MAKING A DEFENSIBLE CASE FOR YOUR ATTORNEYS' FEE AWARD

By Commissioner Eric Watness (Ret.)

We certainly appreciate the gratitude shown by our clients for a job well done, but the best tangible evidence is having that reflected in our income. To that end, knowing how to obtain a defensible attorneys' fee award is just as important as winning the case. Recent case law demonstrates what goes into establishing an attorneys' fee award—as well as some techniques that should not be employed.[1]

GENERAL CONCEPTS

First some rather dry but important ground rules should be mentioned. Rather than considering attorneys' fee applications as a litigation afterthought, the courts are expected to take an active role in approving attorney fees.[2] And the trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision.[3] Any fee award lacking sufficient findings and conclusions will result in an unfortunate remand.[4]

Your motion for attorneys' fees should discuss the purpose for an award in your case.[5] While most fee-shifting rules punish frivolous litigation and encourage meritorious litigation, some were enacted to induce active enforcement of a particular policy such as consumer protection.[6] Some fee provisions are designed to ensure adequate representation.[7] Others seek to equitably balance the burden of litigation without regard to fault or merit.[8] Ultimately, any fee award made for the wrong reason will likely result in a remand. Pay careful attention to the basis for any fee award. Confusion on the authority for fees, whether it is based on a contract, statute or recognized ground of equity, can also result in a remand.[9]

LODESTAR CALCULATION

The starting point for establishing a reasonable attorney fee order is the familiar "lodestar" calculation. The court first determines the reasonable, although not necessarily the actual number of hours expended by counsel in securing a successful recovery. That number is then multiplied by the attorney's reasonable hourly rate. Finally, in rare instances the result may be adjusted upward or downward, in the trial court's discretion.[10] As we can see, calculating the number of hours multiplied by the attorney's contract rate appears to be a simple math problem—but it is often not that easy.

PROVE WHAT SERVICES YOU PROVIDED

To succeed with your claim you must bear the burden of demonstrating the fee is reasonable, explaining what you did and documenting your time with contemporaneous records.[11] You must adequately detail what was done and how the work furthered the issues in the case.[12] Per the Washington State Supreme Court: "This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.)."[13] Ultimately, the court must deduct any wasteful, unproductive or duplicative hours and time spent on unsuccessful claims.[14]

In *224 Westlake, LLC v. Engstrom Properties, LLC*, we see some practices that will not survive a challenge. There the prevailing party refused to provide billing statements, claiming that disclosure was precluded by work product and attorney-client privilege. Rather, the plaintiff provided "broad brush" summaries of the work performed, the firm's general billing practices, and the qualifications of the lawyers and staff involved. Total hours per time-keeper were submitted without stating the work performed or the dates of performance. While the lack of detail was probably enough to cause

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a remand, the fact that the court also reviewed the detailed billing statements *in camera* did not likely help the situation. *In camera* submission of fees statements to the trial court is discouraged.[15] The lesson learned here is to redact the billing statements or provide the court with a more detailed summary of the services provided.[16]

Where claims are truly unrelated and separable, fees should be awarded only for those efforts that are successful.[17] But where a party prevails on any significant issue that is inseparable from issues on which the party did not prevail, a court may award fees on all issues.[18] The award need not be discounted if there are "common core facts" or related theories that make it difficult, if not impossible, to divide the hours on a claim-by-claim basis.[19] Where there are several distinct and severable claims, the court can also apportion fees between the parties who prevailed on each issue, resulting in an offset of fees.[20]

Claims for overhead costs should also be carefully reviewed. Legal assistant time was permitted in one matter where the trial court also properly denied compensation for other overhead costs that were already included in the attorney's hourly rate. Those items included secretarial services, copying, word processing, long-distance phone, and postage and delivery expenses. And, one should also avoid "block billing," where numerous tasks are combined into a single time entry frustrating the determination of what work was performed.[21]

PROVE YOUR HOURLY RATE IS REASONABLE

The reasonable hourly rate applied under a lodestar computation should reflect the market value of attorney services.[22] Ordinarily that rate is the contemporaneous rate actually billed to the client.[23] But the attorney's usual fee is not conclusively a reasonable fee. The court must necessarily assess the skill and experience of the attorneys involved and the quality of the work performed together with the time limits imposed, the amount of potential recovery, the attorney's reputation and the undesirability of the case.[24] The lodestar can be similarly supplemented by the factors set forth in RPC 1.5(a) which requires that a fee must be reasonable. Factors mentioned in that rule include the time and labor required, the novelty and difficulty involved and skill required as well as the terms of the fee agreement. Other factors include whether other work is precluded, the fee customarily charged in the community, the amount in controversy and whether the fee is fixed or contingent on the outcome. The rule also adds as factors the time limitations imposed by the client or circumstances and the nature and length of the attorney client relationship.[25] Other cases have added the undesirability of the case and awards in similar cases.[26] It is also helpful to prove the rate of compensation for other attorneys who perform similar services. Be ready to establish your hourly rates with evidence that your fee is reasonable in your community, being mindful that local standards might not control in all circumstances.[27]

