hundreds of thousands of dollars. The County did not budge. Three years of litigation ensued. There were multiple non-uniform interrogatories, requests for production, requests for admissions, site visits, depositions of jail staff, first and second line supervisors, jail commanders and the

sheriff. Experts were retained and deposed. Motions and cross-motions were filed and a trip was made to the 9th Circuit Court of Appeals.

On the eve of trial (a trial involving mostly damages because the Court found that the County had violated PLN's due process rights), PLN stipulated to a judgment of nominal damages - - one dollar for each time a magazine was mailed to the jail and rejected. The total amount of the judgment after three hard fought years of litigation was \$243. Although it cost the County money to defend, it cost PLN much more. PLN has now stipulated that the "value" of its magazine being rejected by a detention facility is \$1 - - no more.

Critical to this result was the immediate correction of the situation, and implementation of very clear firm policies and effective training. The day after the lawsuit was filed, the Deputy Chief looked into the allegations, noted that mistakes had been made and set about immediately changing the practice regarding incoming publications, clarifying policy and conducting hours of training to ensure that there was no misunderstanding as to the policy. And because quick action was taken, PLN was unable to convince the court that it should issue an injunction. PLN was unable to demonstrate that it faced any threat of future injury, or that the jail's earlier practices were likely to be repeated. The court agreed stating:

"Injunctive relief is for unusual cases, where a Plaintiff "(1) has suffered an irreparable injury; (2) [where], remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) [where], considering the balance of the hardships between the Plaintiff and Defendant, a remedy in equity is warranted; and (4) [where], the public interest would not be disserved by a permanent injunction." *Ebay, Inc. v. MercExchange, LLC*, 547 U.S.388, 391 (2006). In a case like this, where the injury to the Plaintiff has ceased, the Plaintiff carries a weighty burden to show that future

injury is likely. See, *Nelsen v. King Co.*, 895 F.2d 1248, 1251 (9th Cir. 1990). Notably, “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief... if unaccompanied by any continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

The trial court’s refusal to grant a permanent injunction was upheld by the 9th Circuit. Because no permanent injunction was issued, PLN’s request for attorney’s fees would depend solely on whether they would be able to beat the offer of judgment that had been made on November 20, 2011. And, because there was little likelihood that would occur, PLN agreed to a judgment of nominal damages only to settle the case. Furthermore, PLN stipulated that the County beat the offer of judgment it made to PLN and was therefore entitled to its costs (albeit not attorney’s fees) incurred from that date to the present.

The parties are now litigating whether PLN is entitled to any attorney’s fees in light of the stipulated judgment for nominal damages that came after years of scorched earth litigation. That issue has yet to be resolved and will be subject of a future article.

Georgia Staton has been a partner at Jones, Skelton & Hochuli since 1992 and practices in the areas of governmental liability, employment law and personal injury defense. She is a Fellow in the American College of Trial Lawyers, and a member of the American Board of Trial Advocates and the International Association of Defense Counsel.

Michele Molinaro is a partner at Jones, Skelton & Hochuli. She has spent that last 14 years defending governmental entities, law enforcement officers and other governmental employees in civil litigation practice. She has successfully defended Section 1983 claims that include police and jail-related non-lethal and lethal force incidents, special weapons and tactical practices, and other constitutional claims.

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ATTACHMENT 2

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JONES, SKELTON & HOCHULI, P.L.C.

MEMORANDUM

TO: Georgia Staton
FROM: Jon Barnes
DATE: November 7, 2014
SUBJECT: PLN: Attorney's Fees Objections

I. ATTORNEY'S FEES SHOULD BE DENIED IN THIS CASE.

A. Plaintiff is not entitled to fees.

Plaintiff is not entitled to fees. In a nominal damages cases, such as this one, “the district court’s first consideration must be whether the nominal damages plaintiff is entitled to any fees at all.” *Benton v. Oregon Student Assistance Comm’n*, 421 F.3d 901, 905 (9th Cir. 2005). Plaintiff conclusorily asserts that “[a]s the prevailing party, PLN is entitled to attorneys’ fees,” citing *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1059 (9th Cir. 2010). [Oct. 27, 2014 Letter, 1.] But *Mahach-Watkins* shows that in nominal damages cases, “prevailing party” status is alone insufficient to warrant fees. 593 F.3d at 1059.¹ Rather, “[i]f a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage.” *Id.* (emphasis added).

