Note from the Chair
by Kasey D. Huebner

This issue of Litigation News addresses attorneys’ fees in all their joy, frustration, and complexity. In preparing to write this Note, I conducted some online research to find quotes related to attorneys’ fees. I found the following:

- He who said “talk is cheap” has never hired a lawyer.
- Between grand theft and a legal fee, there only stands a law degree.
- The person who represents herself has a fool for a client, but at least there will be no problem with fee-splitting.
- You win some and you lose some, but you get paid for all of them.
- Lawyer’s creed: A man is innocent until proven broke.

You likely did not need to read the quotes outlined above to know that many members of the public—as well as many in our own profession—have misgivings about attorneys’ fees and the costs of litigation. Complaints about attorneys and the way attorneys bills are calculated are rampant online and elsewhere. Even a recent article in the New York Times addresses, from the client’s perspective, a lawsuit related to alleged “churning” of attorneys’ fees, and some of the comments to this piece are startling.

As you read the articles in this newsletter, take some time to think about fees, billing practices, and the perception of these issues both by the public and by attorneys. Ask yourself if the way we bill clients promotes or undermines client service, whether we can or should do anything to improve the perception of our billing practices, whether the costs of litigation prevent access to justice, and to what extent the practice of law is (or should be) a profession versus a business.

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The Right to Attorneys’ Fees: A Lawyer’s Best Frenemy?

by Allison Peryea

More than once I have worked with a client or potential client who has assumed at the outset that the opposing party will pay his attorneys’ fees if he prevails. But the default rule in the United States is that each party to a civil suit pays his own fees, with a few exceptions. The right to attorneys’ fees is not a golden ticket entitling a party to collect all damages without having to pay anything out of pocket. It is however a potential means for a party to avoid taking a significant financial hit in pursuing or defending against a claim.

Does Your Client (or Her Opponent) Have a Right to Fees?

In Washington, there are three exceptions to this rule: if the right to fees is provided by 1) contract, 2) statute, or 3) a “recognized equitable ground.”

Contract. Contracts prepared by relatively sophisticated drafters (or based on some sort of template or sample) frequently include attorneys’ fees provisions. Under RCW 4.84.330, all such provisions are reciprocal, meaning that the prevailing party is entitled to fees even if the language of the clause grants fees only to one side.

Statute. Several statutes provide for an award of attorneys’ fees. These include but are by no means limited to the Consumer Protection Act (See RCW 19.86.090—not reciprocal), the Condominium Association Act (see RCW 64.34.455—fees awarded at the court’s discretion), and RCW 4.84.250. The latter provision provides for an award of reasonable fees to prevailing party who pleads a damages amount of $10,000 or less. (The Legislature has provided statutory attorneys’ fees to prevailing parties in the amount of $200, but that is not an amount that will likely make a meaningful difference in the way you prosecute a matter.

Equity. It is far more likely that a party will recover fees under contract or statute than based on equitable considerations. The most common equitable ground for receipt of attorneys’ fees is bad faith. Bad faith litigation can warrant an award of attorneys’ fees for three types of conduct: (1) pre-litigation misconduct, (2) procedural bad faith, and (3) substantive bad faith. Pre-litigation misconduct refers to obstinate conduct in bad faith that wastes private and judicial resources and necessitates legal action to enforce a clearly valid claim or right. “Procedural bad faith” is unrelated to the merits of the case and refers to vexatious conduct occurring during the course of litigation. “Substantive bad faith,” as basis for attorney fee award, occurs when a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive such as harassment.

Other equitable theories for recovery of fees include the “common fund” exception to the no-fees rule, which applies where a party has created or preserved a specific fund for the benefit of others as well as himself, and the “private attorney general” concept, which may apply in the absence of a specialized statute authorizing fees for private litigants.

Analyzing the Impact of the Right—or Absence of a Right—to Fees.

The existence of an attorneys’ fee clause or applicable reciprocal fee statute is a double-edged sword. On the plus side, if you have a strong case and win, the fee award will offset the expense of litigating, which frequently exceeds the principal amount awarded. The downside is that a fee clause or statute exposes your client to far greater risk in the event that he loses: He will have to pay his opponent’s fees in addition to his own fees. Clients are often very confident about their cases—otherwise they would have avoided litigation or settled earlier on—and need to be cautioned about this latter possibility.

