

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

PROPOSAL TO ADOPT LOCAL RULES

The full Court met in executive session on Monday, 15 November 1993 approved its *C.J.R.A. Delay & Expense Reduction Plan*. In that *Plan* the Court authorized the Chief Judge “to create a committee for the purpose of drafting proposed standards for fee petitions and guidelines for their review.” (*Plan*, page 24) The Chief Judge appointed a Committee by order of 15 March 1994. The Committee filed its *Report* with the Chief Judge in April of this year. In its *Report* the Committee proposed an amendment to the local General Rule 46 and a new rule designated by the Committee as local General Rule 46A.

The Executive Committee considered the proposed rules and guidelines contained in the *Report* at its meeting in May 1995. The Executive Committee directed that the *Report* be presented to the full Court and that the Court direct that the proposed rules be published for comment.

The full Court considered the *Report* at its meetings of Thursday, 18 May 1995, and Thursday 22 June 1995. At the latter meeting the Court approved a proposal to amend local General Rule 46, to re-number the current local General Rule 47 as local General Rule 48, and to adopt a new local General Rules 47. The texts of proposed General Rules 46 and 47 are as follows:

**RULE 46 MOTIONS FOR ATTORNEY’S FEES AND RELATED
 NONTAXABLE EXPENSES**

A. General Provisions; Definition

The following provisions govern motions seeking any award of attorney's fees or related nontaxable expenses to be paid by a party to the litigation rather than out of a fund already created by judgment or by settlement. “Related nontaxable expenses” within the meaning of this Rule means any expenses for which a prevailing party may seek reimbursement other than costs that are taxed

by the clerk as of course under Fed.R.Civ.P. 54(d)(1). This Rule does not apply to motions for sanctions under Fed.R.Civ.P. 11 or other sanctions provisions.

B. Duty to Attempt to Agree on Award

Before such a motion is filed with the court, the parties involved shall confer and attempt in good faith to agree on the amount of fees or related nontaxable expenses that should be awarded. If the motion, when filed, will be based on a judgment and any party is appealing or plans to appeal that judgment, no such agreement (unless otherwise provided therein) shall affect any party's right to appeal the fee order resulting from the agreement or to seek a subsequent increase, decrease or vacation of the agreed award in the event the underlying judgment is reversed or modified by subsequent judicial proceedings or settlement.

C. Exchange of Information

During the pre-motion attempt to settle, the parties shall, upon request, provide the following information to each other:

(1) The movant shall provide each party from whom payment is sought (the "respondent") with the time and work records on which the motion will be based, and shall specify the hours for which compensation will and will not be sought. These records may be redacted to prevent disclosure of material protected by the attorney-client privilege or work product doctrine.

(2) The movant shall inform the respondent of the hourly rates that will be claimed for each lawyer, paralegal, or other person. If the movant's counsel or other billers have performed any legal work on an hourly basis during the period covered by the motion, the movant shall provide representative business records sufficient to show the types of litigation in which such hourly rates were paid and the rates that were paid in each type. If the movant's counsel have been paid on an hourly basis in the case

in question or in litigation of the same type as the case in question, records showing the rates paid for those services must be provided. If the movant will rely on other evidence to establish appropriate hourly rates, such as evidence of rates charged by attorneys of comparable experience and qualifications or evidence of rates used in previous awards by courts or administrative agencies, the movant shall provide such other evidence.

(3) The movant shall furnish the evidence that will be used to support the related nontaxable expenses to be sought by the motion.

(4) The movant shall provide the respondent with the above information within 21 days of the judgment or settlement agreement upon which the motion is based, unless the court sets a different schedule.

(5) If no agreement is reached after the above information has been furnished, the respondent shall, within 21 days of receipt of that information, disclose the total amount of attorney's fees paid by respondent (and all fees billed but unpaid at the time of the disclosure and all time as yet unbilled and expected to be billed thereafter) for the litigation and shall furnish the following additional information as to any matters (rates, hours, or related nontaxable expenses) that remain in dispute:

(a) the time and work records (if such records have been kept) of respondent's counsel pertaining to the litigation, which records may be redacted to prevent disclosure of material protected by the attorney-client privilege or work product doctrine;

(b) evidence of the hourly rates for all billers paid by respondent during the litigation;

(c) evidence of the specific expenses incurred or billed in connection with the litigation, and the total amount of such expenses; and

(d) any evidence the respondent will use to oppose the

requested hours, rates, or related nontaxable expenses.

