

[Dismissal of a Party Does Not Always a Prevailing Party Make](#)

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Just because a defendant is voluntarily dismissed from the litigation does not automatically designate the party as a prevailing party entitled to attorneys' fees. It depends upon all of the facts and circumstances.

For example, in *Lorillard Tobacco Company v. Engida*, 61 F.3d 1209 (10th Cir., 2010), Lorillard Tobacco filed suit against Isaac Engida for selling counterfeit cigarettes. The tobacco company alleged Engida violated the Lanham Act as well as engaged in unfair competition and violated other Colorado common laws. First, the district court granted the tobacco company's request for a temporary restraining order (TRO), but then later dissolved the TRO and denied Lorillard's motion for preliminary injunction. Engida eventually obtained representation on a *pro bono* basis.

When Lorillard appealed, the United States Court of Appeals for the Tenth Circuit affirmed the lower court's rulings. The tobacco company then filed a petition for *certiorari*, but the Supreme Court denied that petition. Upon return to the district court, Lorillard voluntarily dismissed the case before Engida filed his answer.

Engida then moved for an award of \$126,000 in attorneys' fees, claiming he was the prevailing party. The district court agreed and awarded Engida his fees, concluding Lorillard had filed unnecessary and vexatious appeals. Lorillard again appealed.

But this time the Tenth Circuit reversed, concluding that Engida was not a prevailing party under the Lanham Act. While it is true that under the Lanham Act a court may award reasonable attorney fees to the prevailing party in "exceptional cases," the 10th Circuit held that Engida was not a prevailing party because he did not receive any "merits-based relief." The action was dismissed voluntarily, so there was no "judicially sanctioned change in the legal relationship of the parties."

Engida had argued -- and indeed the district court relied upon -- the fact that the tobacco company had lost the preliminary injunction motion, but the 10th Circuit concluded Lorillard had failed to carry its burden of proof on the issue of irreparable harm, rather than on its likelihood of prevailing on the merits. The determination was, consequently, not merits based, and Engida was not entitled to his fees.

The 10th Circuit also disagreed with the lower court's conclusion that the tobacco company had acted vexatiously or filed unnecessary appeals. Engida was therefore not entitled to fees under Colorado common or statutory law.