Here, it is not clear that the three factors used to determine “whether a plaintiff succeeded in some way beyond the judgment for nominal damages,” on balance, favor awarding fees. “First, the court should consider ‘[t]he difference between the amount recovered and the damages sought,’ which in most nominal damages cases will disfavor an award of fees.” *Id.* (citation omitted). This case is no different. Plaintiff demanded \$300,000 in damages [Sept. 30,

¹ “A plaintiff who receives a nominal damage award for a § 1983 claim is a prevailing party under § 1988.” *Mahach-Watkins*, 593 F.3d at 1059. So, Plaintiff is a “prevailing party,” even though the court ruled for defendants on summary judgment: (1) dismissing fourteen of the twenty-six named defendants; (2) dismissing all claims against Sheriff Babeu and Deputy Kimbal in their individual capacities; (3) dismissing all First Amendment claims against Linderholm, Johnson, Valenzuela, and Montano; and (4) dismissing the punitive damages claim. [Doc. # 143.]

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2011 Letter], plus punitive damages [Compl., Doc. # 44], rejecting Defendants' offer of judgment for \$10,000. [Def.'s OJ, Nov. 22, 2011.]² See *Moshir v. Automobili Lamborghini Am. LLC*, 927 F. Supp. 2d 789, 796 (D. Ariz. 2013) (district court may "consider[] settlement negotiations for the purpose of deciding a reasonable attorney fee award"), quoting *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011) ("settlement negotiations may be considered by the district court as a factor in determining a fee award"). Ultimately, Plaintiff settled the case for \$243. Thus, Plaintiff settled for a small fraction (less than 1/40th) of the OJ it rejected, and a microscopic fraction of the \$300,000-plus-punitive-damages demand. This factor therefore cuts against an award of fees.

The second and third factors are a closer call. "Second, the court should consider 'the significance of the legal issue on which the plaintiff claims to have prevailed.'" *Id.* (citation omitted). Plaintiff conclusorily argues that this "lawsuit brought about change on significant legal issues." [Oct. 27, 2014 Letter, 2.] Indeed, Plaintiff prevailed on three legal issues, which were uncontested: (1) the "effective" ban on newspapers and magazines violated the First Amendment [Doc. # 143, 10:18–19]; (2) the "publisher-only" mail requirement violated the First Amendment [*id.* at 11:2–3]; and (3) the failure to provide notice and an opportunity to appeal rejected mail violated the Fourteenth Amendment. [*Id.* at 15:13–14.] But these free speech and due process issues are not necessarily "significant," for purposes of the attorneys' fees analysis. See *Benton*, 421 F.3d at 903 (rejecting entitlement to fees in free speech, free exercise, due process, and equal protection case); cf. *Mahach-Watkins*, 593 F.3d at 1060 (affirming entitlement to fees in part because "constitutional rights at stake in a wrongful death case are of a different magnitude than those at issue in non-death cases").

² Plaintiff also sought other forms of relief, which, although not "damages" per se, included declaratory and injunctive relief, as well as attorney's fees. [Doc. # 44.]

