Journal of Contemporary Law
1997

*379 THE RECOVERY OF ATTORNEY FEES IN UTAH: A PROCEDURAL PRIMER [FN1] FOR PRACTITIONERS

James E. Magleby [FNa1]

WESTLAW LAWPRAC INDEX
GPR -- General Practice Approaches, Articles & Issue

I. INTRODUCTION

In 1984, the Utah Law Review published a symposium [FN2] summarizing the state of Utah law [FN3] on the recovery of attorney fees. [FN4] The symposium contained a brief discussion of the procedural aspects of the process. [FN5] Although Utah law on the subject has developed substantially since 1984, the procedural aspects of the recovery of attorney fees are often overlooked by courts and practitioners alike. [FN6] Accordingly, this Article attempts to reduce the confusion by providing ***380** an overview of the procedural aspects of pleading and recovering attorney fees in Utah and surviving appellate challenge to the award. [FN7]

II. PROCEDURAL REQUIREMENTS

A. Pleading

Although it may appear obvious, practitioners have, on occasion, failed to request an award of attorney fees in the pleadings. Such an omission can have dire consequences. A party who fails to raise the issue of attorney fees until late in the proceedings may be precluded from recovering any fees. This position was first taken in Leger Construction, Incorporated v. Roberts, Incorporated, [FN8] where the Utah Supreme Court declined to award attorney fees because the statute under which fees were sought was not pled in the original pleadings. [FN9] The court noted that, at least with regard to a request for attorney fees under statutory authority, "one entitled [to attorney fees under a statute], in fairness, should make his claim known in his pleadings." [FN10] Although this statement was couched as mere observation, [FN11] the rule in practice is that attorney fees which are not requested in the pleadings will not be awarded. [FN12]

***381** However, if the issue of attorney fees is raised before the trial court and the other party is placed on notice, Utah courts appear willing to interpret the rules of procedure liberally to allow a fee award. In Palombi v. D. C. Builders, [FN13] the Utah Supreme Court upheld an award of attorney fees under the mechanics lien statute, although the issue had not been raised in the original complaint. [FN14] In doing so, the Utah Supreme Court ruled:

> The fact that there was no specific pleading in that regard does not preclude such an award. It is indeed important that the issue be raised and that the parties have full opportunity to meet it. But when that is done, our rules indicate that there shall be liberality of procedure to reach the result which justice requires. Rule 1(a), [Utah Rules of Civil Procedure], provides that they shall be "liberally construed" to secure a "just ... determination of every action and Rule 54(c)(1) provides" ... every final judgment shall grant the relief to which the party ... is entitled, even if the party has not demanded such relief in his pleadings. [FN15]

Other rules have been similarly construed. Rule 8(e) of the Utah Rules of Civil Procedure contains the "notice pleading" rule, which provides that "no technical forms of pleadings or motions are required." [FN16] This rule has been

applied to allow recovery of attorney fees where the opposing party was "clearly on notice" that fees were ***382** sought, albeit by imperfect pleading. [FN17] Trial courts have discretion to take evidence on attorney fees at trial under Utah Rule of Civil Procedure 15(b), [FN18] even if the parties did not raise the issue in the pleadings. [FN19] Nor do the pleadings limit the amount of fees recoverable, [FN20] unless they are awarded pursuant to a default judgment. [FN21]

From these cases, it appears that where a party has failed to request attorney fees in the initial pleadings, as long as "the issue be raised and ... the parties have full opportunity to meet it," [FN22] particularly where the opposing party is "clearly on notice," [FN23] Utah courts will probably allow recovery of attorney fees despite a failure to conform to a specific pleading format. Therefore, a practitioner who has inadvertently failed to plead attorney fees, or is not entitled to do so until the case has progressed, [FN24] should (1) take steps to bring the ***383** issue before the court, and (2) place opposing counsel on notice that fees are at issue.

In pleading attorney fees, practitioners must decide the grounds upon which attorney fees will be sought, whether they be statutory, contractual, or equitable. [FN25] Next, the practitioner must decide the appropriate method for pleading the grounds upon which attorney fees are sought. The practice in Utah varies, with some preferring to request attorney fees in the prayer for relief, rather than as separate claim. [FN26] Intuitively, this may make sense as attorney fees are usually awarded after the conclusion of the lawsuit, [FN27] in temporal proximity to an award of damages. Another approach is to plead attorney fees as a separate claim. [FN28] This method seems particularly appropriate where the request is based upon a statute or other rule which requires the party requesting fees to produce proof on discrete issues. [FN29]

***384** B. Burden of Proof

Once recovery of attorney fees is allowed, [FN30] "[a] party requesting an award of attorney fees has the burden of presenting evidence sufficient to support the award." [FN31] A party which does not provide such evidence, even if indisputably entitled to recover attorney fees, may not recover at all, [FN32] even if there is no disputed issue of material fact. [FN33]

Various types of evidence may be sufficient to meet this burden. Generally, "[s]ufficient evidence should include the hours spent on the case, the hourly rate charged for those hours, and the usual and customary rates for such work." [FN34] This evidence should probably be submitted by affidavit, [FN35] although testimony [FN36] by counsel ***385** for the party requesting attorney fees is allowed. [FN37] Practitioners should be wary of reliance solely upon their own opinion, however, because "[e]ven [if the] evidence is undisputed, the trial judge [is] not necessarily compelled to accept such self-interested testimony whole cloth and make ... an award." [FN38]

The simplest way for a practitioner to meet the initial evidentiary burden is to file an affidavit in compliance with Rule 4-505 of the Utah Code of Judicial Administration. Rule 4-505, designed "[t]o establish uniform criteria and a uniform format for affidavits in support of attorney [[[] fees," [FN39] provides:

> (1) Affidavits in support of an award of attorneys fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services.
>
> (2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed. [FN40]

***386** Although Rule 4-505 does not require the inclusion of an hourly rate for each attorney working on the case, [FN41] such information should probably also be included as "an hourly rate would likely be helpful to the court." [FN42]

Once the initial burden of production is met, opposing counsel has the opportunity to investigate the evidence supporting the claimed fees. Although the procedure is meant to be informal, practitioners opposing an attorney fee award may challenge the evidence, and the trial court is obligated to act "so that procedural fairness will be accorded one who opposes a requested award." [FN43] The Utah Supreme Court has summarized its position regarding the nature of this process:

> Although we do not intend to turn fee award determination into satellite litigation with full scale discovery, thereby increasing the overall cost of litigation, an adversary-type mechanism through which an opponent to a fee request can examine the accuracy of factual assertions underlying the request must be available. Usually, it will be sufficient if the opponent is provided access to supporting documents such as attorney time records. If necessary, however, a party should have an opportunity to contest the accuracy of the documents by either counter-affidavit or cross-examination of the opposing attorney before the court. Full-blown discovery should rarely be necessary. [FN44]

