Focus
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Litigation

Avoiding Fee Traps

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You fancy yourself a savvy civil litigator. One day, your BlackBerry vibrates with a message from your friend Max, who is considered one of the deans of the local litigation bar: "I need to see you today." Max has never sent you such a message before.

Later that day, an emotional Max is in your office handing you a copy of a civil complaint against him. A former business client has sued him for excessive billings, is refusing to pay a large past-due balance and wants some legal fees refunded. His client didn't get everything it wanted in the underlying case that Max handled, but Max's legal work was legitimate and solid. Nonetheless, Max's $600,000 in billings on the case will be examined under a judicial microscope.

Max hands you the written retainer agreement that his client signed. You immediately find a provision that you have become accustomed to searching for in every contract that you review nowadays, a "fee-shifting" provision by which the losing party has to pay the prevailing party's attorney fees. You know that many federal and state statutes contain such provisions. More and more, you are seeing them emerge in ordinary contracts, too, including law-firm retainer agreements.

You realize how an enforceable fee-shifting provision can alter the dynamics of a lawsuit by elevating the risk for both parties. It operates like a bonus for the winner and a double whammy for the loser. This alone may be intimidating enough to cause even the bitterest litigants to pause and consider their alternatives before suing one another.

In today's legal environment, litigators need to understand the issue of entitlement to attorney fees. An attorney-fee award is no longer to be treated as an afterthought to money damages in a litigated case, because some fee awards may exceed money damages.

Once entitlement to attorney fees is established by a judge or arbitrator, then and only then does the debate shift to the reasonableness of the amount of fees being claimed. Never lose sight of what comes first, which is entitlement. Resist the urge to focus prematurely on the reasonableness of the fees. That is putting the cart before the horse.

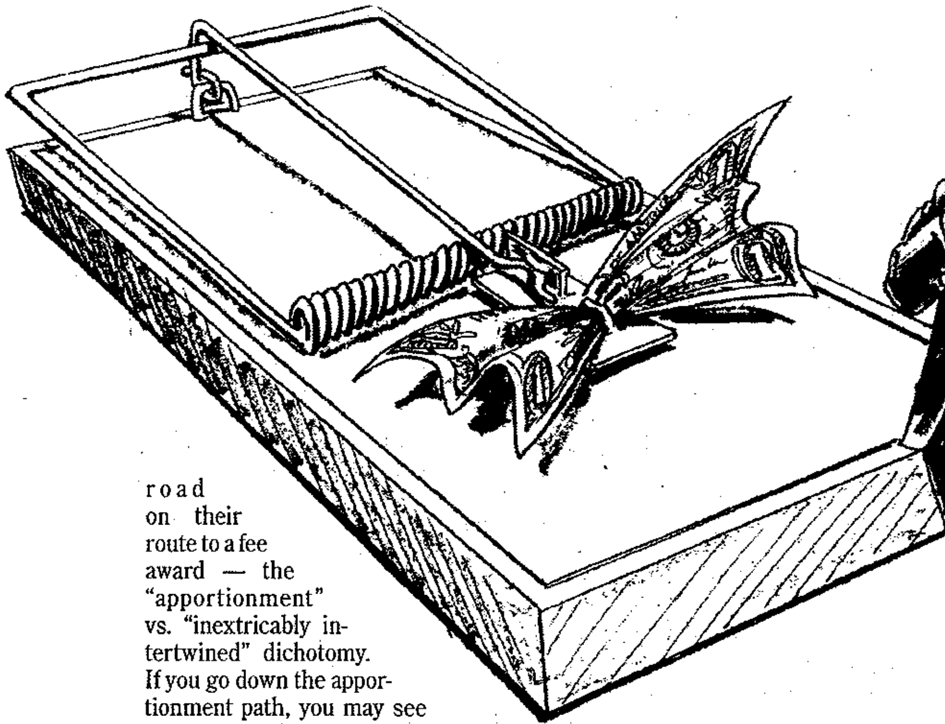
A fee award is usually based on contract or statute. Keep in mind that there may be competing claims about who is the prevailing party at trial for the court or arbitrator to decide. Each basis of entitlement to attorney fees has its own set of evidentiary quirks.

Once you establish the applicable basis for fees, you'll need to understand the different mechanical approaches that courts use to arrive at a fee award. The most common approach is the "lodestar" method of multiplying a reasonable, prevailing hourly rate by a reasonable number of hours billed. However, there may be an enhancement, or "multiplier," on top of the lodestar fee award that the prevailing party can seek, which can boost the fee award greatly. Also, some courts may opt for a percentage fee award instead of using the lodestar approach, especially in large class actions that have a multimillion-dollar common fund of settlement money available.