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At least one federal district court and one federal court of appeals have found that First Amendment issues are “sufficiently important to support an award of attorney’s fees.” *See Dowd v. City of Los Angeles*, No. CV 09-06731 SS, 2014 WL 2937478, at *6 (C.D. Cal. May 23, 2014), *citing Zinna v. Congrove*, 680 F.3d 1236, 1240 (10th Cir. 2012) (plaintiff prevailed on First Amendment retaliation claim after county officials took adverse action against him for criticizing government officials on his website), and *Lippoldt v. Cole*, 468 F.3d 1204, 1223–24 (10th Cir. 2006) (anti-abortion association and members brought § 1983 action against city officials to challenge denial of parade permits). However, *Dowd* and the cases it relies on are distinguishable from this case. In *Dowd*, for example, plaintiffs’ “limited success involved legal issues at the core of the First Amendment, namely regulating speech in a traditional public forum and punishing speech that is critical of elected officials.” *Dowd*, No. CV 09-06731 SS, 2014 WL 2937478, at *6. Here, by contrast, the speech at issue was not necessarily “core” to the First Amendment; it was not primarily “critical of elected officials,” nor did it involve restrictions on a traditional public forum. *See Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) (“right to communicate with prisoners by mail ... is subject to substantial limitations and restrictions”). Thus, the second factor—significance of the underlying legal issue—is debatable and does not clearly favor an award of fees.

“Third, the court should consider whether the plaintiff ‘accomplished some public goal.’” Plaintiff emphasizes this factor, arguing that: (1) “the Jail eliminated its postcard/one-page letter policy,” (2) it eliminated “its de facto ban on newspapers and magazines,” (3) it eliminated “its arbitrary approved vendor list,” and (4) it “instituted a new policy to provide due process when items are rejected.” [Oct. 27, 2014 Letter, 2.] The first issue is irrelevant, however, because the court held that “[t]he jail’s policy limiting correspondence to one-page and post cards did not violate the First Amendment.” [Doc. # 143, 15:8–9.] Further, the second, third, and fourth issues involved voluntary changes that occurred before any court ruling. As in

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Benton, where the defendant remedied the unconstitutional behavior “*well prior* to the district court’s finding of a constitutional violation,” Defendants in this case changed their policies and practices well before the court entered judgment in Plaintiff’s favor. *See Benton*, 421 F.3d at 907. *But see Dowd*, No. CV 09-06731 SS, 2014 WL 2937478, at *6 (“Though Defendant repealed and replaced the 2008 Ordinance in its entirety prior to the Court’s MSJ Order, ... the City would have been free to impose a similar sound ban had Plaintiffs not succeeded on their amplified sound ban claim.”). Thus, the third factor—accomplishment of a public goal—is also debatable and does not clearly favor an award of fees. On balance, the question of whether fees are justified is a close one.

B. Special circumstances may exist to justify denial of fees.

Even if the three factors favor an award of fees, the court must “employ[] a two-pronged test to determine whether special circumstances exist to justify denying attorneys’ fees, namely whether: (1) awarding the attorneys’ fees would further the purposes of § 1988; and (2) the balance of equities favors or disfavors the denial of fees.” *Am. Broad. Companies, Inc. v. Miller*, 550 F.3d 786, 788 (9th Cir. 2008). “[A]ttorneys’ fees should be denied only in unusual cases, ... such as when there is both a strong likelihood of success on the merits and a strong likelihood of a substantial judgment at the outset of litigation.” *Id.*

Here, special circumstances may exist to justify denying attorneys’ fees. First, awarding fees would not further the purposes of § 1988. “[T]he purpose behind § 1988—ensuring that litigants with similar claims would not be dissuaded from bringing suit by the lack of availability of a fee award—is not implicated,” when, as here, “there is both a strong likelihood of success on the merits and a strong likelihood of a substantial judgment at the outset of the litigation.” *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008). Here, there was a strong chance of success on the merits at the outset of the litigation—indeed, defendants were forced to admit to several constitutional violations. Also, Plaintiff must have

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believed there was a strong chance of a substantial judgment, given its rejection of the \$10,000 offer of judgment and demand for \$300,000 in damages. Thus, awarding attorneys' fees would not further the purposes of § 1988.