Accordingly, practitioners should take advantage of the procedural protections, and investigate any a fee request. In particular, inquiry should be conducted to insure that the requested fees have been ***387** properly allocated, [FN45] and meet the evidentiary [FN46] and reasonableness [FN47] requirements discussed in this Article. Failure to investigate, and dispute, at least some of the evidence presented in support of the request for attorney fees creates the risk of summary adjudication in favor of the party requesting the fees. [FN48] However, party failure to provide the court with sufficient evidence, or failure to properly allocate between recoverable and non-recoverable fees, may result in a denial of the fee award altogether. [FN49]

C. Allocation of fees

Practitioners should also be aware of the rule [FN50] that "[a] party is ... entitled only to those fees resulting from its principle cause of action for which there is a contractual (or statutory) obligation for attorney [[[] fees." [FN51] In other words, the party requesting attorney fees is often entitled to fees incurred in pursuing only some portions of the lawsuit, as authorized by statute, contract, or equity. For example, attorney fees awarded under the terms of a contract may not allow recovery of all the fees generated in the lawsuit. [FN52] Similarly, attorney fees awarded under a statute will not allow an award of fees incurred in pursuit of common-law, or other statutory claims. [FN53]

***388** In the event a party is entitled to only some of the legal fees incurred, the practitioner requesting attorney fees has the burden of allocating fees between the various claims. The Utah Supreme Court stated:

> One who seeks an award of attorney fees must set out the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees. [FN54]

A party who fails to differentiate between recoverable and unrecoverable attorney fees may forfeit the award entirely, [FN55] at the trial court's discretion. [FN56]

D. Reasonableness of Fees

Once the initial evidentiary burdens are met, [FN57] the trial court must determine what constitutes a "reasonable" attorney fee. This is the issue upon which practitioners will probably find the majority of their energy focused once an award of fees is made. [FN58]

In determining a reasonable attorney fee, Utah trial courts have considered a number of factors, although it is important to note that "[t]he question of what is a reasonable attorney[] fee in a ***389** contested matter is not necessarily controlled by any set formula." [FN59] Among others, [FN60] Utah courts have considered the following factors: [FN61]

1. The difficulty of the litigation;
2. The efficiency of the attorneys in presenting the case;
3. The fee customarily charged in the locality for similar services;
4. The amount involved in the case;
5. The result attained;

6. The expertise and experience of the attorneys involved; [FN62]
7. The amount in controversy;
8. The extent of services rendered;
9. "[O]ther factors which the trial court is in an advantaged position to judge;" [FN63]
10. The relationship of the fee to the amount recovered;
11. The novelty and difficulty of the issues involved;
12. The overall result achieved; and
13. The necessity of initiating the lawsuit. [FN64]

***390** In addition, although never explicitly listed as a factor, the courts have considered whether the opposing party pursued an "inconsistent and unmeritorious" litigation strategy, [FN65] or acted to "complicate[] and make more difficult" the discovery process. [FN66]

However, in Dixie State Bank v. Bracken, [FN67] the Utah Supreme Court recognized the confusion created by Utah case law, [FN68] and "in order to foster consistent and equitable fee awards ... constructed 'practical guidelines' for analyzing the reasonableness of attorney fees, by consolidating the approaches advocated in then-existing case law into a simple four-step procedure." [FN69] The court announced the general rule that although many "factors may be explicitly considered in determining a reasonable fee, as a practical matter the trial court should find answers to four questions:" [FN70]

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility? [FN71]

Accordingly, at minimum, practitioners who seek an award of ***391** attorney fees should argue these four factors before the trial court to withstand appeal. If additional factors are to be argued, practitioners should alert the court that they are properly considered under the fourth step of Dixie. [FN72]

The Dixie court's attempt to clarify the appropriate procedure for determining reasonable attorney fees has not, however, eliminated the confusion over the issue. Despite the Dixie court's attempt to create a uniform format for considering the reasonableness of an award of attorney fees, Utah courts have not demanded rigorous adherence to the four factors, [FN73] even as recently as 1996. [FN74] At first glance, this may suggest that so long as the trial court's award is based upon consideration of some mix of factors, and is supported by the evidence, it will withstand review. This is not, however, always the case. [FN75]

***392** The Utah Court of Appeals has addressed this apparent deviation, noting that Cabrera "is often cited for the same principles as Dixie." [FN76] Although it is not immediately obvious from a comparison of the cases, [FN77] the Quinn court concluded that both Cabrera and Dixie "ultimately recommend consideration of the same factors." [FN78] However, the Quinn court went on to apply Dixie, "both because it was decided after Cabrera, and because we believe its four step approach is simpler to apply, and will therefore lead to more consistently correct results." [FN79]

The confusion is enhanced by occasional reliance by Utah courts upon Rule 4- 505 of the Utah Code of Judicial Administration to affirm the reasonableness of attorney fees. Although Rule 4-505 appears designed to facilitate the submission of evidence regarding attorney fees, and does not specifically [FN80] call for practitioners to submit evidence on all four factors enunciated in Dixie, [FN81] practitioners who comply with the rule can argue that under Utah law, they have offered sufficient evidence of reasonableness to withstand appeal. [FN82]

***393** In addition, practitioners should take care that the trial court does not improperly modify a request for attorney fees based upon considerations disfavored by Utah appellate courts. It should be noted that attorney fees in excess of a damages award are not per se unreasonable. [FN83] Furthermore, "what an attorney bills or the number of hours spent on a case is not determinative." [FN84] Finally, "although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor." [FN85] Accordingly, if the trial court appears inclined to base an award of attorney fees on one or more of these factors, a practitioner should encourage the trial court to do so as part of its consideration of the four factors enumerated in Dixie.

Because of the inconsistent manner in which the reasonableness analysis is conducted in Utah case law, practitioners face the dilemma of how to proceed in presenting reasonableness arguments. The best possible approach appears to be that taken in Quinn, which suggests that practitioners should urge trial courts to explicitly consider, at the minimum, the first three factors enunciated in Dixie. The trial court should then undertake an evaluation of the fourth Dixie factor, and determine if other evidence would be helpful. If the answer is affirmative, then any of the additional factors may be considered. [FN86]

***394** E. Findings

Once an award of attorney fees has been made, the trial court must make written findings of fact explaining the grounds for the award, and why the amount awarded constitutes a reasonable fee. The only established exception [FN87] to this rule under Utah law occurs when all the relevant facts are undisputed, as in a summary judgment motion. [FN88] Moreover, even in this context, practitioners should be wary, as it takes little to create a disputed issue of fact. [FN89] However, trial courts often fail to make findings in support of an award of attorney fees, [FN90] or make findings which consider the ***395** appropriate factors, [FN91] requiring the case to be remanded after appeal. Practitioners who prevail at trial should therefore take care that the trial court articulates the grounds for an award of attorney fees in a manner which will withstand appellate review.