At the beginning of any matter that could result in litigation, determine at continue … next page
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the start whether there is a possibility of an attorneys’ fee award for either party. What you conclude could be a game-changer in terms of strategy. The possibility of a fee award is critical in large part because the expense of litigating a case through trial or arbitration frequently exceeds the principal amount in dispute. Without the opportunity to recover fees, there may be no economic incentive to prosecute a case when the amount in dispute is relatively small. The right to fees can meanwhile compel a party to continue a lawsuit even after fees have substantially exceeded the principal amount sought. An attorneys’ fees clause in a plaintiff’s breach of contract case involving a relatively small amount of damages could tip the scales in favor of filing if the facts are good. On the other hand, it may not be wise to initiate (or fail to attempt settlement of) a weak case if there is a possibility that the opposing party may recover its fees. The difficulty, of course, is knowing with certainty whether a case is strong or weak. Also relevant to the analysis is the financial welfare of the opposing party—an award of fees is useless if there is no money to pay the award.

Make absolutely sure that your client understands both the risks and benefits of litigating a case where either party may have a right to fees. Likewise, explain to a client where there is no right to fees that any fees billed to him will cut into any settlement or judgment he receives. Do not presume that a client will figure these things out on her own.

One aspect of the risk associated with the possibility of a fee award is that you cannot control the amount an attorney for the opposing party is billing. If your client loses, he may be responsible to pay that amount or a similar amount. But until the opponent prevails and requests fees, you likely have no way of knowing what dollar figure attaches to the fee exposure.

When evaluating a client’s potential right to fees under contract, be sure to analyze the specific terms of the fee clause in the contract. Some clauses, for example, will limit the circumstances under which a party can recover fees, such as by providing for fees incurred relating to certain types of disputes only, or only fees incurred if a suit is filed. (If you are drafting a settlement agreement or some other sort of contract, consider including an attorneys’ fees clause. Do not insert fee language without understanding the effect of the specific terms you use.)

In your first pleading, you should generally request attorneys’ fees regardless of whether you are absolutely sure if there is a basis to fees. You can always drop the request. If the possibility of a fee award favors your client, be sure to mention this possibility in any demand or settlement communications, which may discourage an opponent with weak facts from pressing her case. Be prepared for opposing counsel to likewise use the threat of an attorneys’ fees award to her advantage, and possibly trump up fees already incurred to try to scare you. Even if there is a clear right to fees if your client prevails, it is unlikely that you will succeed in obtaining all fees incurred if a settlement is reached. A settlement, after all, reflects a compromise. I have rarely participated in settlements that involved any award of attorneys’ fees, much less a relatively large award.

Understand that the fight for fees is a second battle in the litigation war after you win your case on the merits. Pursuant to CR 54(d), you must generally file a motion for fees within 10 days after the entry of judgment. You must also submit a description of your fees within that same time frame or you will end up with statutory attorneys’ fees only. From the outset of the matter, understand that your billing entries will be on display should you seek fees. If you do win your case and move for fees, the opposing attorney is going to comb through your fee descriptions, and use them as ammunition for their argument to keep the fee award as low as possible. (Note that, in my experience, you may be able to recover fees incurred during the fee-request process.)

Determining the Fee-Award Amount.

A contract containing an applicable attorneys’ fees provision “does not allow for an exercise of discretion in deciding whether to award fees.” But the court has discretion in deciding the amount awarded. Courts award “reasonable” fees, which do not always match the actual amount of fees billed to the client. Awards of attorneys’ fees are generally calculated using the “lodestar” method. Under the lodestar approach, a court first determines that counsel expended a reasonable number of hours obtaining the successful result. This involves excluding wasteful or duplicative hours, and time spent on unsuccessful theories or claims. The court then determines the reasonableness of counsel’s hourly rate.

The billed rate or fee usually charged by the attorney is not necessarily “reasonable.” The actual hourly rate may be adjusted based on the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney’s reputation, and the undesirability of the case.

