

How To Help Those With Limited Resources

RECOVERING STATUTORY ATTORNEY FEES



Phil Goldsmith

By Phil Goldsmith
OTLA Guardian

A decade ago, Mark Griffin, Hope Del Carlo and I won a great victory in a predatory mortgage lending case.¹ A hard working immigrant couple, Panfilo Vasquez-Lopez and Maria Dominguez, built their credit to be able to buy a home. But then they were tricked into refinancing by a callous bilingual mortgage loan originator.

They signed the English language loan documents that they couldn't read on his representation they were getting a better interest rate. In fact, it was several percent higher. When they came to us, they feared they would lose their home.

The jury found they had been defrauded and assessed \$500,000 in punitive damages. After the lawsuit, they

owned their home free and clear.

But the defendant worked us hard in the trial court and on appeal. So hard that we couldn't have gotten full payment for our time from a percentage of their recovery. We only did because of statutory attorney fees.

Based on that experience and many others, I'll offer suggestions on (1) how to prepare in advance for a fee petition and (2) effective techniques to recover reasonable attorney fees.

Generally, the same principles apply whether the fee petition is governed by state or federal law.² One major difference is state law requires a court to consider the factors in ORS 20.075. Some of these could justify less than a fully compensatory fee, unless the legislative policy of a particular fee statute requires full payment.³

Preparation at the outset

In small value cases, the fee may be significantly greater than the client's recovery.⁴ So the standard contingent fee contract must be adjusted to insure that you, not the client, receive the fees. You must also determine whether the IRS could consider your fees to be taxable income to your client and, if so, how to advise the client.⁵

Framing the complaint

If you allege substantially greater

damages than what seems provable, a court might reduce the fees ultimately awarded.⁶ Think through your claims for relief, as multiple claims create additional timekeeping obligations for you. In state court, ORCP 68 dictates what you must allege to recover fees.

Record your time as you work

Ordinarily, the hours you work are a fundamental component of a statutory fee award.⁷ Provide some detail about what you did. Some courts will not compensate for general entries like "call with X."⁸ And if later developments make some of your time non-compensable, the detail will help you determine what time to remove. You can protect privilege and work product by redacting the records submitted to defense counsel.

When possible, identify the time spent on each discrete task worked in a day. Failure to do so could result in time being discounted for block billing.⁹ In multiple claim cases, note those tasks that advance some but not all claims.

Fee petition strategies

"[B]oilerplate submissions [can be] self-defeating."¹⁰ Obviously, the effort you put into a fee petition depends on the amount at stake and the level of expected opposition. But in every case, you must educate the judge on the law and facts that

See How to Help p 40

warrant the fee you seek, as well as the public policy you have enforced and how a fee award serves that policy. You also need to demonstrate your reasonableness.¹¹

What hours to claim

Courts often reduce a petitioner's hours. In federal court, a reduction up to 10 percent is called "a haircut" and does not require a specific explanation.¹²

Your goal, therefore, cannot be to receive payment for every hour worked. Instead, you must make reasonable judgments and hope your opponent will aid you by taking extreme positions.

The first step is to apply billing judgment, i.e., to ask yourself if I received this bill would I think it fair or consider some of the work excessive, redundant or unnecessary? If this causes you to reduce your time significantly, tell the court. No need for two haircuts.

Unless you have won — and are entitled to fees on — every claim, you normally will have to remove more time.¹³ Certainly any time spent exclusively on a claim that you cannot receive fees for.¹⁴ And when your success on fee-generating claims is "partial or limited," you will need to discount that time too.¹⁵

Detailed time records will aid you in determining specific entries to remove. But likely you will need to propose a further percentage reduction. Be reasonable and hope your opponent will over-

reach.

Courts recognize there can be missteps on the road to success. Often it will be appropriate in seeking compensation on a successful claim to include a motion you've lost or a line of investigation which proved fruitless.¹⁶ But billing judgment may dictate differently when you took a considerable trip down an unsuccessful path.

Explain any case dynamics that required you to spend more time than might be expected.¹⁷ Include the time you spend on the fee petition.¹⁸

What hourly rates to claim

You are entitled to the "prevailing market rates in the relevant community."¹⁹ In a protracted case, courts award interest or use current hourly rates to compensate for delay.²⁰ The rate recently awarded you by another court and the rate you charge hourly clients are suggestive, but not conclusive, evidence of the prevailing market rate.

Often courts look to the average rates for lawyers of comparable experience in the Oregon State Bar's economic survey.²¹ But those rates may not be appropriate. Lawyers with superior skills command higher rates.²² The bar survey itself shows that certain specialty areas such as bankruptcy, commercial litigation and real estate/environmental litigation generally receive higher rates.²³ For commercial litigation, this is confirmed by the surveys conducted by forensic accountant Serena Morones.²⁴

Consider consulting with an attorney fee expert about the rate you should seek. Remember courts will expect lawyers with higher hourly rates to be more efficient.