Findings are required in almost every situation where attorney fees have been contested. Utah appellate courts "have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award. Findings are particularly important when the evidence on attorney fees is in dispute ...." [FN92] Detailed findings are also particularly important in complex cases. [FN93] Trial courts have also shown a tendency to reduce attorney fee awards sua sponte, or in the face of uncontested evidentiary submissions. [FN94] In this event, the necessity of detailed findings is even more imperative.

> Where the evidence supporting the reasonableness of requested attorney fees is both adequate and entirely undisputed, as it was here, the court abuses its discretion in awarding less than the amount requested unless the reduction is warranted by one or more of the factors described in [[[Dixie].... To permit meaningful review on appeal, it is necessary that the trial court, on the record, identify such factors and otherwise explain the basis for its sua sponte reduction. [FN95]

***396** Accordingly, in order for almost any award of attorney fees to survive appeal, the trial court must enter findings in support of the award. Practitioners, therefore, should encourage the trial court to make findings regarding the award. Although it may be counter-intuitive, this is particularly true in cases where a party does not oppose a fee request, but has the fee reduced in their favor by the trial court. Utah appellate courts are especially demanding about findings in this situation.

F. Sufficient Findings

Although it is clear that trial courts must make findings in support of a fee award, the amount of detail required is not as obvious. The exact amount of detail required to survive appellate review is difficult to determine from a survey of Utah case law, as each decision seems to involve different reasoning. Some decisions have reached conflicting results. For example, one Utah Supreme Court Justice has upheld a reduction in attorney fees based only upon an oral ruling from the bench that the fees were "excessive." [FN96] However, the remainder of the court was not in agreement, [FN97] and this position was inconsistent with that taken by the Utah Court of Appeals two years earlier. [FN98]

Despite the confusion created by such comparisons, the courts have offered some general guidance. It appears that, at least in the context of a sua sponte reduction of fees, merely listing some of the factors involved in the determination of "reasonableness," without ***397** more, is not adequate. For example, in Selvage, [FN99] the trial court's entire findings merely stated that the fee award was based upon: "'the amount in dispute, the complexity of the issues presented, the hourly rates charged by the plaintiffs' attorneys and the total evidence presented at trial.'" [FN100] Although the trial court evaluated some of the factors which could be considered under the fourth Dixie factor, [FN101] and made written findings of fact, the Utah Court of Appeals remanded the case to the trial court to enter more detailed findings, noting that "[s]uch conclusory statements do not satisfy the requirement that awards of attorney fees must be supported by adequate findings of fact." [FN102] The court also noted that "[v]ague statements which require speculation as to the actual reasons behind the ruling are not enough to meet this burden." [FN103] To withstand review, findings should be as detailed as findings supporting a damages award. [FN104] Furthermore, "[t] hese findings must be sufficiently detailed, and include enough subsidiary facts, to disclose the steps by which the trial court's decision was reached." [FN105]

Although Utah case law does little to clarify the exact amount of detail necessary to sustain an award of attorney fees on appeal, it does indicate that practitioners should urge the trial court to make as detailed findings as possible. [FN106] In order to create as thorough a record as possible, practitioners should urge the trial court to make written ***398** findings which track the steps in the decision to award attorney fees. The trial court should therefore make a written record [FN107] which does the following: (1) identify the legal basis for the decision to award attorney fees, whether it be by statute, contract, or equity; (2) identify or acknowledge the evidence submitted by the party or parties requesting fees; (3) identify any evidence offered in opposition to the fee request; (4) identify any allocation issues, and the role they played in the fee award; (5) identify the factors it considered in determining what constitutes a "reasonable" attorney fee; [FN108] and (6) explain how the factors affected the calculation of the amount of the award.

G. Scope of Attorney Fees Request

Utah case law has also partially defined what may be included in an award of attorney fees. The Utah Supreme Court has allowed recovery of fees incurred by paralegals in preparing the case. [FN109] It has similarly upheld a trial court's inclusion of paralegal fees in an award of attorney fees. [FN110] In addition, practitioners should also investigate whether they are entitled to prejudgment interest on attorney fees. [FN111]

Finally, in pro se representations, it should be noted that Utah follows "the general rule that pro se litigants should not recover attorney fees for successful litigation." [FN112] This rule applies even if the pro se litigant is a licensed attorney, [FN113] although one member of the Utah Supreme Court argued in favor of "the position ... that non-attorney pro se litigants may be entitled to an award of attorney fees in appropriate circumstances." [FN114]

***399** III. CONCLUSION

The ability to sustain a recovery of attorney fees is made difficult by the confusing nature of Utah case law on the subject. Because this confusion is shared by both trial courts and practitioners, attorneys who wish to sustain an

award of attorney fees on appeal must first meet the initial burdens of pleading and evidentiary production. Next, the practitioner should encourage the trial court to follow the procedural steps outlined by Utah appellate courts, in particular the consideration of the appropriate factors in making the fee award. Finally, practitioners should urge trial courts to place their reasoning on the record, so that the award will withstand appellate review.

[FN1]. A primer is defined as "a small introductory book on a subject." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 934 (1986). This definition reflects that this article is not meant to be the complete word on its subject, but rather a review of the procedures for recovering attorney fees in Utah.

[FNa1]. Jim Magleby graduated from Swathmore College with honors in 1989, with a major in political science and a minor in history. Mr. Magleby received his J.D. for the University of Utah College of Law in 1995, and was admitted to the Order of the Coif upon graduation. He was admitted to the Utah State Bar in October of 1995. Mr. Magleby is the author of Hospital Mergers and Antitrust Policy: Arguments Against Modification of Current Antitrust Law, 21 THE ANTITRUST BULLETIN 137 (1996) and The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution, 21 J. CONTEMP. L. 217 (1995). Mr. Magleby is also the co-author of a book commissioned by the Utah Bar Foundation, JUSTICES OF THE UTAH SUPREME COURT 1896-1996, consisting of a biographical survey of all past and present Utah Supreme Court Justices. After law school, Mr. Magleby clerked for the Honorable Pamela T. Greenwood of the Utah Court of Appeals for one year. He joined the Salt Lake City office of Jones, Waldo, Hoolbrook & McDonough in 1996. The focus of his practice is litigation.

[FN2]. See 1984 UTAH L. REV. 533-669 (1984).

[FN3]. See Kelli L. Sager Note, Attorney's Fees in Utah, 1984 UTAH L. REV. 553-71 (1984).

[FN4]. The terminology for this phrase varies and has included "attorneys' fees," "attorney's fees," "attorney fee" and "attorney fees." Because the Utah courts seem to have settled upon the nomenclature "attorney fees," this is the phrase used in this article. See, e.g., Salmon v. Davis County, 916 P.2d 890 (Utah 1996).

[FN5]. Sager, supra note 3, at 563-65.