Second, the balance of equities also favors a denial of fees. Congress did not intend "to reward attorneys for burdening federal courts with unnecessary litigation when they have not even attempted to remedy their clients' grievances by talking out their differences. ..." *Naprstek v. City of Norwich*, 433 F. Supp. 1369, 1371 (N.D.N.Y. 1977) ("we think that neither Congress nor the Supreme Court intended that private attorneys general need be encouraged to make mountains out of molehills"), cited with approval in *Sethy v. Alameda Cnty. Water Dist.*, 602 F.2d 894, 898 n.5 (9th Cir. 1979). Here, Plaintiff rejected Defendants' early settlement overtures, which emphasized that extensive discovery was unnecessary. Defendants were thus forced to unnecessarily incur years of litigation expenses, despite the fact that they had already changed their policies and practices. Because Plaintiff's settlement rejections forced Defendants to undergo significant and unnecessary litigation expenses, balancing the equities shows that fees are inappropriate in this case.

II. PLAINTIFF'S "LOADSTAR AMOUNT" IS UNREASONABLY HIGH.

Assuming Plaintiff is entitled to fees, the court must calculate the "loadstar amount" of any fee award. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Benton v. Oregon Student Assistance Comm'n*, 421 F.3d 901, 904 (9th Cir. 2005). "After calculating this 'lodestar' amount, the district court should then determine whether 'other considerations' warrant increasing or decreasing the lodestar amount." *Id.* These "other considerations" include twelve factors. *Id.*; *Morales v. City of San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996) (the first five factors are subsumed in the initial loadstar calculation); *see also* LRCiv 54.2(c)(3). Plaintiff's calculation of the loadstar amount is unreasonably high.

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A. The San Francisco-based rates are unreasonably high.

Plaintiff asserts that counsel's San Francisco-based hourly rates "are consistent with the rates in the relevant legal community," citing *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454–55 (9th Cir. 2010). [Oct. 27, 2014 Letter, 2.] But *Schwarzenegger* supports the opposite conclusion. "Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits." *Id.* The *Schwarzenegger* Court upheld the exorbitant rates of PLN's counsel because the forum was the Northern District of California. *Id.* Here, by contrast, the forum was the District of Arizona, so the "relevant legal community" is also Arizona.³

Anticipating this point, Plaintiff cites *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992), arguing that San Francisco is the relevant community because no Arizona-based attorney was available with "the degree of experience, expertise, or specialization required to handle properly the case." [Oct. 27, 2014 Letter, 3 (quoting *Gates*).] In *Gates*, however, both parties offered proof on this issue in the form of competing affidavits. *Gates*, 987 F.2d at 1405. The district court ruled for the plaintiffs and accepted the higher rate because the case involved highly complex issues; the Ninth Circuit affirmed under an abuse of discretion standard. *Id.* Courts have reached the opposite conclusion in less complex cases, recognizing that

³ Courts in Arizona have approved rates of \$450/hr. for lawyers with twenty or more years of experience, \$210/hr. for lawyers with less than one year of experience, and \$127/hr. for law clerks and paralegals. See *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2011 WL 5128142, at *3–5 (D. Ariz. Oct. 31, 2011) (granting Plaintiff's fees in § 1983 case involving First Amendment, due process, and equal protection rights); see also *Nader v. Brewer*, No. CV-04-1699-PHX-FJM, 2009 WL 811450, at *3 (D. Ariz. Mar. 27, 2009) (approving \$200/hr. for seven-year lawyers and \$90/hr. for four-year paralegal in election law § 1983 case); *Agster v. Maricopa Cnty.*, 486 F. Supp. 2d 1005, 1015 (D. Ariz. 2007) (Arizona rate for "senior trial lawyers handling large, complex litigation is between \$300 and \$400 per hour," and rate for senior associate/junior partner is \$180 per hour).

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unavailability of competent counsel is a “narrow exception” to the general rule. *See, e.g., Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 907 (9th Cir. 1995).