The “lodestar award” results from multiplying the reasonable hourly rate by the number of hours reasonably expended. After the lodestar has been calculated, the court may adjust it based on the “contingent nature of success and the quality of the work performed.” You must request a deviation from the lodestar amount to receive one. The lodestar methodology can be supplemented based on factors in RPC 1.5(a) as guidelines as to the reasonableness of a fee.

While a court is supposed to take the amount in dispute into account when determining a reasonable fee award, the fact that the amount of attorneys’ fees requested exceeds the judgment amount is not fatal. For example, I participated in litigation a matter through trial that ended with a fee award to our clients that totaled three times the principal amount awarded. Indeed, an appellate court “will not overturn a large attorney-
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 caselaw 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 who 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 timekeeper were submitted without stating the work performed or the dates of performance. While the lack of detail was probably enough to cause a remand, the fact that continues … next page

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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. The lesson learned here is to redact the billing statements or provide the court with a more detailed summary of the services provided.

Where claims are truly unrelated and separable, fees should be awarded only for those efforts that are successful. 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. 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. 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.

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.

Prove Your Hourly Rate is Reasonable: The reasonable hourly rate applied under a lodestar computation should reflect the market value of attorney services. Ordinarily that rate is the contemporaneous rate actually billed to the client. 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. 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.

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.

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." 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. 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. Furthermore, the factor to be applied is not the percentage of contingent work performed but, rather, the chances of success in the particular case.

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.

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
Obtaining Attorneys’ Fees in Insurance Coverage Disputes

by David W. Howenstine

An insurance policy isn’t worth much to an insured if she has to hire a lawyer to actually obtain coverage. No one (except perhaps an attorney) pays insurance premiums with the expectation he’ll need a lawyer on speed dial and years of litigation to recover the benefit of his bargain. Setting aside the thorny questions of whether coverage is appropriate in any given case, it’s safe to assume most would agree an insured shouldn’t be forced to pick up the tab for attorneys’ fees when an insurer’s unreasonable actions force her into court to obtain coverage.

So how can a policyholder make ends meet and recover her attorneys’ fees in coverage cases? Washington offers three overlapping options: the Olympic Steamship rule, the Consumer Protection Act, and the Insurance Fair Conduct Act (IFCA). This article offers an overview of all three, but focuses principally on IFCA and its body of developing case law as the statute continues to take root in Washington jurisprudence.

Olympic Steamship Fees

In the seminal case of Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37 (1991), the Washington State Supreme Court established that an insured is entitled to recover reasonable attorneys’ fees when compelled to assume the burden of a lawsuit to obtain the full benefit of the insurance policy. Olympic Steamship allows an award of fees only when suit is necessary to obtain coverage in the first instance, and does not apply where the insurer acknowledges coverage but disputes the amount due.

Though Olympic Steamship appears out of line within the American tradition that each party shoulders his or her own attorneys’ fees, the rule arises out of the equity tradition and recognizes the disparate power and special fiduciary nature of the relationship between insured and insurer. Since 1991, the rule has been regularly expanded and now permits attorneys’ fees for a successful appeal and for litigation conducted outside Washington.

Courts use the “lodestar” method as the starting point to calculate recoverable attorneys’ fees. This method multiplies a reasonable hourly rate by the number of hours reasonably expended on the matter. The total award may then be adjusted up or down based on additional considerations, including the contingent nature of success and the quality of the work performed.

Consumer Protection Act

Washington’s Consumer Protection Act (CPA), RCW 19.86, authorizes a cause of action with respect to unfair deceptive acts or practices in commerce that result in injury to business or commerce. To establish a viable CPA claim, a plaintiff must satisfy the five-part test set forth in Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 792 (1986). The CPA applies to insurers when they do not perform their contractual and statutory duties in good faith, including promptly investigating claims and making coverage determinations. Per se CPA violations occur when an insurer violates insurance regulations governing claims-handling standards.

A party who maintains a successful CPA action is entitled to recover “a reasonable attorneys’ fee,” per RCW 19.86.090. The recovery of attorneys’ fees depends on whether a cognizable injury within the scope of the CPA has taken place, regardless of whether the plaintiff has suffered actual damages. A showing of actual damages is only necessary to recover treble damages. The calculation of attorneys’ fees under the CPA follows the lodestar method.

