Think Again

Making the Most of Defense Attorneys' Fee Awards

By Adam M. Koss
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Attorneys' fees clauses and statutes, while most often thought of as an advantage to plaintiffs, can provide a significant benefit to the defense bar.

As defense lawyers, we often think of attorneys' fee clauses and statutes as a hindrance to settlement and a liability for our clients after judgment. This is because, more times than not, plaintiffs retain their attorneys on a contingency fee basis, and thus pay nothing out of pocket to their attorneys, yet assume they will recover damages and attorneys' fees. Meanwhile, our clients are paying hourly and incurring substantial fees, increasing their expectations as to the savings they should achieve through settlement. This type of thinking can and should be turned on its head.

If a case proceeds to judgment and the defense wins, defendants are generally entitled to fees under the same standard as plaintiffs, regardless of whether they originally paid hourly, on a flat fee, below-market rate, or not at all. Understanding the situations in which fee awards are recoverable and how such awards are calculated can also greatly assist in encouraging settlement. In that regard, this article will look at the two main issues which often come up in fee awards sought by the defense: (1) who is entitled to seek an award; and (2) how is the award calculated.

Availability of a Fee Award

Under the well-known "American Rule" adhered to by default in all federal and state courts of this country, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), *superseded on other grounds*; *see also Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291, 301 [225 A.2d 325] (1966). There are, however, several exceptions to the American Rule, the most common being fee shifting statutes and contractual fee shifting provisions. With Congress having enacted hundreds of fee shifting statutes over the years, in addition to those promulgated by the 50 states, and the costs of litigation on the rise, fee shifting, whether by statute or contract, is becoming ever more prevalent. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 562 (1986) (noting that by 1986, over 100 fee statutes

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had been enacted). It is therefore important that defense counsel evaluate the potential right of fee recovery from the outset.

Fee Shifting Statutes

Generally, a fee shifting statute has one of three purposes:

> First, they are designed to address the 'problem of unequal access to the courts.' Second, they are intended to provide the individuals, whose rights are being protected by the statutes, with the resources to enforce those rights in court. Finally, they operate so as to '[e]ncourag[e] adequate representation [which] is essential' to ensuring that those laws will be enforced. In addition … fee-shifting provisions 'are designed… to promote respect for the underlying law and to deter potential violators of such laws.'

Walker v. Giuffre, 209 N.J. 124, 129–30 [35 A.3d 1177] (2012); *see also Smith v. Rae-Venter Law Group,* 29 Cal.4th 345, 350 [58 P.3d 367] (2002) (noting fee shifting statutes are meant to promote the finality of decisions by discouraging meritless appeals with the threat of paying fees related thereto).

Fee shifting statutes come in countless different shapes and sizes. For instance, many fee shifting statutes—such as those for civil rights violations—are often one-way statutes where only the prevailing plaintiff can recover. Additional examples of fee shifting statutes which favor plaintiffs or "claimants" are statutes governing claims by shippers against carriers of their goods, property owner claims against railroads for damages incurred by negligent operation of trains, workers' compensation cases, tax collection cases, litigation arising from a violation of local securities regulations, and other similar statues "designed to accomplish a particular purpose the enforcement of which would be aided by requiring an unsuccessful defendant to pay the claimant's attorney's fee." Annotation, *Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice versa*, 73 A.L.R.3d 515, §2a (2009).

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Other fee shifting statutes, although less common, particularly favor defendants. For instance, anti-SLAPP statutes and other vexatious litigation statutes often favor the defense. *See e.g. Norris-LaGuardia Act,* 29 U.S.C. §107; Cal. Code Civ. Proc. §425.16 (California's anti-SLAPP statute, providing for a mandatory defense award and a discretionary plaintiff's award); Me. Rev. Stat. Ann. tit. 14, §556 (2003) (Maine's anti-SLAPP statute, meant to "combat… litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants"). Another example of "pro-defense" fee shifting occurs with respect to condemnation proceedings, where the land-owners, forced to protect their property, can recover fees. 73 A.L.R.3d 515, *supra,* at §2a. That said, reciprocal fee shifting statutes are just as common, where the prevailing party, regardless of its side, is permitted to recover. *See e.g.,* Cal. Lab. Code, §98.2 & Wis. Stat. §109.03 (statutes governing wage claims); 11 Del. C. §941 (2014) (providing for attorneys' fees in civil cases filed to enjoin violations of the criminal code governing computer-related offenses); Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415(i)(3)(B).1 (2004); 42 U.S.C. §1988 (providing for attorneys' fees in civil rights actions to the prevailing party, other than the United States).