[FN6]. Despite the focus of the 1984 symposium, the issue of attorney fees is often ignored or given only cursory treatment by both practitioners and courts. As the Utah Supreme Court has noted, "[i]n many instances, where the question arises at all, the attorney fee issue is treated as incidental by the appellant, who focuses on more substantial issues, and has accordingly tended to receive the same kind of cursory treatment by us." Dixie State Bank v. Bracken, 764 P.2d 985, 989 n.6 (Utah 1988). This problem is compounded by the often confusing or even contradictory statements in Utah case law. See, e.g., infra notes 96-98 and accompanying text.

[FN7]. Traditionally, Utah appellate courts have "generally reviewed a trial judge's decision on the issue of attorney fees for abuse of discretion." Salmon, 916 P.2d at 892. However, in State v. Pena, 869 P.2d 932 (Utah 1994), the Utah Supreme Court clarified that in some cases the appropriate standard of review would be a mixed question of law and fact, and therefore require a somewhat different standard of review. Id. at 935-39. Since then, the appropriate standard of review for an award of attorney fees has been subject to some debate. Justice Durham now takes the position that "[i]n light of ... [Pena] ... the reasonableness of an award of attorney fees ordinarily presents a question of law, with some measure of discretion given to the trial court in applying the reasonableness standard to a given set of facts." Salmon, 916 P.2d at 892 (Durham, J., lead opinion). However, Justice Durham may be alone in this approach. Id. at 890 (Russon, J., joined by Howe, J., dissenting) (disputing that Pena calls for a change in the standard of review for an award of attorney fees). Id. at 900 (Zimmerman, C.J., concurring "in Justice Russon's articulation of the proper standard of review for a trial court's award of attorney fees ...."). Id. at 900.

[FN8]. 550 P.2d 212 (Utah 1976).

[FN9]. Id. at 215. Attorney fees were also not requested until after judgment was entered, and the request came one day before the time for filing a motion to amend expired. Id. It is unclear from the decision how much weight, if any, the court gave to this consideration.

[FN10]. Id.

[FN11]. The court noted that "[a]lbeit we say in fairness [a request for attorney fees in the pleadings] should be done we need not and do not decide that point." Id.

[FN12]. See, e.g. Christensen v. Farmers Ins. Exchange, 669 P.2d 1236, 1239 (Utah 1983) (denying a request for attorney fees because, in part, "a review of the pleadings on file does not reflect any claim for attorney fees."). Cf. Projects Unlimited v. Copper State Thrift, 798 P.2d 738, 753 n.18 (Utah 1990) (declining to award attorney fees to bank which was statutorily entitled to fees where bank "did not request attorney fees as part of its motion for summary judgment."); Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985) (declining to award attorney fees on appeal where prevailing party "has not sought them").

[FN13]. 452 P.2d 325 (Utah 1969).

[FN14]. However, attorney fees could not have been raised in the original complaint, as the mechanics lien statute was not raised until the defendant contractor raised the statute by filing a counterclaim. Id. at 327. It is unclear from the decision how much weight, if any, the court gave to this consideration.

[FN15]. Palombi, 452 P.2d at 328 (footnote omitted) (emphasis added).

[FN16]. Utah R. Civ. P. 8(e). Other rules call for similar results, although they have not yet been used by Utah courts to allow an award of attorney fees. See, e.g., Utah R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); Utah R. Civ. P. 15(a) ("[A] party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given.") (emphasis added). Id. ("A party may amend his pleading once as a matter of course before a responsive pleading is served," or, if no responsive pleading is allowed, "within 20 days after it is served."); Utah R. Civ. P. 15(d) (allowing filing of supplemental pleadings, noting "[p]ermission [to file a supplemental pleading] may be granted even though the original pleading is defective in its statement of a claim for relief or defense") (emphasis added).

[FN17]. Sears v. Riemersma, 655 P.2d 1105, 1110 (Utah 1982) (allowing party who requested attorney fees in counterclaim, but not in answer, to recover fees incurred in defending lawsuit because the other parties "were clearly on notice that [attorney fees] be awarded in connection with the dismissal of [the] complaint").

[FN18]. Rule 15(b) states, in relevant part:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits.

Utah R. Civ. P. 15. Because it is unlikely that an award of attorney fees would prejudice an objecting party on the merits, a practitioner should almost always be able to argue that the issue of attorney fees may be raised as late as trial. However, the decision is within the trial court's discretion, and care should therefore be taken not to rely upon this approach unless absolutely necessary. See supra note 7.

[FN19]. Redevelopment Agency v. Daskalas, 785 P.2d 1112, 1125 (Utah Ct. App. 1989) (holding that "the trial

court was within its discretion in concluding that the pleadings could be amended to included attorney fees, even though not initially raised in the pleadings") (footnote omitted).

[FN20]. Pope v. Pope, 589 P.2d 752, 753 (Utah 1978) ("[U]nder [Rule 54(c)(1), an award of attorney[] fees in excess of that requested in the pleadings, is allowable where the proof shows the party to be entitled to it."); Ferguson v. Ferguson, 564 P.2d 1380, 1383 (Utah 1977). See also Utah R. Civ. P. 54(c)(1) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings ....").

[FN21]. Pope, 589 P.2d at 753; Ferguson, 564 P.2d at 1383. See also Utah R. Civ. P. 54 (c)(1) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled ...") (emphasis added).

[FN22]. Palombi, 452 P.2d at 328.

[FN23]. Sears, 655 P.2d at 1110.

[FN24]. Such as in Palombi, where plaintiff was not allowed to seek recovery under the mechanics lien statute, but was allowed to recover fees as a prevailing party once defendant raised a counterclaim under the statute. 452 P.2d at 328.

[FN25]. "It has long been established that "[t]he general rule in Utah, and the traditional American Rule, subject to certain exceptions, is that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994). However, recent decisions by the Utah courts may indicate an increased willingness to consider equitable grounds for awarding attorney fees. See id. at 782 (recognizing inherent power of courts to award fees where party acts in bad faith, vexatiously, wantonly, or for oppressive reasons). Id. at 783 (recognizing power of court to award fees under common fund theory). Id. (recognizing power of court to award fees under private attorney general theory). See also Jensen v. Bowcut, 892 P.2d 1053, 1059 (Utah Ct. App. 1995) (affirming an award of attorney fees "based on principles of equity and justice as they relate to the specific circumstances of this case."); Saunders v. Sharp, 840 P.2d 796, 809 (Utah Ct. App. 1992) (noting that "courts may, in some situations, award attorney fees on an equitable basis").

[FN26]. This conclusion is based upon the author's own observations and those of a number of practitioners in Salt Lake City, Utah.

[FN27]. There are exceptions, such as an award of attorney fees for failure to comply with discovery requests, or Rule 11 sanctions. See Utah R. Civ. P. 37(a)(4) ("If the motion [to compel compliance with a discovery request] is granted, the court shall ... require the party or deponent whose conduct necessitated the motion ... to pay ... the reasonable expenses incurred ... including attorney fees ..."); Utah R. Civ. P. 11 ("If a [court paper] is signed in violation of this rule, the court ... shall impose ... an appropriate sanction, which may include an order to pay ... a reasonable attorneys fee").

