The Expert's Corner

Why Are Fee Reductions Always 50%?: On The Imprecision Of Sanctions For Imprecise Fee Submissions

William B. Rubenstein*

In a recent series of fee decisions, federal judges (and a Special Master) have penalized class counsel for a variety of problems and reduced their fee requests accordingly. While the problems themselves differ, one theme running through these cases is that the penalty tends to be a reduction of 50% of the fee request. It may be that a 50% reduction happens to provide the appropriate level of deterrence for a wide variety of improper timekeeping practices. Nonetheless, there is some irony in the fact that these courts are penalizing class counsel for imprecision in their fee requests—and then proceed to do so by swinging the blunt hammer of a 50% penalty. Why not 51%? Or 18%? Or 79%? Somehow, often after a painstaking review of every hour billed, courts always arrive, rather magically, at the same broad penalty. Before considering the reasons they might do that, let's look at the cases.

Throughout his report, the Special Master demonstrates a profound faith in the 50% reduction. He painstakingly documents each of counsel's excesses, only to arrive at a 50% reduction as the appropriate solution for every one.

**William B. Rubenstein, a law professor at Harvard Law School, specializes in class action law; he has litigated, and regularly writes about, consults, and serves as an expert witness in class action cases, particularly on fee-related issues. Professor Rubenstein's work can be found at www.billrubenstein.com. The opinions expressed in this article are solely those of the author.*

1. In *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.,* 2008 WL 113901 (D.Colo. 2008), U.S. District Judge Marcia S. Krieger appointed a Special Master (Thomas C. Seawell) to determine if the plaintiff's motion for attorney fees in a securities class action was reasonable. The defendants had settled for $15 million. Lead Counsel – with the approval of Lead Plaintiff – sought 20%, or $3 million, and had a lodestar of roughly $950,000, suggesting a multiplier at 3.16. The Special Master rejected both the percentage fee request and the lodestar analysis. Performing his own lodestar analysis in which he adjusted the hourly fee, number of hours, and provision of services, the Special Master found that the plaintiffs' $950,000 figure was inflated by a factor of two.

Throughout his report, the Special Master demonstrates a profound faith in the 50% reduction. He painstakingly documents each of counsel's excesses, only to arrive at a 50% reduction as the appropriate solution for every one. Some attorneys recorded a suspicious number of entries using whole-hour amounts, thus implying shoddy timekeeping. Reduction? 50%. Some attorneys charged hours using overly broad descriptions of their time. Reduction? 50%. Meanwhile on other occasions attorneys used vague or meaningless descriptions of service. Reduction? 50%. Finally, some entries charged unreasonable amounts of time for simple tasks. Reduction? You guessed it – 50%. Taken together, the Special Master's piecemeal reductions add up to an overall reduction of almost exactly one half the initial lodestar: instead of the $950,000 lodestar, the Special Master recommended an award of $450,000.

(continued on page 296)

(continued from **Expert's Corner,** page 295)

One needn't quarrel with the Special Master's supposition that the lodestar was errant to marvel at his conclusion that each error mandated the same penalty. Was each error of precisely the same magnitude? Was the Special Master limited to the choice between only two options: approval or 50% reduction? Were there reasons 50% was chosen? The Master's report supplies no answers to these inquiries. But in that opacity, he has good company.

2. In *In re Top Tankers, Inc. Securities Litigation,* 2008 WL 2944620 (S.D.N.Y. 2008), the plaintiffs were a class of shareholders of Top Tankers Inc. who claimed the company had improperly accounted for some $50 million dollars paid to another company as part of a sale-leaseback agreement. Initially, plaintiff's complaint contained allegations of self-dealing on the part of Top Tankers' executive officers, but these charges were dropped shortly after the defendant filed a motion to dismiss. The parties settled the remaining accounting claim for $1.2 million.

Judge Colleen McMahon declined to grant plaintiff's counsel their requested 25% percent fee, cutting the award to 10% of the settlement amount. As her primary rationale, the judge cited counsel's actions in filing and then withdrawing the self-dealing claims against Top Tanker's executive officers, summarizing her objections as:

> [P]laintiff put defendant to tremendous expense, abandoned most of the significant allegations of wrongdoing as soon as they were challenged, then settled the case rather than take the quite modest amount of court-ordered discovery that would either have proven or disproven the core remaining allegation in the lawsuit. I am thus unwilling to award counsel 25% of the settlement.

Id. at *13.

Judge McMahon's only other explanation, if explanation it is, was to rely on the venerable wisdom of one Kenny Rogers: noting that Lead Counsel's significant experience meant that they "know when to hold 'em and know when to fold 'em." Judge McMahon concluded that, "An award of 10% of the total recovery will be enough to compensate for that knowledge."

The judge seemed particularly incensed that plaintiff's counsel characterized the amended complaint as minimal, when in fact significant charges were dropped, and by the fact that only 400 pages of documents were ever reviewed. The court assumed that the defendant settled solely for the "nuisance" value, writing that "Lead Counsel accomplished very little for this class." As further evidence, Judge McMahon noted that Counsel's lodestar ($1,077,409) was about the same size as the settlement itself.

Fair enough (I assume), but from that, the Court simply concludes: "On the whole, the court is convinced that 10% of the settlement is sufficient for a fee award." *Id*. at 14. Judge McMahon's only other explanation, if explanation it is, was to rely on the venerable wisdom of one Kenny Rogers: noting that Lead Counsel's significant experience meant that they "know when to hold 'em and know when to fold 'em." *Id*. at 16. Judge McMahon concluded that, "An award of 10% of the total recovery will be enough to compensate for that knowledge." *Id*.