Claiming enhancement for risk

Risk enhancements are possible under state, but not federal, law.²⁵ Despite appellate guidance,²⁶ state trial judges vary widely on when and how they will enhance attorney fees for contingent risk. So in shaping the argument for a particular case, learn how your judge has previously ruled.

Presenting testimony of a fee expert

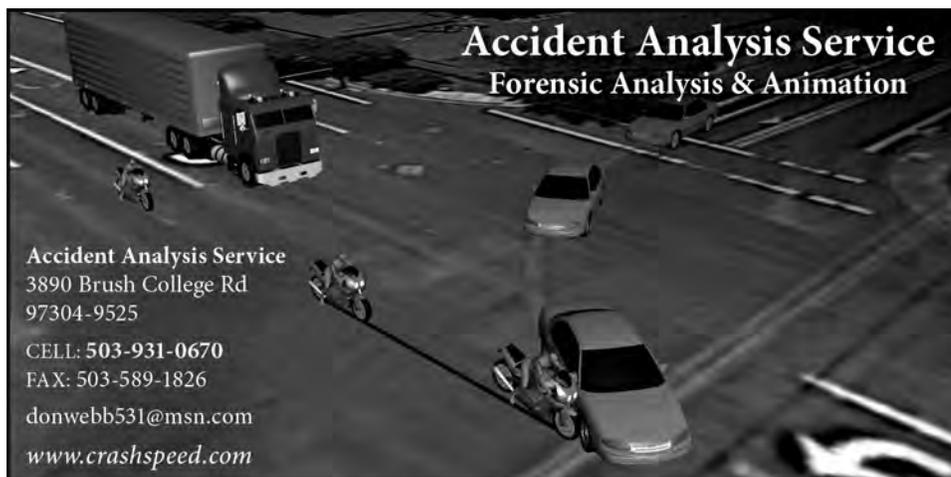
In major cases, expert testimony on market rates, appropriate enhancement and similar subjects offers potential benefits that significantly exceed the cost.²⁷ A lawyer who regularly handles smaller statutory fee cases may achieve sufficient long-run value from a favorable hourly rate decision to justify the expense of a testifying fee expert. But sometimes it is financially prudent just to consult with an expert.

Responding to attacks

The fee opposition may claim you spent too much time on a simple case, and that you don't deserve the hourly rate you seek. Don't let it show if you take these attacks personally. Your judge has seen your performance. You won't enhance your status by responding to your opponent in kind.

Provide any facts that deflate your opponent's claims. Among the key facts are the aggregate hours worked by each lawyer for your opponent and the rates at which they bill.²⁸ Many judges will allow their discovery.

In a recent class action where plaintiffs' counsel were accused of overstaffing, discovery established they had billed 2,000 hours fewer than defense counsel. The trial court consequently awarded more than 90 percent of the requested hours.²⁹ The fee opponent who blocks discovery of lawyers' hours and rates may



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achieve a pyrrhic victory. In an earlier class action, a trial judge in granting a motion to quash warned he would “take into consideration defendant’s refusal to produce such information... if I hear an argument that plaintiff’s hours or hourly fees are excessive.”³⁰

Conclusion

Statutory attorney fees made it possible for Panfilo Vasquez-Lopez and Maria Dominguez to obtain justice. Those fees enable me and other lawyers to continue to do this kind of work for cheated homeowners, defrauded consumers and mistreated employees. Take the steps necessary so you can be fairly paid when you win a case of this kind.

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¹ *Vasquez-Lopez v. Beneficial Oregon, Inc.*, Multnomah County Circuit Court Case No. 0210-10108, 210 Or App 553, 588 (2007).
² The applicable law is determined by the statute that grants the right to fees, not the law of the forum. *E.g., Vasquez-Lopez, supra*, 210 Or App at 588 (applying federal standards to federal statutory fees). Applicable procedures depend on the forum. Thus, for example, you only have a right to an evidentiary hearing in state court. ORCP 68 C(4)(e).
³ Compare ORS 20.075(1)(c) (“The extent to which an award of an attorney fee would deter others from asserting good faith * * * defenses in similar cases”) with *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 213 (1990) (“The availability of basic compensation to counsel * * * cannot be problematical if consumers are going to be able to bring UTPA actions”).
⁴ Capping statutory attorney fees at some ratio of the plaintiff’s recovery “would seriously undermine the ability of injured plaintiffs to obtain any redress in small dollar cases.” *Strawn v. Farmers Insurance Co.*, 228 Or App 454, 488 (2009). Under federal law, see *City of Riverside v. Rivera*, 477 US 561, 576-578 (1981).
⁵ 26 USC § 62(a)(20) and (21) shield plaintiffs in employment and civil rights cases. Consult the author for strategies in other contexts.
⁶ *Beaverton School District 48J v. Crescent Grove*

Cemetery Association, Washington County Circuit Court Case No. C132747CV (October 6, 2014) (fee reduced when the defendant in a condemnation case recovered less than half the damages sought and the original damages pled were not objectively reasonable).