Care must be exercised when applying these factors to avoid an inaccurate result. The approach had been criticized because it involves consideration of often conflicting and redundant factors.[28] The court should apply as many of these factors as possible in determining the reasonable rate before making the mathematical lodestar computation. If, for instance, an attorney's hourly rate already takes into account his or her skill, experience and reputation, it would not be appropriate to add to the fee over and above the lodestar calculation.[29] Only adjust the lodestar result based on factors that have not yet had a bearing on the determination of the attorney's reasonable rate.

APPLY RECOGNIZED DEVIATION FACTORS

Cases have recognized two additional factors: the contingent nature of success and the quality of the work performed. These can be used to adjust the lodestar computation.[30]

CONTINGENCY

The contingency factor is based on the notion that an attorney will not take on representation if there is a high risk that no recovery will be obtained. In applying this factor, the trial court's job is to assess the likelihood of success "at the outset of the litigation" by considering the risk "that the litigation would be unsuccessful and that no fee would be obtained."[31] This factor should apply only where there is no assurance of fees regardless of the outcome of the case. In *224 Westlake*, the parties entered into a joint venture, not a contingent fee, where the law firm agreed to a reduced fee unless the claim was successful.[32] And the contingency factor should only be applied to services rendered before the recovery is assured and not to post-decision services rendered such as efforts to obtain the fee award.[33] Furthermore, the factor to be applied is not the percentage of contingent work performed but, rather, the chances of success in the particular case.[34]

QUALITY

The second basis for an adjustment to the lodestar result is the quality of work performed. This is usually an extremely limited adjustment because it is appropriate only when the representation is unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to

compute the lodestar.[35] While complexity has also been discussed in the context of the quality of the work, it generally does not warrant application.[36]

PROTECT THE RECORD

Ultimately you want to avoid any circumstance where the court bases its order on indefensible findings and conclusions. You certainly do not want your record on appeal to include such comments by the trial court as these: "[W]hen I did my initial calculation, and *I did that kind of arbitrarily*, I did not put his full hours in" and "*I put arbitrarily* $100 an hour for (the associate)." The judge also rounded off dollar figures without specific findings to justify that methodology.[37] Protect your record. ■

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[1] See, e.g., *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn.App. 700 (Div. 1, 2012).

[2] *Mahler v. Szucs*, 135 Wn.2d 398, 434-435 (1998).

[3] *Pham v. City of Seattle*, 159 Wn.2d 527, 538 (2007).

[4] *Mahler* at 435.

[5] *Brand v. Department of Labor and Industries of Washington*, 139 Wn.2d 659, 667 (1999); *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 594 (1983).

[6] RCW 19.86.920.

[7] *Brand* at 667.

[8] RCW 26.09.140.

[9] *Deep Water Brewing LLC v. Fairway Resources Limited*, 152 Wn.App. 229 (Div. 3, 2009).

[10] *Mahler* at 433-434.

[11] *Mahler* at 434.

[12] *Mahler* at 434.

[13] *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597 (1983).

[14] *Bowers* at 597.

[15] *224 Westlake* at 741.

[16] *224 Westlake* at 740.

[17] *Collins v. Clark County Fire District No. 5,* 155 Wn.App. 48 (Div. 2, 2010).

[18] *Brand* at 1117.

[19] *Collins* at 99 quoting *Pham* at 538.

[20] *Marassi v. Lau,* 71 Wn.App. 912, 917-918 (Div., 1993).

[21] *Collins* at 102-104.

[22] *Collins* at 99.

[23] *Mahler* at 434.

[24] *Bowers* at 597.

[25] *Mahler at 434;* see also *Allard v. First Interstate Bank of Washington,* 112 Wn.2d 145 (1989).

[26] *Bowers* at 597.

[27] *Collins* at 101.

[28] *Bowers at 596,* quoting from *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980).

[29] *224 Westlake* at 737.

[30] *Bowers* at 598; *224 Westlake* at 735.

[31] *Bowers* at 598-599.

[32] *224 Westlake* at 739.

[33] *Bowers* at 599.

[34] *Bowers* at 601.

[35] *Bowers* at 599.

[36] *224 Westlake* at 737.

[37] *Brand* at 664.