Insurance Fair Conduct Act

Last but not least, IFCA, RCW 48.30.015, is the newest option for insureds seeking to recover attorneys’ fees without specific findings to justify that methodology. Protect your record.

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3 Pham v. City of Seattle, 159 Wn.2d 527, 538 (2007).
4 Mahler at 435.
6 RCW 19.86.920.
7 Brand at 667.
8 RCW 26.09.140.
10 Mahler at 433-434.
11 Mahler at 434.
12 Mahler at 434.
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.
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 596.
27 Collins at 101.
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.
fees in coverage-related actions. Unlike Olympic Steamship fees and the CPA, IFCA remains a relatively new addition to Washington law and its interpretation has been left largely to Washington's federal district courts. After the state Legislature passed IFCA in spring 2007, the law was put forth for popular vote via the referendum process. Voters ultimately approved IFCA by a vote of 56.7 percent to 43.3 percent, and it became law in December 2007.

Under IFCA, a first-party claimant who "is unreasonably denied a claim for coverage or payment of benefits by an insurer" may file suit to recover her actual damages, together with attorneys' fees and litigation costs. The Legislature sweetened the pot by allowing a discretionary award of treble damages. With respect to attorneys' fees, another provision clarifies in RCW 48.30.015(3) that:

The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of [an insurance regulation specified] in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs.[1]

(This provision references Washington insurance regulations prohibiting unfair claims practices, and appears to establish that a violation of these regulations mandates an award of attorney's fees.)

However, debate has arisen about whether a violation of an insurance regulation is sufficient—without a predicate unreasonable denial of a claim—to make out a viable IFCA claim. Some courts initially embraced the notion that a violation of an insurance regulation constituted an "express violation" of IFCA. [2]

In recent years, however, courts have often rejected IFCA claims resting on regulatory violations without claim denials. [3] These courts reason that RCW 48.30.015(1) creates a cause of action only for an unreasonable denial of claim and, thus, all IFCA claims must necessarily arise from such a denial.

Despite the modern trend, practitioners representing first-party claimants should not give up arguing that the plain language of IFCA does not support this limitation on recovery. Although reasonable minds can disagree, it remains difficult to discern why IFCA would authorize an award of fees or damages after either a claim denial "or" a violation of the insurance regulations if the sole relevant consideration were a claim denial. [1] This is particularly true for IFCA's provision authorizing attorneys' fees because the award is mandatory, thereby rendering the potentially cumulative significance of regulatory violations irrelevant in the presence of an unreasonable denial of claim.

Other hurdles have also arisen with respect to recovery of attorneys' fees under the IFCA. Several decisions have held that actual damages operate as a predicate not only for recovery of treble damages, but also for recovery of attorneys' fees. In Coleman v. Am. Commerce Ins., 2010 WL 3720203 (W.D. Wash. 2010), the court found the insurer had violated four insurance regulations, but still concluded the claim failed because the insured had not shown any actual damages as a result of the insurer's bad acts. On appeal, the Ninth Circuit affirmed the dismissal of the IFCA claim because the insured had "not shown actual damages … sufficient to substantiate a claim under IFCA." [2] The Ninth Circuit denied a request to certify this question to the Washington State Supreme Court. Similarly, other rulings have mentioned, in dicta, lack of harm when denying IFCA claims. Under this approach, IFCA would operate as a tool to recoup actual losses arising from an insurer's unreasonable denial of a claim, but would not offer a cost-effective method for policyholders to challenge questionable claims handling practices or to help police compliance with insurance regulations.

The requirement of actual damages as a predicate to recovery of attorneys' fees under IFCA also appears open to debate. Other federal district courts have looked to the plain language of IFCA and granted attorneys' fees without regard to a specific damages finding. [2]

Time will tell what roadblocks will ultimately stand in the way of policyholders' attempts to recover attorneys' fees under IFCA. Traditionally, however, the Washington State Supreme Court has taken a robust approach to protecting the rights of policyholders and may be inclined to interpret IFCA more expansively than some federal courts. Although Washington offers several options for recovery of attorneys' fees in coverage disputes, the answers to these questions under IFCA will nevertheless have consequences with respect to encouraging or discouraging those policyholders who wish to challenge alleged unreasonable denials of claims or unfair claims practices.