Kenny Rogers may be doing some work for the court here but whatever work he is doing does not explain how the court came up with the 10% figure. The reduction from 25%-10% is, I concede, a 60 (not 50)% reduction

(continued on page 297)

(continued from **Expert's Corner,** page 296)

in the fee request, but one is tempted to conclude that if half of 25% were not such an awkward number, the court would have reduced the award by precisely 50%. In any case, the particular reduction imposed by the court seems arbitrary not because the judge failed to explain her reasons for a reduction but rather because she failed to provide any reason for this reduction.

3. In *Barfield v. N.Y. City Health & Hosps. Corp.*, __ F.3d __, 2008 WL 3255130 (2nd Cir. 2008), the court reviewed the district court's award of attorney's fees in a case brought under the Fair Labor Standards Act ("FLSA"). The plaintiff was a certified nursing assistant who worked for the defendant Bellevue Hospital through three different referral agencies. Although she never worked more than forty hours per week through any one of the agencies, when combined her hours worked through all three agencies often totaled more than forty. The plaintiff sought compensation from Bellevue for overtime pay she had never received. Plaintiff's counsel also sought class certification under FLSA for the class of all similarly situated employees. Although the district court awarded summary judgment on the named plaintiff's claims, it did not certify the putative class.

The plaintiff's damages amounted to less than $2,000 but plaintiff's counsel requested over $300,000 in attorney fees. U.S. District Judge Jed Rakoff slashed the fee award in a two-pronged attack affirmed by the Second Circuit. First, the court performed its own lodestar analysis, arriving at the figure of $100,000. Second, the district court reduced its own lodestar figure by 50%, thus arriving at a total award of about $50,000.

Here again we see the magic 50% figure appearing enigmatically in the middle of a judicial opinion. Just how did the district court in Barfield arrive at the same approximate percentage reduction we saw in both Newmont and Top Tankers?

Here again we see the magic 50% figure appearing enigmatically in the middle of a judicial opinion. Just how did the district court in *Barfield* arrive at the same approximate percentage reduction we saw in both *Newmont* and *Top Tankers*? This time, the court pointed to counsel's failure to successfully certify a FLSA class of similarly situated employees at Bellevue. Class certification had been, in the court's view, the primary goal of the litigation. Because plaintiff's counsel had failed to achieve their primary goal, they were not entitled to the full amount of the lodestar calculation. But why should the reduction be 50% in particular? Here's the trial court's reasoning:

> While the Court fully appreciates the importance of encouraging civil rights litigants to pursue their claims and does not believe that the very limited monetary value of plaintiff's claim (under $2,000) undermines the significance of plaintiff's success on her individual claim, the Court also believes that her limited success in the litigation as a whole justifies a further reduction in the fee award. To award the full amount would be tantamount to awarding a fee as if plaintiff had prevailed on her collective action motion, a result which would hardly encourage counsel to vigorously litigate such motions and could encourage counsel to bring them even when there is little basis for doing so. Accordingly, the Court determines that a fifty percent reduction in the lodestar amount is appropriate.

2006 WL 2356152 at *3.

What's of particular interest is that in this case plaintiff's counsel suggested a different method for calculating a reduction, if one were to be assessed: simply subtract from plaintiff's lodestar the number of hours expended on the unsuccessful certification effort.

(continued on page 298)

(continued from **Expert's Corner,** page 297)

There is an obvious reason for using the 50% figure – it is simultaneously simple, painful, and Solomon-esque.

While 50% is thus understandable, it is also a blunt instrument not calibrated in any way to the particular abuses allegedly at hand.

But the Second Circuit rejected this argument, simply holding that the district court's 50% approach was not an abuse of discretion.

In sum, the *Barfield* courts, like the master in *Newmont* and the judge in *Top Tankers*, provided reasons for a reduction without providing a case for *this particular* reduction.

* * *

Assuming that in each of the three cases counsel did engage in some activity that arguably justified some reduction the fee award, how much should the courts have reduced their fees? There is an obvious reason for using the 50% figure – it is simultaneously simple, painful, and Solomon-esque (though it's worth remembering that King Solomon never actually cut the baby in half: he only threatened to do so to invoke the passion of its real mother). While 50% is thus understandable, it is also a blunt instrument not calibrated in any way to the particular abuses allegedly at hand. While shoddy timekeeping, abusive pleading, and failure to win class certification are all offenses, they are not necessarily each offenses that warrant the same sanction nor warrant that same sanction each time they arise. It is true that one can imagine a penalty regime that penalizes different offenses similarly – for instance, jaywalking, littering, and driving with an expired license may all carry a $50 penalty. What's more difficult to imagine, though, is a penal system that penalizes all offenses equally. It is also true that there are ready alternatives – not only could different percentages be employed depending upon the quality of the problem, but, as plaintiff's counsel in *Barfield* demonstrated, there are also other alternatives, such as hour-based reductions rather than percentage based reductions.

The blanket 50% approach is nothing to make a federal case over – as penalty regimes go, it makes the point, albeit rather bluntly. What warrants my attention here is simply the disjuncture that these fees award decisions present: a judge painstakingly combs over every hour of counsel's time and then, without even a moment of apparent self-consciousness, that same judge administers a similarly blunt and un-careful solution. If the penalty should fit the crime, then the particular penalty for laxness ought to be less breezily administered.