D. No Admission or Waiver

By providing the opposing party with information under this Rule about the party's hours, billing rates and related nontaxable expenses, no party shall be deemed to make any admission or waive any argument about the relevance or effect of such information in determining an appropriate award.

E. Elimination of Undisputed Issues

Within 14 days after the above exchange of information is completed and before the motion is filed, the parties shall specifically identify all hours, billing rates, or related nontaxable expenses (if any) that will and will not be objected to, the basis of any objections, and the specific hours, billing rates, and related nontaxable expenses that in the parties' respective views are reasonable and should be compensated. The parties will thereafter attempt to resolve any remaining disputes.

F. Confidentiality

All information furnished by any party under section C of this Rule shall be treated as strictly confidential by the party receiving the information. The information shall be used solely for purposes of the fee litigation, and shall be disclosed to other persons, if at all, only in court filings or hearings related to the fee litigation. A party receiving such information who proposes to disclose it in a court filing or hearing shall provide the party furnishing it with prior written notice and a reasonable opportunity to request an appropriate protective order.

G. Joint Statement of Agreed and Contested Matters

If any matters remain in dispute after the above steps are taken, the parties, prior to the filing of the fee motion, shall prepare a joint statement listing:

(Order to Publish Proposals to amend General Rule 46 & adopt General Rule 47: page 4 of 13)

- (1) the total amount of fees and related nontaxable expenses claimed by the moving party. If the fee request is based on the “lodestar” method, the statement shall include a summary table giving the name, claimed hours, claimed rates, and claimed totals for each biller;
- (2) the total amount of fees and/or related nontaxable expenses that the respondent deems should be awarded. If the fees are contested, the respondent shall include a similar table giving respondent's position as to the name, compensable hours, appropriate rates, and totals for each biller listed by movant;
- (3) a brief description of each specific dispute remaining between the parties as to the fees or expenses;
- (4) a statement disclosing (a) whether the motion for fees and expenses will be based on a judgment or on a settlement of the underlying merits dispute, and (b) if the motion will be based on a judgment, whether respondent has appealed or intends to appeal that judgment.

The parties shall cooperate to complete preparation of the joint statement no later than 70 days after the entry of the judgment or settlement agreement on which the motion for fees will be based, unless the court orders otherwise.

H. The Motion for Fees and Related Nontaxable Expenses

The movant shall attach the joint statement to the motion for fees and related nontaxable expenses. Unless otherwise allowed by the court, the motion and any supporting or opposing memoranda shall limit their argument and supporting evidentiary matter to disputed issues.

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Appendix to local General Rule 46
SAMPLE JOINT STATEMENT

Pursuant to section G of local General Rule 46, the parties submit the following Joint Statement with respect to plaintiff's motion for fees and expenses:

1. Plaintiff claims attorney's fees of \$103,925 and related nontaxable expenses of \$12,578.40. Plaintiff calculates this claim as follows:

Lawyer	Hours	Rate	Totals
Smith	300	\$245	73,500
Jones	175	\$110	19,250
Johnson	65	\$95	6,175
Wilson (paralegal)	70	\$50	3,500
Total			\$ 102,425

2. Defendant's position is that fees should be awarded on the following basis:

Lawyer	Hours	Rate	Totals
Smith	200	200	40,000
Jones	175	110	19,250
Johnson	40	95	3,800
Wilson	70	50	3,500
Total			\$66,550

Defendant's position is that related nontaxable expenses of \$11,380.00 should be awarded.