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3 See RCW 48.30.015(2)-(3).
4 See Fed. R. App. P. 600 (9th Cir., 2011).
Recently, I defended an action for breach of contract. Both sides served and responded to discovery requests and I brought a motion for summary judgment. While that motion was pending, the plaintiff moved ex parte to voluntarily dismiss under CR 41(a)(1) (B), indicating a plan to file its claims again in another jurisdiction. The court granted the motion and dismissed the action without prejudice. The court never ruled on the motion, and I brought a motion for summary judgment. While that motion was pending, the plaintiff voluntarily dismissed under CR 41(a)(1) (B), indicating a plan to file its claims again in another jurisdiction. The court never ruled on the motion, and I brought a motion for summary judgment.

Before you answer, let me advise you: Can the defendant "prevail" if the plaintiff hasn’t lost?

Before you answer, let me advise you: Can the defendant "prevail" if the plaintiff hasn’t lost?

To be fair, the judge never actually told me her first instinct. Instead, the judge showed me. She stopped me at the beginning of my oral argument and asked me if I had any case law to rely on. Pointing out the case law quotations in my motion was not good enough; the judge wanted me to hand the cases across the bench. And not the printout I brought with me, only bound volumes off the courtroom bookshelf would do. (I do not think most judges require hand-delivery of the Washington Appellate Reports when they are inclined to grant a motion, but I may be wrong.)

As a Matter of Common Sense, a Defendant Prevails When a Plaintiff Voluntarily Dismisses.

The judge in my case was not the only sensible lawyer I have talked to who thinks there cannot be a prevailing party when a case is dismissed without prejudice. In fact, based on discussions I have had with other lawyers, I could probably assemble a roomful of attorneys who would agree that, as a matter of common sense, a defendant does not prevail until a plaintiff’s claims are adjudicated and defeated. But one roomful of attorneys cannot dictate what is and is not common sense. That is, unless those attorneys happen to be a panel of appellate judges, such as the decision-makers in Walji v. Candyco, Inc.1 and Hawk v. Bransej.2

In each of those cases, a landlord voluntarily dismissed a suit to enforce a commercial lease and the tenant moved successfully for an award of attorneys’ fees under a bilateral fee provision in the lease. In Walji, the fee provision favored the “prevailing party” but did not define that term. The higher court affirmed the trial court’s fee award, stating that, "at the time of a voluntary dismissal, the defendant has ‘prevailed’ in the common sense meaning of the word.”3 In Hawk, the fee provision favored the “successful” party. Relying on Walji, the Hawk Court determined that under the “plain meaning” of the word “successful,” the defendant tenant was entitled to fees at the time of the landlord’s voluntary dismissal.4

The Walji and Hawk courts did not go on a limb to develop their holdings. They relied on Andersen v. Gold Seal Vineyards, Inc., the first case that squarely asked the Washington State Supreme Court whether a voluntary non-suit could create a prevailing party.5 In Andersen, when the third-party plaintiff voluntarily dismissed its claims, the third-party defendant, who had been served under the long-arm statute, sought attorney fees under RCW 4.28.185(5). That section of the long-arm statute allows for a fee award to a defendant served outside the state who “prevails in the action.” Relying on treatises and dicta from earlier cases, the Court determined that it was a “general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed.”6 The long-arm statute does not specifically define what it takes to “prevail,” so the state’s highest court held that “the Legislature must naturally have had in mind that a defendant who ‘prevails’ is ordinarily one against whom no affirmative judgment is entered.”7

While Walji adopted the Andersen court’s reading of the word “prevail,” it added new policy arguments in favor of awarding fees following voluntary dismissal. Walji explained that, because a case dismissed voluntarily may never be renewed, “it is essential to apply the attorney fee provision of the lease at the time of the dismissal to effectuate the intent of the parties” that the prevailing party should receive its fees.8 The court went on to explain that, if the case is renewed, the fee provision could be applied again. The court concluded: This “interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.”9

Common Sense Does Not Always Apply.