There is also a big distinction between mandatory and discretionary statutory fee awards. Under a mandatory fee shifting statute, assuming the conditions set forth in the statute are met, the court must award fees. *See e.g., MCA TV, Ltd. v. Public Interest Corp.*, 171 F.3d 1265, 1281 n.21 (11th Cir. 1999) (if claimants suffer the requisite antitrust injury in "any amount," a fee award is mandatory under 15 U.S.C. §15(a)). Compare also, *Middleton v. Lockhart*, 344 Ark. 572 [43 S.W.3d 113] (2001) (where the relevant statute provided that the fees for an attorney assigned to represent a prisoner "shall" be taxed as costs and paid by the plaintiff, the court had no discretion to tax the fees as costs against the prisoner as a sanction for his conduct in discovery), to *Maietta Const., Inc. v. Wainwright*, 2004 ME 53 [847 A.2d 1169] (2004) (upholding the discretion of a court under the State's anti-SLAPP statute to award attorneys' fees to one defendant of the suit (an attorney) but not a second defendant (the client), despite the similarity of the allegations against them). However, even under a mandatory fee shifting statute, the Court is often allowed to exercise at least some discretion. For instance, under federal civil rights statutes, the Supreme Court has held a prevailing plaintiff should recover attorneys' fees *unless* special circumstances make an award unjust, but a prevailing defendant should *only* recover fees if the plaintiff's action was frivolous, unreasonable, or without foundation. *See Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402–03 (1968); *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978). *See also* Cal. Code Civ. Proc. §425.16(c) (discussed above).

Contractual Fee Provisions

Whether in state or federal court, contractual fee claims are generally governed by state law. *Security Mortgage Co. v. Powers*, 278 U.S. 149, 154 (1928) (stating the construction of a fee shifting agreement between private parties is a "question of local law"). However, federal courts have carved out several exceptions to this general rule, notably that enforcement of an attorneys' fees clause on a federal issue must be consistent with the substantive federal law. *See Slurry Seal v. Laborers Int'l Union of N. Am. Highway & St. Stripers/Road & St. Slurry Local Union 1184*, 241 F.3d 1142, 1146–48 (9th Cir. 2001) (California statute requiring reciprocity of attorneys' fee provisions in all contracts could not be applied to collective bargaining

agreement when doing so was against federal policy); *Moore v. Local 569 of the Int'l Brotherhood of Elec. Workers*, 53 F.3d 1054, 1058–59 (9th Cir. 1995) (clause in collective bargaining agreement providing for fees in any dispute between union and one of its members was invalid under federal labor law). The default position, however, is to allow fee shifting contracts, and only disallow them when the shifting would be inconsistent with federal law. Merely supplementing the federal remedies through the application of state contract law does not produce such an inconsistency. *See, e.g., Menchise v. Senterfitt,* 532 F.3d 1146, 1152–53 (11th Cir. 2008) (state statute regarding the recovery of attorneys' fees for a failure to accept a reasonable settlement offer was not inconsistent with Federal Rule of Civil Procedure 68, and was therefore applicable in an adversary proceeding in a bankruptcy action). The issue does not arise when a matter is in federal court on diversity grounds since, under the *Erie* doctrine, the federal courts are to apply state law.

