

DRAFTING ATTORNEY FEES ORDERS TO WITHSTAND AN APPEAL TO THE NEVADA SUPREME COURT

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As I was waiting for my motion to be called in a recent District Court hearing, the presiding judge informed the attorneys in her courtroom that she wanted the attorney fees orders submitted for her signature to include an itemization of various factors. The judge explained that even when cases are affirmed on appeal, the attorney fees portion of the appeal is sometimes reversed due to careless drafting of the order or failure of the parties to present mandatory factors for an award of fees. Although various elements should go into an award of attorney fees, it is not uncommon to see language that does not even state the basis for the award, such as, “Plaintiff’s motion for attorney fees is hereby granted.” While the Supreme Court can sometimes review the record to support such bare language, the better practice is to include, within the order, all of the necessary factors to support the award of attorney fees.

Taking into account the judge’s counsel, this article discusses the various mandatory elements that should be present when drafting an attorney fees order, including a stated basis for granting or denying attorney fees, the mandatory *Brunzell* factors and the *Beattie/Yamaha* factors when an offer of judgment is the basis of the award of attorney fees. When following these guidelines, the attorney fees order has a better chance of withstanding an appeal to the Nevada Supreme Court.

Stated Basis for Granting or Denying Attorney Fees

At the end of a case, when a motion for attorney fees is filed, the litigation has usually been contentious. But, sometimes attorneys run out of steam when drafting the attorney fees order. It is not uncommon to see language that does not even state the basis for the fees award, such as “Plaintiff’s motion for attorney fees is hereby granted.” When reviewing such bare orders granting attorney fees, the Nevada Supreme Court has stated, “The failure of a district court to state a basis for the award of attorney fees is an arbitrary and capricious action and, thus, is an abuse of discretion.”¹ Of course, if there was only a single basis for which attorney fees were requested, the Supreme Court can infer the basis for the award of attorney fees.² But, a simple statement of the basis for the award in the order itself can save the

Supreme Court the trouble of searching the record to find support for the order.

The same reasoning would seem to apply to an order denying a request for attorney fees. In fact, in older Nevada Supreme Court opinions, the court required district court judges to articulate the reasons behind denying requests for attorney fees.³ More recently, the Supreme Court has confirmed the requirement for inclusion of a stated basis for an award of attorney fees, but the court has also relaxed the requirement for such a stated basis when the order denies attorney fees.⁴ Despite the court's recent position, it is better practice to put all the necessary information in the order, to allow for a meaningful review on appeal. Otherwise, the Supreme Court will have to look through the record to find supporting information that could have been included in the written order.

The Mandatory *Brunzell* Factors

Judges always retain the right to determine a reasonable amount of attorney fees.⁵ In determining that reasonable amount, the district court must consider and weigh the *Brunzell* factors, which include the advocate's professional qualities, the nature of the litigation, the work performed and the result.⁶ The Supreme Court has repeatedly identified the requirement to weigh these factors as mandatory, but it has also stated that the attorney fees order does not necessarily have to reflect the district court's reasoning as to these factors.⁷ While the court will look to the record to support the district court's reasoning of the *Brunzell* factors, the better practice is to include that information in the written order. Otherwise, the Supreme Court may not find the relevant information, and the appeal could be remanded for clarification.

The *Beattie/Yamaha* Factors When an Offer of Judgment Is the Basis for Attorney Fees

Just as a consideration of the *Brunzell* factors is mandatory for all awards of attorney fees, a consideration of the *Beattie/Yamaha* factors is mandatory for awards of attorney fees based upon an offer of judgment.⁸ When awarding attorney fees based upon an offer of judgment, the district court must consider:

1. Whether or not the plaintiff's claim was brought in good faith;
2. Whether or not the defendant's offer of judgment was reasonable and in good faith in both timing and amount;
3. If the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or made in bad faith; and

4. If the fees sought by the offeror are reasonable and justified in amount.⁹

If, however, the plaintiff is the prevailing offeror, the first *Beattie* factor is, instead, treated as the *Yamaha* factor, which requires the district court to consider whether or not the defendant's defenses were litigated in good faith.¹⁰ Although a consideration of the *Beattie/Yamaha* factors is mandatory, the Supreme Court has not strictly required the analysis to be included in the written order.¹¹ Instead, the Supreme Court can review the analysis contained within the record. Once again, however, if this information is readily available, it should be included in the written order, since the Supreme Court's review process should not be unnecessarily prolonged.

In summary, the drafting of the attorney fees order should include a stated basis for the award, a weighing of the *Brunzell* factors and a weighing of the *Beattie/Yamaha* factors, if applicable. By following these guidelines, attorneys will not find themselves in the awkward position of winning an appeal but losing on the attorney fees issue due to a failure to provide the relevant information. ■

- 1 See *Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998) (citing *Integrity Ins. Co. v. Martin*, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989)).
- 2 Cf. *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049–1050, 881 P.2d 638, 643 (1994).
- 3 See *Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 650–651, 503 P.2d 1219, 1221 (1972); see also *Pandelis Constr. Co., Inc. v. Jones-Viking Assocs.*, 103 Nev. 129, 131–132, 734 P.2d 1236, 1237–1238 (1987).
- 4 See *Stubbs v. Strickland*, 297 P.3d 326, 330, n. 1 (Nev. 2013) (citing *Argentina Consol. Mining Co. v. Jolley Urga*, 125 Nev. 527, 540, 216 P.3d 779, 788, n. 2 (2009)).
- 5 See *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864–865, 124 P.3d 530, 548–549 (2005) (citing *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 350, 455 P.2d 31, 33 (1969)).
- 6 *Id.*
- 7 See *Haley v. Dist. Ct.*, 273 P.3d 855, 860 (Nev. 2012).
- 8 See, e.g., *RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41, 110 P.3d 24, 28 (2005).
- 9 *Beattie v. Thomas*, 99 Nev. 579, 588–589, 668 P.2d 268, 274 (1983).
- 10 See *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).
- 11 See *Wyeth v. Rowatt*, 244 P.3d 765, 786, n.14 (Nev. 2010).



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