In Wachovia SBA Lending, Inc. v. Kraft,10 the Washington State Supreme Court put an important limit on the application of the Andersen line of cases. In Wachovia, Kraft appealed when she did not receive a fee award after Wachovia voluntarily dismissed its lawsuit to enforce the terms of a loan contract. The loan contained a unilateral fee provision entitling Wachovia to attorneys’ fees if it prevailed in an action to enforce the terms of the loan. Kraft moved for prevailing party fees under RCW 48.84.330, which requires a court to read a unilateral contractual attorneys’ fee provision as if it is bilateral. (In other words, a court can award fees to the prevailing party even if that party is not

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Hold Your Fire: Exercise Restraint When Considering a CR 11 Motion for Attorneys’ Fees

by Matthew Munson

In the right circumstances, Civil Rule 11 provides a vehicle for obtaining fees incurred because of an opposing lawyer or party’s baseless or bad-faith filings. As tempting as it may be to seek CR 11 sanctions whenever an opposing party or counsel makes questionable legal or factual claims, courts are reluctant to impose them for all but the most egregious conduct. Consider the following guidelines when contemplating a motion for an award of fees under CR 11:

Consult the Rule

CR 11 authorizes a court to sanction a party or its counsel for a filing that is baseless or made in bad faith. A filing is baseless if it is (a) not well-grounded in fact or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law. To impose sanctions for a baseless filing, the trial court must also find that the attorney who signed the filing did not conduct a reasonable inquiry into the claim’s factual and legal basis. A bad-faith filing is one interposed for an improper purpose such as harassment or unnecessary delay.

Trial courts have discretion in awarding sanctions. Possible sanctions include an order to pay the other party’s reasonable attorneys’ fees incurred because of the filing. Sanctions must be calculated to carry out CR 11’s purpose, which is to deter baseless filings and curb abuses of the judicial system. A court should impose the least severe sanction necessary to carry out that purpose. The court may also consider a sanction’s punitive, compensatory, and educational impact.

It is also important to understand the limits of CR 11. It generally does not apply to discovery, which is governed by CR 26 and CR 37. Sanctions in appellate proceedings are addressed by RAP 18.9.

Reserve CR 11 for Truly Egregious Conduct

CR 11 should be reserved for those filings that are genuinely baseless or that have no legitimate purpose. In general, a court will impose sanctions only when a party or attorney’s filing has utterly no basis in the facts or the law. Examples from recent cases include the following:

- Continuing to prosecute claims that are clearly barred by the statute of limitations.

Prevailing to be “Prevailing”: Can a Party Recover Fees Following a Voluntary Dismissal?

the party the contract says is eligible for a fee award.)

Despite Andersen, Wachovia and Hawk, Kraft lost her bid for attorneys’ fees. Kraft needed to rely on RCW 4.84.330 to make the contractual fee provision apply in her favor, and that provision defines “prevailing party” as “the party in whose favor final judgment is rendered.” In Wachovia, there was no final judgment, just an order of voluntary dismissal without prejudice under CR 41. So the appellate court and Supreme Court affirmed the trial court determination that Kraft was not the “prevailing party.” The same result has been reached under RCW 4.84.250 and .270, which identify the “prevailing party” with respect to the result in a final judgment.

Wachovia explicitly stated that the Andersen line of decisions does not govern cases under RCW 4.84.330 because those decisions did not involve the statute’s definition of “prevailing party.” Based on Wachovia, the Andersen line should not apply in any situation where the governing contract or statute identifies the prevailing party with reference to a favorable final judgment. But, under Wachovia, in the absence of such a definition, Andersen and its progeny are still good law.

Read Statutory and Contractual Fee Provisions Carefully.

Unfortunately, after touring through the case law, it appears that common sense alone is actually not enough to answer my original question—can the defendant prevail if the plaintiff hasn’t lost? Instead that question requires more questions: Is the governing fee provision in a contract? Is it bilateral or unilateral? Does the defendant need a final judgment to trigger the fee provision? So the only way to get your clients the fees they deserve and avoid the fees they should not have to pay is to do what lawyers always do—read the governing fee provision closely. And, perhaps, to do what lawyers rarely do—fetch a few books off a shelf and wait through a brief recess while the court reviews the law that says your client wins.