Of course, not all states follow the same laws for contractual fee provisions. Some jurisdictions, such as California, prohibit the enforcement of one-way fee provisions and instead require any fee provision, even one-way, be enforced equally against both parties. *See* Cal. Civ. Code §1717 ("In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorneys' fees in addition to other costs."). Other jurisdictions do the same, at least in certain types of contracts. *See generally* Conn. Gen. Stat. §42-150bb (2005) (making fees reciprocal in consumer contracts); Mont. Code Ann. §28-3-704 (2005) (reciprocal fees in contracts); Or. Rev. Stat. §20.096 (reciprocal fees in contracts); Utah Code Ann. §78-27-56.5 (2005); Wash. Rev. Code §4.84.330 (2005) (reciprocal fees in contracts and leases). In fact, at least one jurisdiction provides for attorneys' fees in *all* actions on a contract. *See, e.g.,* Tex. Civ. Prac. & Rem. Code §38.001(8) (individual or corporation liable for attorneys' fees on claim under oral or written contract).

Under basic contract principles, a contractual fee shifting provision must be enforced pursuant to its strict terms. *See e.g., Kellogg Co. v. Sabhlok,* 471 F.3d 629, 636–37 (6th Cir. 2006) (though employment severance agreement contained attorneys' fee clause, it was expressly applicable only when former employee "filed" claim against employer, so clause was inapplicable when employer filed declaratory judgment action and employee merely presented counterclaim); *Chong Kook Kim v. Yong Do Kang*, 154 F.3d 996, 1001 (9th Cir. 1998) (district court properly denied award of attorneys' fees in litigation concerning brokerage contract, because fee provision in contract was limited to suits by broker to collect amounts due under contract, and therefore did not apply to tort claims asserted in action).

Indeed, whether a contractual attorneys' fee award will include all fees in an action for contract and tort claims, or only those for contract claims, depends upon a careful reading of the fee provision. In California, one case held that a fee provision stating "if legal action or arbitration is necessary to enforce the terms of this Agreement, the prevailing party shall recover reasonable attorneys' fees" did not allow recovery of fees for anything other than contract claims in a subsequent action. *Loube v. Loube*, 64 Cal.App.4th 421, 429–31 (1998). On the other hand, another California case interpreted the following phrase to allow fees for the entire defense: "[T]he prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded attorneys' fees and costs incurred in that action or proceeding, including, without limitation, the value of the time spent by attorneys to prosecute or defend such an action." *Lockton v. O'Rourke*, 184 Cal.App.4th 1051, 1071–76 (2010). The crucial difference between the two is that, in *Loube*, the provision calls only for fees to "enforce the terms of" the agreement, whereas in *Lockton* the provision calls for "fees and costs incurred in that action." The latter was held to be broader, and thus included the entire defense. (Although, as discussed below, the former may be better for the award since it entitles the prevailing party to "reasonable" fees as opposed to fees "incurred.") Obviously, a careful reading of a contract or statute is crucial in determining from the outset what fees a client may be entitled to recover.

What Fees Are Recoverable

Once defense counsel has determined that there is a right to recover fees, the next equally important issue is recovery amount. In most statutes or contracts, the recovery is for *reasonable* fees, which is generally the default position if there is no distinction made. *See e.g.* Cal. Civ. Code §1717(a) (stating where a contract contains a clause providing for attorneys' fees incurred in litigation, "the party who is determined to be the party prevailing on the contract… shall be entitled to reasonable attorneys' fees in addition to other costs…which shall be fixed by the court."). However, if the contract or statute clearly and specifically provides only for fees "paid" then the fees actually paid are often the outer limit of what is recoverable. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("*Blanchard*") ("The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way.").

The default position, however, is to allow fee shifting contracts, and only disallow them when the shifting would be inconsistent with federal law.

The universally adopted method of calculating a reasonable fee, the lodestar, was first crafted by the Third Circuit in *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161, 167–69 (3d. Cir. 1973) ("*Lindy I*"). Under *Lindy I,* courts were instructed to first calculate the lodestar fee based on the hours expended multiplied by the attorneys' rea-

sonable hourly rate of compensation. The lodestar amount was then adjusted on the basis of certain factors, such as "(1) the contingent nature of the case, reflecting the likelihood that hours were invested and expenses incurred without assurance of compensation and (2) the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained." *Merola v. Atlantic Richfield Co.,* 515 F.2d 165, 168 (3d Cir. 1975); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 117 (3d Cir. 1976) ("*Lindy II*").