⁷ However, under state law, where there is a large contingent recovery, a court has “discretion to award attorney fees based on a percentage of a party’s recovery” even when that fee is “considerably larger” than the value of the time worked. *Coulter Property Management, Inc. v. James*, 160 Or App 390, 392, 394 (1999). But make sure your fee agreement lines up with the language of the governing statute. See *English v. Multnomah County*, 229 Or App 15, 29-30 (2009).
⁸ See Message from the [Oregon Federal District] Court Regarding Fee Petitions, <http://ord.uscourts.gov/index.php/court-info/court-policies/fee-petitions>.
⁹ For the federal court definition of block billing, see *United States v. Montagne Development, Inc.*, 2014 US Dist LEXIS 73825 at *11-12 (D Or 2014). Contrary to *Montagne*, a complete denial of fees is no longer an appropriate remedy for block billing. *Lyon v. Chase Bank United States, N.A.*, 656 F3d 877, 892 (9th Cir 2011); *Rosekrans v. Class Harbor Association, Inc.*, 239 Or App 621, 641 (2009).
¹⁰ *Computer Concepts, Inc. v. Brandt*, 141 Or App 275, 280 (1996) (Haselton, J, concurring).
¹¹ At a recent CLE, Multnomah County Circuit Judge Jerome LaBarre stressed building credibility with the court when petitioning for fees.
¹² *Moreno v. City of Sacramento*, 534 F3d 1106, 1112 (9th Cir 2008).
¹⁴ *But see Hensley v. Eckerhart*, 461 US 424, 435 (1983) (no reduction required under federal law when “excellent results” have been achieved).
¹⁴ *Bennett v. Baugh*, 164 Or App 243, 248-249 (1999).
¹⁵ *Hensley, supra*, 461 US at 436.
¹⁶ *Thiebes v. Wal-Mart Stores, Inc.*, 220 Fed Appx 750, 751 (9th Cir 2007) (recognizing “scorched earth” defense strategy will increase plaintiff’s fees).
¹⁷ *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869, 884 (9th Cir

2005).

¹⁸ *Crandon Capital Partners v. Shelk*, 219 Or App 16, 47-48 (2008) (compensable under “long-standing precedent”).
¹⁹ *Parrott v. Carr Chevrolet*, 156 Or App 257, 283 (1998). See *Blum v. Stenson*, 465 US 886, 896 n11 (1984) (rate “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation”). However, higher rates are appropriate when a case requires “specialized * * * litigators not readily available in the locality.” *Hanna Limited Partnership v. Windmill Inns of America, Inc.*, 223 Or App 151, 166-167 (2007).
²⁰ *Missouri v. Jenkins*, 491 US 274, 294 (1989).
²¹ The federal court calls those rates the “initial benchmark” and “requests” that lawyers justify higher rates. <http://ord.uscourts.gov/index.php/court-info/court-policies/fee-petitions>. The current (2012) Bar fee survey can be found at <http://www.osbar.org/docs/resources/Econsurveys/12EconomicSurvey.pdf>.
²² *Strawn v. Farmers Insurance Co.*, 233 Or App 401, 418 (2010) (rates for peers of lead class counsel between \$450 to \$590 per hour).
²³ http://www.osbar.org/_docs/resources/Econsurveys/12EconomicSurvey.pdf 29, 31-32.
²⁴ See *Prison Legal News v. Columbia County*, 2014 US Dist LEXIS 38663 at *8, 23.
²⁵ Compare *Strawn, supra*, 233 Or App at 416 with *City of Burlington v. Dague*, 505 US 557 (1992).
²⁶ *Strawn, supra*, 233 Or App at 416-418.
²⁷ And may be expected by the court. See *Computer Concepts, supra*, 141 Or App at 280 (Haselton, J, concurring).
²⁸ However, lower rates charged by insurance defense counsel are not material for the reasons explained in *Dockins v. State Farm Insurance Co.*, 330 Or 1, 13, 997 P2d 859 (2000).
²⁹ *Liborio v. Del Monte Fresh Produce N.A., Inc.*, Multnomah County Circuit Court Case No. 0710-11657, Attorney Fee Opinion (November 30, 2011), 8.
³⁰ *Guinasso v. Pacific First Federal*, Multnomah County Circuit Court Case No. 416-583, Letter Opinion (January 24, 1985).

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