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5. 81 Wn.2d 863 (1973).
6. Id., at 868.
7. Id.
9. Id.
10. 165 Wn.2d 481 (2009).
13. 165 Wn.2d at 490-491.
Hold Your Fire: Exercise Restraint When Considering A CR 11 Motion for Attorneys’ Fees from previous page

- Filing the same claims that are pending in another lawsuit.
- Filing a suit against the wrong party and refusing to dismiss that party after being provided evidence of the mistake.
- Alleging that demolition of a neglected house caused the release of toxins onto property without having any evidence of toxins being present.
- Alleging that an opponent improperly withdrew money from a retirement account without evidence to support that allegation.

Courts are especially reluctant to impose sanctions if the issues involved are new or complicated. In a case of first impression, Division One of the Washington State Court of Appeals addressed the statue of limitations on a claim arising from the end of a committed intimate relationship (previously called a “meretricious” relationship). The trial court had awarded sanctions because a party had, among other things, filed an amended complaint alleging a claim that party had, among other things, filed an amended complaint alleging a claim nearly identical to a dismissed claim and refused to vacate a house because the court’s decision was not captioned “Order.” The court was “uncomfortable” with the sanctions because the issues arising from the committed intimate relationship were “novel, complex, and no doubt charged with a bit of emotion.”

Many litigators believe that attorneys are too quick to allege that a filing is sanctionable. Some trial court judges agree: “[A]ttorneys overuse Civil Rule 11. Civil Rule 11 … [is] supposed to be focused on … arguments that there's just absolutely no basis for and not things that are a stretch …” And the Supreme Court has pointedly observed that CR 11 should not be viewed as “simply another weapon in a litigator’s arsenal.”

There are also practical reasons to think twice before asking for sanctions. Accusing an opposing party or attorney of a CR 11 violation is likely to antagonize him or her, making continued litigation difficult and threatening prospects for settlement. Such accusations, when unwarranted, also contribute to the erosion of civility in the profession. And if you develop a reputation as a lawyer who invokes CR 11 too frequently, you may lose credibility with other attorneys and with judges. If an opponent’s claims lack merit, sometimes the best approach is to seek dismissal under CR 12 or 56. For all these reasons, it’s best to reserve CR 11 only for those filings that are unquestionably baseless or improper.

Ask Opposing Counsel to Withdraw the Filing

If you do think a filing is truly beyond the pale, consider asking opposing counsel to strike or withdraw it before seeking sanctions. Unlike the rules governing discovery violations, CR 11 does not require a conference or other communication before moving for sanctions. But advising an opponent of your intention to seek sanctions—in a calm, professional tone—is a good practice. If the opponent complies with the request, you will have accomplished your goal while saving your client the expense of bringing a motion. And if your request is refused, the court may be more inclined to award sanctions later.

Request Only Those Fees Incurred Because of the Breach

An award of attorney fees is limited to those fees reasonably expended in responding to the sanctionable filings. Courts generally require a party to submit billing records or a declaration from that party’s counsel detailing the time it took to complete each litigation task. Be sure to seek fees only for those tasks incurred due to an opposing party’s baseless or bad-faith filings. Attempting to overreach is not only improper, it might also dissuade the court from awarding any sanctions at all.

Create a Record

One of most common bases for reversal of CR 11 sanctions is a failure to create a written record explaining the basis for the sanction. A court must create an adequate record for review by identifying the sanctionable conduct and explaining its reasons for imposing sanctions. Biggs, 124 Wn.2d at 201. Without a record explaining the basis for imposing sanctions, an award may be remanded. When moving for an award of fees, provide the court proposed findings that explain the basis for the sanction.

Consider How and Whether to Collect on a CR 11 Award

Generally, an opposing party or counsel will pay an award of sanctions to avoid further sanctions or even contempt proceedings. In instances of a refusal to pay, a sanction award can be reduced to judgment. Only substantial awards justify the expense of obtaining and collecting on a judgment. (For guidance on judgment collection, refer to the Winter 2012-13 issue of Litigation News.)