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The United States Supreme Court first weighed in on the topic in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), *superseded and abrogated in part,* wherein the court adopted a hybrid methodology, combining the approaches of *Lindy I* with an earlier Fifth Circuit factor analysis for fee shifting, as articulated in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). Under the *Hensley* approach, the court began by calculating the lodestar amount, which provided "an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley* at p. 433. Thereafter, other factors, including the result obtained, could be considered by the trial court in making adjustments of the fee amount up or down. *Id.* at p. 434. The approach of *Hensley* remains in effect and the standard starting point for determining the amount of reasonable attorneys' fees continues to be the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Kingvision Pay-Per-View Ltd. v. Villalobos,* 554 F.Supp.2d 375 (E.D. N.Y. 2008); *accord, PLCM Group v. Drexler*, 22 Cal.4th 1084, 1095 [997 P.2d 511] (2000) ("*PLCM*") (In calculating "reasonable" attorneys' fees, the California Supreme Court requires a court must follow the "lodestar" method, based on the prevailing market rate where the legal services were rendered.).

Evidence of Hours Expended

The *Hensley* case provided that where the documentation of hours is inadequate, the court may reduce the award accordingly. In most courts, "[t]estimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." *See Martino v. Denevi*, 182 Cal.App.3d 553, 559. *See also Weber v. Langholz*, 39 Cal.App.4th 1578, 1587 (1995) (finding an attorney declaration sufficient for the trial court to "make its own evaluation of the reasonable worth of the work done in light of the nature of the case....").

However, a court still must ensure that fees were "reasonably expended" and will exclude those hours which the court in its discretion deems were due to an overstaffed or overbilled case. *Hensley,* at p. 434 ("Hours that are not properly billed to one's client also are not properly billed to one's *adversary*....") (emphasis in original).Thus, cautious attorneys should, at the very least, provide some detail concerning the nature of the actual time expended on each of the legal tasks performed, the identity of who performed them, an explanation as to how the task related to the litigation, and whether the task was necessarily required; block billing is not advised. *See generally Paul v. United States*, 21 Cl. Ct. 415 (1990), *aff'd without opp.; Mars v. Priester,* 205 Ill.App.3d 1060 [563 N.E.2d 977] (1990), *appeal den'd; AMFAC Hotels & Resorts, Inc. v. State Dept. of Transp. & Public Facilities*, 659 P.2d 1189 (Alas. 1983), *overruled on other grounds; Healey v. Chelsea Resources, Ltd.* 133 F.R.D. 449 (S.D.N.Y. 1990) ("*Healey*"). Determining the amount of detail to provide regarding billings requires a balancing act to protect privileges and strategy, of which attorneys must be cognizant. This is particularly important in an instance where an appeal or further review is expected because counsel will not want to provide the other side with significant details regarding their work on the case during an ongoing lawsuit.

Reasonable Hourly Rate

While the hours worked is a mostly subjective analysis, the rate is often more of an objective test. Generally, in deciding a "reasonable hourly rate," the rate actually charged is irrelevant. *Blanchard,* at p. 86–97; *PLCM, at* p. 1096 (the rate charged to the fee applicant "do[es] not compel any particular award."); *Welch v. Metro. Life Ins. Co.,* 480 F.3d 942, 946 (9th Cir. 2007) ("We have repeatedly held that the determination of a reasonable hourly rate "is not made by reference to the rates actually charged the prevailing party."). To the contrary, if the rate the applicant's attorney has actually charged to the applicant is less than the amount of a reasonable hourly rate, then a court should generally *increase* the rate actually charged to match the reasonable rate. "The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may… be adjusted… to fix the fee at the fair market value for the legal services provided." *PLCM*, at p. 1095. The market value of legal services rendered is determined by the rates charged in the relevant community by attorneys of comparable knowledge, skill, experience, and reputation. *Blum v. Stenson,* 465 U.S. 886, 895 (1984) ("*Blum*") ("The statute and legislative history establish that 'reasonable fees' under section 1988 are to be calculated according to the prevailing market rates in the relevant community..."); *see also Carson v. Billings Police Dep't*, 470 F.3d 889, 892 (9th Cir. 2006) (stating the lodestar should be based upon the prevailing market rate rather than the specific attorney-client fee agreement).