[FN28]. This conclusion is based upon the author's own observations and those of a number of practitioners in Salt Lake City, Utah.

[FN29]. See, e.g., Utah Code Ann. § 78-27-56 (Supp. 1996) (awarding attorney fees to a prevailing party where action was without merit or brought in bad faith). See also Hermes Assocs. v. Park's Sportsman, 813 P.2d 1221, 1225 (Utah Ct. App. 1991) (requiring proof of three discrete elements before attorney fees may be awarded under § 78-27-56).

[FN30]. After pleading attorney fees, the parties must obviously litigate the right to attorney fees. This step is beyond the scope of this article.

[FN31]. Salmon, 916 P.2d at 893 (quoting Cottonwood Mall Co. v. Sine, 830 P.2d 266, 268 (Utah 1992). This has been the explicit rule in Utah since at least 1945. See Mason v. Mason, 160 P.2d 730, 733 (Utah 1945).

[FN32]. See, e.g., Dixie, 764 P.2d at 988-89; see also Regional Sales Agency, Inc. v. Reichart, 784 P.2d 1210, 1216 (Utah Ct. App. 1989) ("[A]n award made without adequate supporting evidence constitutes an abuse of discretion and must be overruled."); Bangerter v. Poulton, 663 P.2d 100, 103 (Utah 1983) ("[T]he award of the trial court of attorney's fees and certain costs is not supported by any evidence in the record and is reversed.").

[FN33]. "Even if there were no disputed issue of material fact, the summary judgment would not award an attorneys fee without a stipulation as to the amount, an unrebutted affidavit, or evidence given as to the value thereof." Freed Finance Co. v. Stoker Motor Co., 537 P.2d 1039, 1040 (Utah 1975). Therefore, even if the opposing party does not dispute the fee award, practitioners should take care to submit either a stipulation, an affidavit, or other evidence regarding the value of the requested attorney fees. In the event evidence is undisputed, a party may be entitled to recover attorney fees by summary disposition. See infra note 88 and accompanying text.

[FN34]. Salmon, 916 P.2d at 893 (quoting Cottonwood Mall Co. v. Sine, 830 P.2d 266, 268 (Utah 1992)).

[FN35]. Aside from the obvious advantages of submitting a fee request in writing, rather than by oral testimony, a written fee request reduces the chance that counsel requesting attorney fees will be subject to cross examination. However, a party may be entitled to cross examine regardless of the method chosen to submit the evidence. As the Utah Supreme Court has noted, "[i]f necessary ... a party should have an opportunity to contest the accuracy of the documents by either counter-affidavit or cross-examination of the opposing attorney before the court." Cottonwood Mall, 830 P.2d at 268-69.

[FN36]. Associated Indus. Dev. v. Jewkes, 701 P.2d 486, 489 (Utah 1984) (finding "trial court abrogated its responsibility to undertake a full inquiry" of evidence in support of attorney fees by refusing to receive testimony by attorney for party requesting fee); Stubbs v. Hemmert, 567 P.2d 168, 170 (Utah 1977) (finding trial court's award of attorney fees was reasonable based, in part, upon testimony of plaintiff's attorney). See also Associated Indus. Dev., 701 P.2d at 488-89. ("Logically, the attorney claiming the fee ought to be a valuable and relevant source of information concerning the composition of that fee.") But see Paul Mueller Co. v. Cache Valley Dairy Assoc., 657 P.2d 1279, 1287-88 (Utah 1982) (noting that where "detailed billing records" were submitted by stipulation, trial court abused its discretion in relying only upon statement of counsel at post-trial hearing).

[FN37]. A practitioner should not, however, object on the grounds that counsel cannot act as both a witness and an attorney in a case. First, such an argument is incorrect. See Utah Rules of Professional Conduct 3.7(a)(2) (allowing attorney to testify where "[t]he testimony relates to the nature and value of legal services rendered in the case."). See also Associated Indus. Dev., 701 P.2d at 489 n.1 (allowing attorney to testify regarding attorney fees under previous version of Rules of Professional Conduct). Second, if the trial court erroneously sustains the objection, the appellate court may find that "counsel cannot successfully object at trial to [[[opposing] counsel's testimony about his fee and then complain on appeal that plaintiff has failed to prove the reasonableness of the fee." Id. at 489 (declining to reverse award of attorney fees for insufficient evidence where attorney for party requesting fees was not allowed to testify because opposing counsel objected on grounds that "attorneys are not permitted to testify in cases in which they represent" a party).

[FN38]. Beckstrom v. Beckstrom, 578 P.2d 520, 523-24 (Utah 1978). See also Regional Sales Agency, 784 P.2d at 1215 ("[A] trial court is not compelled to accept the self-serving testimony of a party requesting attorney fees even if

there is no opposing testimony."); Paul Mueller Co., 657 P.2d at 1287-88 (noting "it is not good practice to make an award [of an attorney fee] predicated only upon [the] opinion [of a party's attorney].") (quoting 59 C.J.S. MORTGAGES § 812(e)(2), at 1554.). But see infra note 88 and accompanying text (discussing propriety of summary judgement motion for attorney fees where no disputed issue of material fact).

[FN39]. UTAH CODE JUD. ADMIN. R4-505.

[FN40]. Id.

[FN41]. In LMV Leasing, Inc. v. Conlin, 805 P.2d 189, 198 (Utah Ct. App. 1991), the Utah Court of Appeals noted the hourly rate for each attorney is not required, and that "[s]o long as the legal basis of the award, the nature of the work performed by the attorneys, the number of hours spent to prosecute the claim, and some affirmation that the fees charged are reasonable in light of comparable legal services are included in the affidavit submitted by the party requesting the fees, there is no failure to comply with Rule 4-505(1)." Inconsistent statements have also been made in this area. Although perhaps distinguishable because the court was not discussing Rule 4-505, the Utah Supreme Court has apparently contradicted the statement in LMV Leasing, by noting that "[s]ufficient evidence should include the hours spent on the case, the hourly rate charged for those hours, and the usual and customary rates for such work." Salmon, 916 P.2d at 893 (quoting Cottonwood Mall, 830 P.2d at 268). (emphasis added).

[FN42]. Id.

[FN43]. Cottonwood Mall, 830 P.2d at 269.

[FN44]. Id. at 268-69.

[FN45]. See supra Section IIG.

[FN46]. See supra IIB.

[FN47]. See infra Section II D.

[FN48]. See infra note 88 and accompanying text. "Specifically, where attorney fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, as a matter of law, that (1) the party is entitled to the award and (2) the amount awarded is reasonable." Taylor v. Estate of Taylor, 770 P.2d 163, 169 (Utah Ct. App. 1989).

