Focus

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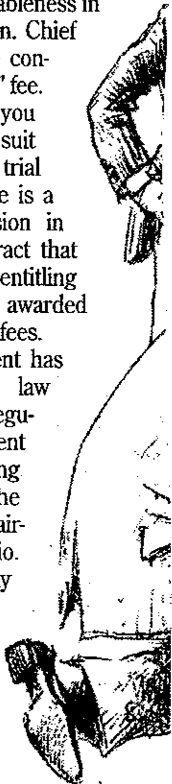
Attorney Fees

Trying to Be Reasonable

By Gregory Bergman and Ken Moscaret

Every attorney thinks his or her fees are reasonable. While some clients may disagree with that notion, attorneys consider it a matter of professional pride that they are billing reasonably.

Yet reasonable attorney fees are truly in the eye of the beholder. Despite what attorneys may think about their own fees, the courts have adopted different formulas for determining reasonableness in attorney-fee litigation. Chief among these is the concept of the "lodestar" fee.



Imagine that you have won a big civil suit for your client at trial or arbitration. There is a "fee-shifting" provision in the statute or contract that you sued under, entitling your client to be awarded reasonable attorney fees.

Perhaps your client has been paying your law firm's invoices regularly, so it is the client who will be seeking reimbursement for the fees already paid, a fairly common scenario. Since you naturally assume that your actual fees are reasonable, you believe that you simply have to submit your law firm's monthly invoices on the case wholesale to the court to have them reimbursed in full.

You are surprised when the judge or arbitrator rejects that proposition. It turns out that there is a big difference between reasonable fees and actual fees for purposes of an attorney-fee award in a fee-shifting case.

While your clients may have paid your actual fees, the law entitles them to be awarded only reasonable attorney fees. The reasonable fees may end up being lower, or higher, than your actual fees. In a typical, non-class-action, fee-shifting case, the lodestar is the approach that you will encounter in virtually every court.

The lodestar approach was applied by the U.S. Supreme Court in an important fee-shifting decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The California Supreme Court in *Serrano v. Priest (Serrano III)*, 20 Cal.3d 25 (1977), held that the lodestar method was to be used in California state courts.

The lodestar is calculated by multiplying a reasonable hourly rate for each working attorney times the reasonable number of hours billed on the case. There is no universal definition of "reasonableness," which can make the lodestar process very inexact and unscientific. It is determined on a case-by-case basis, with the court having broad discretion to arrive at the lodestar through whatever evidence it deems appropriate. When the dust settles, the lodestar is presumed to be a reasonable fee.

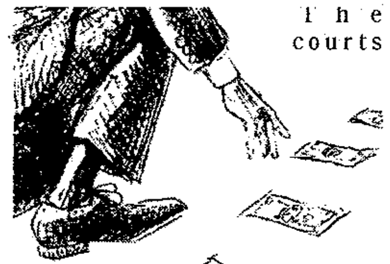
The first step in calculating the lodestar is for the court to determine a reasonable hourly rate for the law firm timekeepers who worked on the case. That rate must be based on prevailing market rates for similar work by comparable local attorneys. Here, the judge or arbitrator will want to know what other attorneys in the local community would charge. A reasonable, prevailing hourly rate is one that other attorneys of comparable skill, experience and reputation in the local legal marketplace would command to perform similar work.

It makes no difference if a law firm has actually been charging a cash-strapped client at below-market hourly rate per their retainer agreement. If the prevailing market rate for that same attorney would be higher, the court in a fee-shifting case will generally award the higher rate.

For example, if the evidence establishes that comparable local attorneys charge $400 per hour for real estate litigation, an attorney generally will receive that rate in a fee award, even if he has been charging a smaller client a discounted rate of $300. The attorney and client would simply have to carry their burden of proof on that point.

Similarly, plaintiffs attorneys working on contingency, public interest attorneys who defer collection of their hourly fees on a case until a fee award is made later on, and even in-house attorneys who do not bill their time on an hourly basis at all, would also receive the same treatment. In short, every attorney can be shown to have some kind of prevailing market rate for purposes of a fee award. It's just a matter of proof.

If it seems that the hourly-rate-determination process is inexact, the determination of reasonable hours billed is even more wide open, fraught with subjectivity and reliant on the court's broad discretion.



The courts also do not base the amount of an attorney's prevailing market rate on how much salary or compensation an attorney may be receiving internally from the law firm. That is irrelevant. The courts do not want to have to rely upon principles of cost-plus accounting to rate determinations, because that would end up being a messy and time-consuming affair in each case.