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1 See West v. Washington Ass’n of Cnty. Officials, 162 Wn.App. 120, 135 (Div. 2, 2011).
2 Id.
11 Id. at 741.
14 See Biggs, 124 Wn.2d at 198 n.2.
The prospect of an award of attorneys' fees can seem like the Holy Grail for client and attorney alike. In certain lucky situations under contract, statute, or ground in equity, your client will be entitled to such a coveted fee award. But because awards of attorneys' fees are the exception to the “American Rule” that parties bear their own costs, courts carefully scrutinize such awards.

Attorneys’ fee awards must be reasonable, and courts use a number of factors to determine reasonableness. The party seeking the award of fees bears the burden of proving they are reasonable. For example, when awarding fees, courts will segregate between time expended on successful and unsuccessful claims. If you have not taken certain proactive steps to track your time and segregate between claims, you risk the court denying your entire fee petition. Even if you convince a trial judge to award fees without segregation, you risk that award being overturned on appeal, as awarding fees without segregating constitutes reversible error.

A. Washington Approach to Segregating Fees

Washington follows the “lodestar” method of awarding attorneys’ fees. Under the lodestar method, the court multiplies the total number of attorney hours reasonably expended by the reasonable hourly rate of compensation. As a part of this determination, courts will discount time spent on “unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time.” A court will not segregate fees between claims where a successful and unsuccessful claim share a common core of facts and related legal theories.

Where the party does not properly segregate between successful and unsuccessful claims in their attorney fee petition, the court could deny the entire request for fees. Without proper segregation, the court cannot determine whether the hours spent on the successful claims were reasonable.

In the Chuong Van Pham v. Seattle City Light case, the Washington State Supreme Court went even farther, even discounting time spent on unsuccessful motions. The Supreme Court upheld a trial court decision that denied time spent on an unsuccessful cross-motion for summary judgment, a motion on the merits, a motion for a second amended complaint that was never filed, and time spent on media contacts, as those tasks were “not reasonably related to the favorable claims.” There was a strong dissent in that case by Justice Sanders, who stated that it was improper for the trial court to look at the success of each individual effort or motion rather than the litigation as a whole. Despite this dissent, Chuang remains good law, and demonstrates the importance of keeping good billing records with sufficient detail to identify both claims made and tasks completed.

B. Oregon Approach to Segregating Fees

Like Washington, Oregon courts require a party to segregate fees on a claim-by-claim basis. Additionally, Oregon courts require a prevailing party to affirmatively segregate between successful and unsuccessful claims in its fee petition, or to explain why the fees cannot be segregated. It is insufficient to address those issues on reply. Failure to affirmatively segregate in your moving papers is grounds for denial of the entire fee request.

It is also insufficient to divide your time proportionately between successful and unsuccessful claims without specifically identifying billing records applicable to each claim. Thus, a party who brought two claims and prevailed on one is not permitted to merely submit a request for 50 percent of their entire fee amount. The party must segregate based on actual hours spent.

C. Best Practices

If an award of fees is even a remote possibility in your case, the time to start thinking about segregating fees is now. It is nearly impossible to go back at the end of a case and attempt to segregate between claims. Contemporaneous billing should reflect not only the task performed, but the claim worked on, if the task is claim-specific. Often providing additional detail in billing is a good practice anyway, as this added explanation will help show your client what value you are adding to the case.

Additionally, the fee petition should not be a task that is slapped together or approached lightly. It is not the best practice to ask for everything and hope your opposing counsel does not point out the time spent on lost claims. Not only have some courts said it is too late to segregate on reply, but courts are charged with independently determining the reasonableness of attorney fee awards, meaning the court will likely raise the issue even if opposing counsel is asleep at the wheel. Making sure the fee award is appropriate and reasonable will ensure your client finality and prevent overturn on appeal.

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3 Chuang Van Pham v. Seattle City Light, 159 Wn.2d 527 (2007).
5 Vannatta v. Or. Gov’t Ethics Comm’n, 348 Or. 117 (2010).
6 Id at 128 (Durham, J., concurring).
8 Vannatta, 348 Or. at 127 (Durham, J., concurring).
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