[FN49]. See supra notes 32-33 and accompanying text; see generally Section IIC.

[FN50]. The allocation issue is treated as a Separate rule by the courts, independent of the reasonableness analysis discussed in section IID. See infra notes 48-51. But see Mountain States Broad. v. Neale, 776 P.2d 643, 649 n.10 (Utah Ct. App. 1989) (noting that "a reasonable fee" will only compensate a party for those fees expended upon issues where the party prevailed).

[FN51]. Utah Farm Prod. Credit Assoc. v. Cox, 627 P.2d 62, 66 (Utah 1981).

[FN52]. See, e.g., Paul Mueller Co., 657 P.2d at 1288 (allowing only those fees incurred in defense of the main causes of action, but not those incurred in pursuit of counterclaim). Stubbs, 567 P.2d at 170 n.11 (refusing to award any attorney fees incurred in trial where contractual liability for fees was limited to collection of debt and these claims were settled before trial). Sears, 655 P.2d at 1110 (upholding trial court's reduction in fees where trial court found "'a goodly portion of the time' would have been directed to activities other than simply defending against ... the claim.") (citing Beckstrom, 578 P.2d at 520); Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) ("[A] party is

entitled only to those fees attributable to the successful vindication of contractual rights within the terms of the agreement").

[FN53]. See, e.g., Graco Fishing v. Ironwood Exploration, 766 P.2d 1074, 1079-80 (Utah 1988) (remanding for allocation of attorney fees between those incurred in pursuit of successful claims under one statute, and unsuccessful claims pursued under another statute).

[FN54]. Cottonwood Mall, 830 P.2d at 269-70.

[FN55]. Utah Farm Prod. Credit Assoc., 627 P.2d at 66 (finding no abuse of discretion in trial court's refusal to award any attorney fees where party requesting fees failed to distinguish between time "spent prosecuting its complaint and the portion spent in defending the counterclaim"); Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252, 1266 n.15 (Utah Ct. App. 1996) (noting that "it may be proper to deny a request for attorney fees if the requesting party fails to allocate in accord with the directive of Cottonwood Mall").

[FN56]. "[S]uch a decision is within the trial court's discretion, rather than being a strict legal requirement." Selvage, 910 P.2d at 1266 n.15 (citing Schafir v. Harrigan, 879 P.2d 1384, 1394 (Utah Ct. App. 1994)).

[FN57]. It should be reiterated that if the evidence in support of an award of attorney fees is insufficient, the trial court's finding that an attorney fee award was "reasonable" will not withstand appeal. "When the evidence presented is insufficient, the court's evaluation of [the reasonableness of] those fees will also be insufficient." Cottonwood Mall, 830 P.2d at 269.

[FN58]. "Perhaps the most frequently litigated issue involving attorney [[[] fees in Utah is that of determining what constitutes a 'reasonable fee.'" Sager, supra note 3, at 563.

[FN59]. Wallace v. Build, Inc., 402 P.2d 699, 701 (Utah 1965). See also Dixie, 764 P.2d at 989 ("[W]hat constitutes a reasonable fee is not necessarily controlled by any set formula").

[FN60]. The factors considered by trial courts have varied over time. For example, trial courts once considered "whether the acceptance of employment ... will preclude the lawyer's appearing for others in cases likely to arise out of the transaction," "will involve the loss of other employment," "the contingency or the certainty of the compensation," and "the character of the employment, whether casual or for an established and constant client." Thatcher v. Indus. Comm'n., 207 P.2d 178, 183-84 (Utah 1949). See also FMA Fin. Corp. v. Build, Inc., 404 P.2d 670, 673 (Utah 1965) (noting, with regard to the value of legal services, "that the judge may fix it on the basis of his own knowledge and experience; and/or in connection with reference to a Bar approved schedule"). These factors have not been considered in recent decisions, and therefore are omitted from the list.

[FN61]. The reader's conclusion that the list may repeat itself is correct. The listed factors are taken from cases cited in the Dixie decision, and are listed as they appear in the cases cited, with care taken to maintain nearly identical language with that in the decisions. The result gives a glimpse of the similarity among factors considered by the courts, but also reveals the haphazard and sometimes confusing manner in which evaluation of the reasonableness of attorney fees has been conducted. Dixie, 764 P.2d at 989- 90.

[FN62]. Factors 1 through 6 were discussed in Dixie, 764 P.2d at 989 (citing Cabrera, 694 P.2d at 622). These factors were derived from the Code of Professional Responsibility. Id. at 624. However, consideration of these factors is not mandatory, as the court noted only that "the trial court may take into account the provisions" of the Code of Professional Responsibility in setting reasonable attorney fees. Cabrera, 694 P.2d at 624.

[FN63]. Factors 7 through 9 were discussed in Dixie, 764 P.2d at 989 (quoting Wallace v. Build, Inc., 402 P.2d 699,

701 (Utah 1965)).

[FN64]. Factors 10 through 13 were discussed in Dixie, 764 P.2d at 989 (citing Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984)).

[FN65]. Dixie, 764 P.2d 991. In this regard, the court noted that the losing party's litigation strategy "converted the action from a routine collection action ... into a brouhaha of much larger proportions" which "increased [the attorney fees] several-fold over what they should have been ...." Id.

[FN66]. Morgan v. Morgan, 854 P.2d 559, 570 (Utah Ct. App. 1993). See also Finlayson v. Finlayson, 874 P.2d 843, 852 (Utah Ct. App. 1994) (noting that trial "court correctly based its award of attorney fees on Husband's non-compliance with its interim orders").

[FN67]. Dixie, 764 P.2d at 985.

[FN68]. The Utah Supreme Court felt that Dixie, "which involves only the issue of attorney fees, provides us with a unique opportunity to clarify our standards for evaluating attorney fees awards against an abuse-of-discretion standard." 764 P.2d at 989 n.6.

[FN69]. In re Quinn, 830 P.2d 282, 285 (Utah Ct. App. 1992) (citing Dixie, 764 P.2d at 989-90).

[FN70]. Dixie, 764 P.2d at 990. (citations omitted)

[FN71]. Id. This last consideration is a catch-all which may included some, or all, of the other factors considered in awarding attorney fees. Although appropriate because of the many possible issues which may arise in evaluating the reasonableness of an award of attorney fees, because of the broad nature of the fourth step, the Utah Supreme Court's attempt to "clarify" the "standards for evaluating attorney fee awards" may be less effective than hoped.

[FN72]. The Utah Court of Appeals describes the process as follows: "After consideration of the first three criteria, a trial court can establish a preliminary fee by multiplying the number of necessary hours of legal work performed by the appropriate hourly rate." Quinn, 850 P.2d at 285. The court then noted that "after the preliminary fee is established, Dixie's fourth step asks that courts adjust the amount of that fee, when necessary, to reflect the court's consideration of various criteria set forth in UTAH CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106." Id. (footnotes omitted). The author believes this procedure is incorrect. First, multiplying the necessary hours by the hourly rate completely ignores the first factor, consideration of the legal work actually performed. Second, the author does not read Dixie to require consideration of only the criteria set forth in the Code of Professional Responsibility. See Dixie, 764 P.2d 990 (noting that court should consider whether there are "circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility") (emphasis added).