3. The specific disputes remaining between the parties are the following:
- (a) The appropriate hourly rate for Smith;
 - (b) Whether 100 hours spent by Smith and 25 hours spent by Johnson on the state claim should be compensated;
 - (c) Whether \$1,198.40 spent on deposition transcripts of four specific

witnesses (Banks, Davis, George, and Penny) should be compensable.

4. The underlying judgment in the case will not be appealed and the only remaining dispute in the litigation is the appropriate fee award.

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**RULE 47 TIME FOR FILING MOTIONS FOR ATTORNEY'S FEES
AND RELATED NON-TAXABLE EXPENSES**

A. Time Limit for Filing Motions

The 14-day time limit provided by Fed.R.Civ.P. 54(d)(2) for filing and serving motions for attorney's fees and related nontaxable expenses is hereby superseded. Unless the court orders a different schedule, a motion for fees and related nontaxable expenses in a civil proceeding shall be filed and served no later than 90 days after the entry of the judgment or settlement agreement on which the motion is founded.

B. Effect of Filing Motion on Appeal Time

The filing of a motion for fees and related nontaxable expenses shall not stop the running of the time for appeal of any judgment on which the motion is founded, unless:

- (1) the motion is filed and served prior to the expiration of the appeal time and prior to the filing and becoming effective of a notice of appeal; and
- (2) thereafter the district court, after determining that the interest of justice would be served by having merits issues and fee issues determined in a single appeal, issues an order providing that the filing of the motion for fees and related nontaxable expenses shall have the same effect on the running of the time for appeal as a timely motion under Fed.R.Civ.P. 59.

COMMENT: The Court made a few minor changes to the proposals of the Committee on Attorneys' Fees. One change that effects a rule not covered by the Committee's *Report* is that local General Rule 47 be re-numbered as local General Rule 48. This would allow the Committee's proposed local General Rule 46A to be numbered General Rule 47.

The following comments are essentially those made by the Committee on Attorneys' Fees in its *Report*.

Proposed local General Rules 46 and 47 are intended to promote the settlement of attorney's fee litigation and to reduce the work the court must do to resolve those disputes that cannot be settled. The proposed rules deal only with fee litigation in "fee shifting" situations, i.e., where the losing party will be asked to pay the prevailing party's fees and related nontaxable expenses. Fee motions in "common fund" cases raise a somewhat different set of problems which, in the Committee's view, should be dealt with separately.

Under present practice, fee motions, with massive amounts of supporting documentation, are typically presented to the court before there has been any significant attempt by the parties to settle the fee dispute. As a result, a second major litigation frequently develops. That second litigation is often sprawling, bitter, and unnecessary. Judges are rightly concerned about the extent to which such fee litigation intrudes on their more important tasks.

In the Committee's view, this problem is best addressed by requiring, *before* the fee motion is filed, a rigorous process of exchanging information and specifying agreements and disagreements over the requested fee. This process will encourage total settlement of the fee dispute, or at least will force the parties to pinpoint their disagreements and to present only the disputed issues for the court's resolution.

A similar approach is currently and successfully used in the underlying litigation. Discovery disputes cannot be presented to the district court until the parties meet and attempt to resolve them. *See local General Rule 12K*. Similarly, most district judges require the parties to prepare, without court intervention, a joint Final Pretrial Order that enumerates areas of agreement and disagreement in order to make the trial simpler and more orderly. Most judges and lawyers would agree that these procedures save judges time and discourage unnecessary

disputes.

The Committee recommends a similar approach to fee motions in fee-shifting situations. This would be done by proposed General Rule 46. Its companion, proposed General Rule 47, establishes a new time scheme for fee motions that will allow the steps required by General Rule 46 to be completed before the fee motion is filed. Neither proposed rule deals with, or purports to change, the substantive law used to determine fee awards.

Summary of Proposed Rule 46

Proposed Rule 46 calls for certain steps to be taken *before* any fee motion is filed and before any involvement by the district court.

(1) *Provision of information by the movant to the other side.* Within 21 days after the underlying judgment or settlement agreement that gives rise to the entitlement to fees, the movant would be required to disclose the amount of fees and related nontaxable expenses it will request and the basis of its calculation. Since under current law most fee motions in fee-shifting situations will be based on the “lodestar” method, General Rule 46 would require the movant to give the respondent its attorney time records, expense records, and the evidence that will be relied on to support its requested hourly rates.