Remember that some approaches to awarding fees will yield higher dollar recoveries than others. Equally important, some approaches may end up being impractical or unrealistic to present to a judge or arbitrator. You don't want to ask a court or arbitration panel to use a round peg to fit into a square hole in awarding attorney fees.

Then there are more esoteric scenarios for attorney-fee recovery. Attorneys who sue or defend public entities in particular must be knowledgeable about them. In California, contrary to the federal system, "catalyst" attorney fees are available to a plaintiff in certain situations involving public-interest litigation. In *Tipton-Whittingham v. City of L.A.*, 34 Cal.4th 604 (2004), the California Supreme Court clarified that, to receive catalyst fees, a plaintiff must prove three things. First, the lawsuit was a catalyst motivating the defendants to provide the primary, "behavior-changing" relief sought. Second, the lawsuit had merit and achieved its catalytic effect by threat of victory, not by "dint of nuisance" and threat of expense. And third, the plaintiff reasonably attempted to settle the litigation before filing the lawsuit. If you establish the first and second elements (which have to occur during the pendency of the litigation) but fail to make reasonable attempts to settle the dispute before the lawsuit is filed, no catalyst fees are recoverable.

It is a rare lawsuit today that contains only a single cause of action. Modern litigation practice is replete with numerous separate and distinct causes of action, affirmative defenses and cross-actions in the same case. Everything gets pleaded. Thus, you're bound to win some and lose some claims and defenses all within the same lawsuit. Partial victories in court or arbitration can affect the amount of attorney fees awarded post-trial. Invariably, the parties involved in fee-shifting cases face a fork in the



road on their route to a fee award — the "apportionment" vs. "inextricably intertwined" dichotomy. If you go down the apportionment path, you may see the fee award diminish before your eyes. Conversely, if you take the inextricably intertwined path, you may see the fee award expand.

A prevailing party cannot include an unsuccessful or unrelated claim in an attorney-fee request covering successful claims in order to inflate the amount requested. *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124 (1979). A judicial process, known as apportionment, occurs where, for example, fees might be warranted on a statutory cause of action containing a fee-shifting provision, but not on a concurrent contract cause of action without that provision, even if found in the same lawsuit. In such a situation, if you prevail on the statutory cause of action, you may be entitled to recover attorney fees for legal work related to litigating that cause of action, but not necessarily for the work you performed on the contract cause of action.

The same principle applies when attorney fees may be warranted for successfully litigating a complaint, but not for defending a cross-complaint, or vice versa. In other words, you may have a basis for recovery of attorney fees on one half of the litigation but not on the other half.

However, although the concept of apportionment is the ally of a losing party opposing an attorney-fee request, the opposite concept of inextricably intertwined is the requesting party's ally. The rationale for the inextricably intertwined rule is straightforward: If there is intertwined legal work or there are intertwined factual issues between both the successful and unsuccessful claims that are impossible to separate from one another in a practical sense, then no apportionment occurs. The whole ball of wax can be included legitimately in the attorney-fee request. If the legal work or factual issues genuinely and legitimately overlap one another between the successful and unsuccessful claims, then typically courts and arbitrators do not try to parse them out in making a fee award.

The net effect of the inextricably intertwined scenario is that your attorney-fee request on the successful claims is augmented (often substantially) by the amount of the attorney fees incurred in litigating the unsuccessful or unrelated claims, too. In short, if you can demonstrate that both your successful claims and your unsuccessful claims in the litigation are inextricably intertwined, you stand a solid chance of being able to receive a greater amount of attorney fees.

Although no bright-line rules exist to identify easily when claims are inextricably intertwined, the courts have adopted various standards. For example, the courts have held that, when both successful and unsuccessful claims involve a common core of facts or are based on related legal theories, apportionment is not required. Additionally, when different claims for relief raise common factual issues requiring virtually identical evidence, apportionment is not practical. A prevailing party that successfully advances the inextricably intertwined argument may see a bigger dollar sign next to its fee award.

At a time when the cost of litigation has never been higher, attorney-fee provisions have moved front and center in the civil litigation arena. They can drive the decision about whether to litigate. An attorney must understand how to make use of those provisions to the client's advantage in the litigation arena.

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