[FN73]. See, e.g. Baldwin v. Burton, 850 P.2d 1188, 1200 (Utah 1993) (upholding trial court's award of attorney fees based upon mix of factors); Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App. 1993); Cottonwood Mall, 830 P.2d at 269 (considering only the factors enumerated in Cabrera, 694 P.2d 625). See also infra note 72 (discussing failure of Utah Court of Appeals to consider fact that trial court did not consider any of the first three factors enunciated in Dixie).

[FN74]. See Salmon, 916 P.2d at 893 (considering only the factors enumerated in Cabrera, 694 P.2d at 625).

[FN75]. See Brown v. Richards, 840 P.2d 143, 155 (Utah Ct. App. 1992) (trial court abused its discretion where "none [of the factors considered] answer[ed] the basic questions posed in Dixie"); Govert Copier Painting v. Van

Leeuwen, 801 P.2d 163, 174 (Utah Ct. App. 1990) (remanding case where, although trial court "explained its reason for reducing the attorney fee award, [it] did not utilize the factors established by appellate courts as relevant to a reduction in fees"); American Vending Serv., Inc. v. Morse, 881 P.2d 917, 926 (Utah Ct. App. 1994) ("[T]hen trial court's cursory statement that the requested attorney fees were 'excessive,' failed to show that it had undergone an analysis similar to that contemplated in Dixie."); Hoth v. White, 799 P.2d 215, 220; Rappleye v. Rappleye, 855 P.2d 260, (Utah Ct. App. 1993) (remanding case where findings "failed to demonstrate the that the ... award was arrived at after proper consideration of the relevant factors for determining the reasonableness of attorney fee awards"); Mountain States Broad., 649 n.10 (remanding case for determination of "reasonableness" under Dixie factors where trial court had "simply awarded each [party] the total amount of its accumulated billing statements."); Sorensen v. Sorensen, 769 P.2d 820, 832 (Utah Ct. App. 1989) (reversing award of attorney fees where evidence offered "reflect[ed] only the time spent and the rates charged").

[FN76]. Quinn, 830 P.2d at 285 n.3.

[FN77]. Cabrera appears to involve the consideration of factors not contained in Dixie. Specifically, Cabrera calls for evaluation of "the difficulty of the litigation," "the amount involved in the case and the result attained," and "the expertise and experience of the attorneys involved." Cabrera, 694 P.2d at 625. A review of the first three factors in Dixie does not yield the obvious conclusion that these factors should be considered.

[FN78]. Quinn, 830 P.2d at 285 n.3.

[FN79]. Id.

[FN80]. UTAH CODE JUD. ADMIN. R4-505. The rule makes the general statement that the affidavit submitted in support of a request for attorney fees should "affirm the reasonableness of the fees for comparable legal services." While the use of the term "reasonable" could be read to call for consideration of all four Dixie factors, the plain meaning of the phrase more likely coincides with only the third factor, the rates customarily charged in the locality for similar services.

[FN81]. Rule 4-505 calls for a description of "the nature of the work performed by the attorney," probably equivalent to the first Dixie factor, the legal work actually performed. The rule also mandates that the affidavit "affirm the reasonableness of the fees for comparable legal services," probably equivalent to the third Dixie factor, the rates customarily charged in the locality for similar services. The rule does not, however, call for consideration of the amount of work reasonably necessary to adequately prosecute the matter, or circumstances which may require consideration of additional factors, the second and fourth factors considered in Dixie.

[FN82]. See Estate of Covington v. Josephson, 888 P.2d 675, 679 (Utah Ct. App. 1994) (upholding award of attorney fees where unrebutted affidavit "complie[d] with the requirements of Rule 4-505," noting that "the trial court was not required to take further evidence regarding attorney fees."); Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194-95 (Utah Ct. App. 1993) (finding that trial court's award of attorney fees "is amply supported by the evidence and appears to be reasonable, especially in light of the fact that ... affidavit with detailed billing statements attached ... strictly complied with Rule 4-505 of the Utah Code of Judicial Administration."); LMV Leasing, 805 P.2d at 198-99 (upholding reasonableness of attorney fees where affidavit complied with Rule 4-505).

[FN83]. "The total amount of the attorney fees awarded in this case cannot be said to be unreasonable just because it is greater than the amount recovered on the contract. The amount of the damages awarded in a case does not place a necessary limit on the amount of attorneys fees that can be awarded." Cabrera, 694 P.2d at 625.

[FN84]. Dixie, 764 P.2d at 990. See also Mountain States Broad., 776 P.2d at 649 n.10 (remanding case for determ-

ination of "reasonableness" under Dixie factors where trial court had "simply awarded each [party] the total amount of its accumulated billing statements."); Sorensen v. Sorensen, 769 P.2d 820, 832 (Utah Ct. App. Ct. 1989) (reversing award of attorney fees where evidence offered "reflect[ed] only the time spent and the rates charged").

[FN85]. Dixie, 764 P.2d at 990. In this regard, the court made the salient point that "[i]t is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of $1,000 as it takes to collect a note for $100,000." Id.

[FN86]. It should be noted, however, that some factors have apparently fallen into disfavor. See supra note 60.

[FN87]. One potential way to survive appeal is to argue in favor of implied findings. See, e.g., Hall v. Hall, 858 P.2d 1018, 1025 (Utah Ct. App. 1993) (findings "can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding"). However, this tactic has not met with favorable results. In Taylor for example, the Utah Court of Appeals rejected the argument that a "fair reading" of the record supported the trial court's award, applying a strict interpretation of the Hall test. Taylor, 770 P.2d at 165.

[FN88]. In Taylor, 770 P.2d at 168, the Utah Court of Appeals examined whether the rule "that findings of fact are unnecessary in connection with summary judgment decisions," applied to summary judgment regarding an award of attorney fees. The court found that "[a]lthough it may be unusual for the facts concerning attorney fees to be undisputed, the rule is no different where the subject of the summary judgment is a claim for attorney fees." Id. (footnote omitted). In support, the Utah Court of Appeals noted "[o]ther cases recognize that findings are unnecessary to support an award of fees where the relevant facts are undisputed." Taylor, 770 P.2d at 169 n.6 (citing Freed Fin. Co. v. Stoker Motor Co., 537 P.2d 1039, 1040 (Utah 1975)) (attorney fees may be awarded on summary judgment if the record contains a stipulation, an unrebutted affidavit, or evidence supporting the reasonableness of the award); South Sanpitch Co. v. Pack, 765 P.2d 1279, 1283 (Utah Ct. App. 1988) (uncontroverted testimony concerning amount of reasonable fee provides adequate basis for fee award)). It is also possible that findings in support of an award of attorney fees could be implied, although no Utah court has yet to do so.