Courts have held that a fee proceeding should not be turned into a separate, protracted piece of litigation unto itself. Judges and arbitrators simply want to know what the local legal marketplace would command per hour for similar work, not what a particular law firm might be paying in salary to the attorney who handles the winning case.

The avoidance of a cost-plus accounting approach has particular relevance in today's legal marketplace in California, where law firms large and small routinely hire part-time contract attorneys to work on their cases alongside law-firm partners and employee-associates. When such a law firm seeks its fees in a fee-shifting case, it need not disclose the payments that those part-timers actually have been receiving from the firm.

For example, a law firm may have hired an experienced, senior-associate contract attorney for $100 per hour, but has been billing his or her time on the case at $300 per hour. Despite the obvious huge profit margin to the law firm, the court will be concerned only with whether the $300 rate is a prevailing market rate for a local attorney of comparable skill, experience and reputation doing similar work. *Shaffer v. Superior Court*, 33 Cal.App. 4th 993 (1995).

Most law firms will ask the court to award all their allowable hours at their then-current hourly rates, even though a fee award usually covers several years of work, including years when rates where lower. A judge or arbitrator has discretion to award current rates.

The theory is that current rates compensate the law firm for delay in payment, inflation and lost interest. If the court awards year-by-year historical hourly rates instead, it can add an adjustment to cover prejudgment interest.

Sometimes law firms seek fees in jurisdictions far from their offices. Federal case law, including in the 9th U.S. Circuit Court of Appeals, generally has held that prevailing market rates are based on the rates in the community where the legal work is performed, namely the forum of the litigation. *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991).

In some circumstances, federal courts may award home market rates to a law firm litigating a case in a forum where the prevailing rates are lower. However, the California Supreme Court applied the opposite approach in *PLCM Group Inc. v. Drexler*, 22 Cal.4th 1084 (2000). It affirmed an award to a law firm based on prevailing rates in the law firm's home San Francisco market, not the Los Angeles market where the case was litigated.

Once a reasonable rate has been established, the court will turn its attention to a reasonable, allowable number of hours billed by the law firm. If it seems that the hourly rate determination process is inexact, the determination of reasonable hours billed is even more wide open, fraught with subjectivity and reliant on the court's broad discretion.

The court will typically entertain oral or declaration testimony from the working attorneys themselves, and from opposing counsel, on why the claimed hours are reasonable or not.

The court may consider expert testimony on this issue (along with the hourly rate issue), although it is not required to do so.

If the judge or arbitrator making the fee award also was the trial judge, he or she will probably have developed some personal impressions, pro and con, about how competently and credibly counsel performed. Inevitably, those impressions will be a factor in the number of hours deemed reasonable.

Therefore, in a fee-shifting case, a law firm should always try to appear as professional, competent, cooperative and efficient as possible. The judge or arbitrator won't forget later on at fee-award time.

The factors a court might consider on the reasonable-hours issue are many. Some judges and arbitrators like to refer to the 11 factors set forth in California Rules of Professional Conduct 4-200. Although these factors technically govern the conscionability of a fee, they also serve as a partial barometer of reasonableness.

On a more specific level, the court may watch out for issues such as bloated staffing levels, unnecessary duplication of effort, too many vague time entries, failure to delegate routine work, junior attorney training time, billing for non-chargeable overhead or clerical-secretarial tasks, excessive office conferencing and too many double-digit billing days. Every case is different.

A law firm can greatly assist its own cause by maintaining and presenting to the court contemporaneous, itemized time records of all its work on the case. While California law does not mandate contemporaneous, itemized time records to support a fee award, they are always preferred, and they demonstrate to a judge or arbitrator that the firm is careful and conscientious about its billings. That helps instill more confidence in the judge or arbitrator toward the firm.

The federal courts are generally stricter about wanting contemporaneous, itemized time records, and they are more willing to penalize a law firm that does not have them. As a general rule of thumb, any law firm seeking fees is wise to maintain and present the same kinds of complete time records to the court that it would want to see if it were judging the case.

Finally, some successful counsel at trial in fee-shifting cases may be under the mistaken impression that they are automatically entitled to an enhancement, that is, a multiplier, in addition to and on top of the lodestar reasonable fee award. That is not necessarily the case. In the next article in this series, we will examine the differences between the lodestar fee versus multiplier and situations when the latter is deemed appropriate by the courts.

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