If the movant’s counsel have been paid on an hourly non-contingent basis during the period covered by the fee motion, the rates paid may be relevant to the determination of an appropriate “market” rate for counsel. See, e.g., *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993). In such cases, General Rule 46 would require the movant to provide the respondent with business-record evidence sufficient to show the types of litigation in which hourly non-contingent rates have actually been paid and the rates that were paid for each type.

Although the Rule would require disclosure of actually-paid hourly rates, the Committee does not suggest that this is the only kind of relevant evidence to establish the appropriate market rate. Some movants’ attorneys will not have charged hourly non-contingent rates to paying clients, for example, attorneys employed by nonprofit or “public interest” organizations, or attorneys who confine their practice to contingent plaintiffs’ litigation. Such movants will have to rely on other kinds of evidence to establish the appropriate rate. Moreover, even as to

attorneys who have been paid on a non-contingent hourly basis, the rates they have been paid may not be conclusive as to the hourly rate that should be used in determining the lodestar. See *Gusman*, 986 F.2d at 1150-1151. Accordingly, General Rule 46 contemplates that other kinds of evidence may be used to establish this hourly rate, and requires the movant to provide the other side with such other evidence.

(2) *Provision of information by the respondent to the prevailing party.* If provision of the above information by the movant does not result in a settlement, General Rule 46 would continue the information-exchange process by requiring the respondent to provide certain information to the movant. That information would include the total fees paid to the respondent's counsel, plus certain detailed information whose scope would depend on the particular issues that remain in dispute. If respondent objects to the number of hours the movant claims as compensable, the respondent would be required to provide the movant with its counsel's time records. If the respondent objects to the rates being sought, it would have to provide the movant with information on the rates paid to its own counsel, or with other evidence the respondent will rely on to oppose the rates being requested, and with the total amount of fees paid to the respondent's counsel.

The Committee recognizes this information may not in all cases prove to be probative if the court is ultimately required to decide the fee petition. General Rule 46 therefore contains a specific provision that the exchange of information required by the rules does not constitute an admission or waiver of any argument on any issue, including the relevance or effect of this information.

Nonetheless, if the reasonableness of the fee remains in dispute, the Committee believes that requiring a respondent to disclose these matters is justifiable under the broad discovery standard of Fed.R.Civ.P. 26(b)(1), which provides that "The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." On this ground, district judges in particular cases have frequently ordered respondents to fee motions to disclose their own hours, rates, and total fees. Moreover, imposing substantial (and often unwelcome) disclosure obligations on both movants and respondents is necessary if the rule is to promote settlement of fee disputes or reduce their

scope.

(3) *Confidentiality.* The information General Rule 46 requires to be exchanged in order to promote settlement or reduction of the fee dispute will frequently be sensitive. The Rule therefore provides that the party to whom such information is given must maintain the confidentiality of that information, use it only in connection with the fee litigation, and disclose it, if at all, only in court filings or hearings in connection with that litigation. The provision also requires that before such disclosure, a party give the other side prior written notice and an opportunity to request a protective order from the court. The Committee takes no position as to when such protective orders should be issued or what they should provide when issued.

(4) *Elimination of undisputed issues.* After the above exchange of information is completed, General Rule 46 would require the parties to specify what remains and does not remain in dispute. This process would lead to the preparation of a “Joint Statement” that would specify—

- (a) the total amount of fees and related nontaxable expenses claimed by the moving party (including a summary table of each biller’s claimed hours, rates, and totals);
- (b) the total amount of fees and/or related nontaxable expenses that the respondent deems should be awarded (including a similar table giving respondent's position as to the appropriate hours, rates, and totals for each biller);
- (c) a brief description of each specific dispute remaining between the parties as to the fees or expenses; and
- (d) a statement disclosing (1) whether the motion for fees and expenses will be based on a judgment or on a settlement of the underlying merits dispute, and (2) if the motion will be based on a judgment, whether respondent has appealed or intends to appeal that judgment.