[FN89]. In this regard, a request for attorney fees by summary judgment is no different from any other summary judgment motion. "It takes only one competent sworn statement to dispute the averments on the other side of the controversy and create an issue of fact." Redevelopment Agency, 785 P.2d at 1126 (reversing trial court's award of attorney fees where opposing party filed affidavit controverting reasonableness of fee). See also Provo City Corporation v. Cropper, 497 P.2d 629, 630 (Utah 1972) ("[U]nless the parties agree otherwise, the court is obliged to take evidence on the issue of the reasonableness of attorney[] fees and to make findings thereon") (emphasis added); F.M.A. Fin. Corp., 404 P.2d at 670 (reversing award of attorney fees where no evidence was presented and no findings made because the award "was an issue of fact which was denied").

[FN90]. See, e.g., Rappleye v. Rappleye, 855 P.2d 260, 266 (Utah Ct. App. 1993) (remanding case to trial court where "trial court articulated no reasonable basis for its ultimate award"); Saunders v. Sharp, 818 P.2d 574, 580 (Utah Ct. App. 1991) (remanding case to trial court "for an adequate explanation of the amount of fees awarded" where trial court "gave no explanation to support" award); In re Estate of Quinn, 784 P.2d 1238, 1249 (Utah Ct. App. 1989) ("The absence in the record before us of findings and conclusions on the issue of attorney fees compels remand to the trial court to correct that deficiency in the record"), cert denied, 795 P.2d 1138 (Utah 1990).

[FN91]. See supra note 84 and cases therein discussing failure of trial courts to properly consider the Dixie factors.

[FN92]. Regional, 784 P.2d at 1215.

[FN93]. See Brown, 840 P.2d at 156 (finding that trial court's findings were "simply too sparse" where "award of at-

torney fees is a complex matter due to the adjudication of multiple claims arising under several contracts with each party winning some and losing some").

[FN94]. See, e.g., Selvage, 910 P.2d at 1265 (trial court reduced fees where "the reasonableness of the fee and the supporting affidavit were uncontroverted by the opposing party."); Regional, 784 P.2d at 1215.

[FN95]. Martindale v. Adams, 777 P.2d 514, 517-18 (Utah Ct. App. 1989) (emphasis added). See also Selvage, 910 P.2d at 1265 (noting that "[t]he need for sufficiently detailed findings is especially great where, as here, the reasonableness of the fee and the supporting affidavit were uncontroverted by the opposing party") (quoting Martindale, 777 P.2d at 517-18); Regional, 784 P.2d at 1215 ("Findings are particularly important when ... the trial court has reduced the attorney fees from those requested and supported by undisputed evidence."). In fact, it may be a trial court's duty to reduce an uncontroverted request for attorney fees. See Hoth, 799 P.2d at 220 ("A court need not award the entire amount requested, but [it] must evaluate the requested fees to determine if a lesser amount is reasonable under the circumstances") (emphasis added). However, although the Hoth court cited Regional, 784 P.2d at 1215, in support of this proposition, it is not clear that Regional stands for a mandatory evaluation of the fees. Id. ("[E]ven if there is no opposing testimony ... [a] trial court can evaluate the fees requested and determine a lesser amount is reasonable under the circumstances") (emphasis added). It is also unclear if a court must engage in such considerations if there is no dispute regarding the reasonableness of the requested fees. See e.g., infra note 88, discussing whether trial court must make findings in context of summary judgment motion.

[FN96]. Salmon, 916 P.2d at 901 (Zimmerman, C.J., concurring) ("the trial court's oral ruling from the bench that [the] bills were 'excessive' is minimally sufficient to support the reduction here.") (emphasis added). Id. at 899 (Russon, J., dissenting) (upholding award of attorney fees, noting the trial court "need only make findings sufficient to support the ultimate award.").

[FN97]. Id. at 894 (Durham, J.) (declining to award attorney fees where evidence was insufficient and "trial court made no findings to support its reduction, except for the 'finding' that most cases have a cap.").

[FN98]. American Vending Serv., 881 P.2d at 926 ("[T]he trial court's cursory statement that the requested attorney fees were 'excessive,' failed to show that it had undergone an analysis similar to that contemplated by Dixie.").

[FN99]. 910 P.2d at 1252.

[FN100]. Id. at 1265 (quoting trial court's findings of fact).

[FN101]. Interestingly, none of the first three factors in Dixie were discussed. Id. The Utah Court of Appeals did not comment on the propriety of the trial court's approach, presumably because the findings were too inadequate to allow proper review. Id.

[FN102]. Id.

[FN103]. Id. at 1265 n.12. As an example, the Selvage court referred to Willey v. Willey, 866 P.2d 547 (Utah Ct. App. 1993). In Willey, the trial court reduced Mrs. Willey's attorney fees, noting only that the amount of fees was a "very unfortunate use of funds." Id. at 556. The court noted that "[w] hile this statement may indicate the trial court believed both parties' fees were unreasonable, it does not constitute a finding addressing the reasonableness of Mrs. Willey's attorney fees ...." Id.

[FN104]. Brown, 840 P.2d 156 ("When a party is contractually entitled to attorney fees, the trial court's findings regarding those fees should be just as complete as its findings regarding other types of contractual damages").

[FN105]. Quinn, 830 P.2d at 286.

[FN106]. Even if a practitioner does not contest the evidentiary submissions of the party requesting attorney fees, encouraging the trial court to make findings may be worthwhile in the event the trial court reduces fees sua sponte. Without such findings, a sua sponte reduction in fees is certain grounds for an appeal, which will involve additional resources and will almost certainly give an opposing party opportunity to revisit the issue with the trial court, perhaps obtaining a more favorable result.

[FN107]. Although the courts have not required strict adherence to a specific format for findings in support of an award of attorney fees, "[a]s a matter of form, it would [be] preferable for the trial court to have entered separate findings of fact and conclusions of law in addition to the order and judgment for attorney[] fees." Cabrera, 694 P.2d at 625.

[FN108]. See supra notes 67-72 and accompanying text. At a minimum, this should include some discussion of each of the four factors identified in Dixie. If additional factors are considered, the trial court should also be encouraged to make findings explaining why the additional considerations are relevant.

[FN109]. Baldwin v. Burton, 850 P.2d 1188 (Utah 1993).

[FN110]. Id. at 1200.

[FN111]. James Constructors v. Salt Lake City Corp., 888 P.2d 665, 671- 72 (Utah Ct. App. 1994).

[FN112]. Smith v. Batchelor, 832 P.2d 467, 473 (Utah 1992).

[FN113]. Id. at 474.

[FN114]. Id. (Stewart, J., dissenting).

END OF DOCUMENT