Here, the free speech and due process issues in this case were significantly less complex than the issues in *Gates*, which involved areas of “medical care, psychiatric care, conditions of confinement, and HIV inmates.” *Gates*, 987 F.2d at 1395–96 (9th Cir. 1992). It seems highly unlikely that no attorney in Arizona was competent to handle a Free Speech / Due Process case, such as this one. If we can offer proof showing that competent counsel was available, the court should refuse to apply the market rate of a different forum because “[t]he justification of complex, specialized knowledge and experience did not apply.” *See Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) (“court did not abuse its discretion in selecting the forum area of Sacramento [not San Francisco] in determining prevailing market rates”). In short, Arizona should be the relevant community for determining a reasonable rate.⁴

B. The time entries suffer various defects.

Plaintiff’s time entries suffer from various objectionable defects. “The party seeking an award of fees must submit evidence supporting the hours worked. ...” *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000). Thus, it is Plaintiff’s burden to show that the hours worked are reasonable. “A district court should exclude from the lodestar amount hours that are not reasonably expended because they are excessive, redundant, or otherwise unnecessary.” *Id.* The court should also exclude hours that are not properly documented under Local Rule 54.2. *See, e.g., Pure Wafer, Inc. v. City of Prescott*, No. CV-13-08236-PCT-JAT, 2014 WL 3797850, at *4 (D. Ariz. July 29, 2014) (district courts should reduce

⁴ Additionally, Zach Phillips’ rate was \$12 an hour for his work at HRDC starting in 2012, and \$11 an hour before that. [Wright depo. (Vol. I), 28:16–29:13; Phillips depo., 22:24–23:10.] This is a far cry less than the \$205 an hour listed in Plaintiff’s October 27, 2014 letter.

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an award “where the documentation is inadequate”). Here, many of Plaintiff’s time entries are inadequately described, block billed, etc., as shown in the attached tables.

C. Other considerations warrant a reduction.

Courts should also consider “other factors” when calculating the loadstar amount, including (1) the time and labor required; and (2) the novelty and difficulty of the questions.⁵ *Benton*, 421 F.3d 901, 904–05. These factors favor a reduction in this case. Plaintiff had already researched and litigated the relevant legal issues in this case in dozens of other cases. [See Sept. 30, 2011 Letter (listing prior cases).] Further, Defendants made early settlement overtures, which shows that Plaintiff could have avoided many if not all of its expenses, had they made a demand before filing suit. In view of these special considerations, Defendants are entitled to a reduction in the loadstar amount calculated by the court.

III. OBJECTIONS TO PLAINTIFF’S COSTS.

Plaintiff also lists several costs that are not taxable under Local Rule 54.1(e). However, “[u]nder 42 U.S.C. § 1988, a prevailing party may recover as part of the attorneys’ fees award out-of-pocket expenses that attorneys normally charge to fee paying clients.” *Agster v. Maricopa Cnty.*, 486 F. Supp. 2d 1005, 1017 (D. Ariz. 2007). Such non-taxable expenses may include copying costs, telephone, postage, and messenger services costs, as well as computer-assisted legal research expenses. *Id.* “The requested expenses must be reasonable.” *Id.* The Arizona Local Rule “requires attorneys to identify each non-taxable cost with particularity” and appropriate documentation. *Id.* at 1018 (citing LRCiv 54.2(e)(3)).

⁵ Other factors include: (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Benton*, 421 F.3d 901, 904–05.

JONES, SKELTON & HOCHULLI, P.L.C.

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Here, RBG&G's claimed costs include Lexis and Pacer research, telephone, postage, and delivery costs, as well as "in-house copying/printing" costs. Similarly, HRDC's claimed costs include expenses for office supplies, such as envelopes, labels, postage, and copies. These claimed costs are devoid of any particular description or documentation. Thus, Plaintiff failed to meet its burden to show they are reasonable.

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