This process aims to present the district court with a dispute that has been reduced to its essentials. Correspondingly, General Rule 46 would limit the fee motion, memorandum, and supporting materials to those areas in dispute, thereby saving judges and their law clerks from blizzards of time records and other supporting evidentiary materials on issues that are not really in dispute. The briefs will be shorter and better focused, and decision on the motion will be easier

because both sides will have been forced to specify what the “correct” numbers are.

(5) *Timetable.* General Rule 46 sets out a presumptive timetable for completing each stage of the process of exchanging information and minimizing disputes. The initial information from movant would be provided within 21 days; the information from respondent would be provided within 21 days thereafter; the respondent would provide the movant with its precise position on allowable hours, rates, and total fees within 14 days thereafter; and the Joint Statement would be completed within 14 days thereafter. Since the motion itself will be due, under proposed General Rule 46A, within 90 days of the judgment, this presumptive timetable will then leave an additional 20 days for the movant to prepare and file the formal motion and supporting materials. The court could, of course, alter this schedule, and in exceptionally simple or complicated cases may well want to shorten or lengthen it.

Summary of Proposed Rule 47

Proposed local General Rule 47 sets a presumptive 90-day deadline for the filing and serving of the fee motion itself, unless the court sets a different schedule.

This would change the current local General Rule 46 which calls for a fee motion to be filed and served within 14 days of the underlying judgment. The current General Rule 46 tracks the presumptive system in Fed.R.Civ.P. 54(d)(2).

Fed.R.Civ.P. 54(d)(2) allows a local district to change this schedule, and the Committee believes it should be changed. The Committee believes that a 14-day rule limit is too short to fit the processes of exchanging information and encouraging settlement established by the proposed General Rule 46. It seems preferable to the Committee that no motion for fees be filed until this process is completed. The filing of a formal fee motion tends to harden positions, while General Rule 46 encourages the parties to remain flexible.

While General Rule 47 would postpone the actual filing of the motion by up to 90 days, it require that the movant notify the respondent within 21 days of the underlying judgment of the amount of fees and related nontaxable expenses movant will seek. This will allow the respondent to know its potential exposure on fees and to weigh that exposure in its decision on whether to appeal the underlying judgment.


Proposed General Rule 47 also addresses the question of whether the proceedings on the fee motion should be "tied" to the underlying judgment for purposes of calculating time for appeal. Under Fed.R.Civ.P. 58, the presumptive rule is that entry of final judgment is not to be delayed, or the time for appeal extended, in order to tax fees or related nontaxable expenses. However, Fed.R.Civ.P. 58 allows the district court under certain circumstances to issue an order that does in fact delay entry of a final and appealable judgment until the attorney's fee issue is resolved.

The Committee sees no reason to change this presumptive system of Fed.R.Civ.P. 58. Accordingly, proposed General Rule 47 makes clear that unless the district court issues the order called for by Fed.R.Civ.P. 58, the fee proceedings have no effect on the time for appealing the underlying judgment.

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By direction of the full Court and pursuant to 28 U.S.C. § 2071(b) regarding appropriate public notice and opportunity for comment, the Clerk is directed (a) to cause the proposals to amend local General Rule 46, to change the number of the current General Rule 47 to General Rule 48, and to adopt a proposed General Rule 47 to be posted in the Courthouses at Chicago and Rockford, (b) to cause notice of the proposal and requests for comment to be published in the **Chicago Daily Law Bulletin**, (c) to indicate in such notice a final date for receipt of comments, which date shall be sixty days from the first date of publication in the newspaper specified, (d) to collect and distribute among the members of the Advisory Committee for Local Rules all comments received, and (e) following receipt of a copy of the report and recommendations of the advisory committee, to distribute copies of the comments together with copies of the report and recommendation among the members of the Court for consideration at a regular meeting of the full Court.

ENTER:
FOR THE COURT


Chief Judge

Dated at Chicago, Illinois, this 23rd day of June, 1995.