There is sometimes more hesitance to award fees beyond those incurred when a party has been paid by the hour; this is an issue that often comes up in defense contractual fee shifting cases. However, many courts realize a prevailing defendant in a fee shifting case should be treated the same as a prevailing plaintiff, and therefore should be entitled to a lodestar rate regardless of the costs actually paid. Indeed, if an award was to be for fees "paid" the legislature or contract drafters could have

inserted that or similarly specific language. Two recent California cases addressed this issue, and both decided that the lodestar is the appropriate calculation in a contractual fee dispute, even where the defendant was charged hourly.

In *Nemecek & Cole v. Horn,* 208 Cal. App.4th 641, 651–52 (2012), the Court held that the rate actually charged was not the determinative factor on what constitutes a reasonable fee. There, the appellant argued that the contractual fee award should be limited to the amount of fees actually paid, rather than pursuant to a lodestar calculation. *Id. Nemecek* expressly rejected the argument: "In short, Horn urges us to cap the attorney fee award to that which was actually incurred. We decline to do so… [T]here is no support for Horn's argument that Nemecek cannot be reimbursed for attorney fees which were not actually paid. Indeed, this argument runs counter to [the law]." *Id.*

Two years later, in *Syers Properties III, Inc. v. Rankin,* 226 Cal.App.4th 691 (2014), the California Court of Appeal once again considered a fee award based upon a contractual fee shifting provision. There, the Court stated: "There is no requirement that the reasonable market rate mirror the *actual* rate billed." *Id.* at p. 701 (emphasis in original). The plaintiff in *Syers Properties* argued that in a case where there was no contingency risk regarding fees paid, but rather an hourly arrangement, the "reasonable rate" should be limited by the amount charged. The plaintiff also argued that the market rate should be couched in terms of insurance defense, which it argued had their own separate, and lower, market rate, as opposed to a market rate for litigation attorneys generally. *Id.* at p. 701–02. The appellate court found the trial court was well within its discretion to award a "reasonable fee" regardless of what the prevailing parties' attorneys billed hourly, and indeed was permitted to award a reasonable rate without seeing the actual rate billed or paid. *Id.* at p. 702–703. (At the time this article went to press, a petition for review of *Syers Properties III* was pending before the California Supreme Court. The petition, answer and reply had all been filed, and a decision of whether the California Supreme Court would grant review was pending.)

These cases both relied upon longstanding California fee award law providing for the use of the lodestar regardless of the rate charged. *See e.g. Ketchum v. Moses*, 24 Cal.4th 1122, 1132 [17 P.3d 735] (2001) ("We expressly approved the use of prevailing hourly rates as a basis for the lodestar, noting that anchoring the calculation of attorney fees to the lodestar adjustment method is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.") (citation and internal quotations omitted). *See also Chacon v. Litke,* 181 Cal.App.4th 1234, 1260 (2010) (awarding a reasonable rate of $350 per hour under the lodestar calculation despite a fee agreement stating the attorney's reasonable hourly rate was $300 and stating: "The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel.") (citations omitted, emphasis added); *accord*, *Blum,* at p. 895.

The reason for this rule is that "the market value approach has the virtue of being predictable for the parties and easy to administer" rather than an actual fees/costs approach, which is intrusive, cumbersome, and subject to manipulation, among other evils. *PLCM*, at p. 1097. The California Supreme Court went on to state: "Requiring trial courts in all instances to determine reasonable attorney fees based on actual costs and overhead rather than an objective standard of reasonableness, *i.e.*, the prevailing market value of comparable legal services, is neither appropriate nor practical; it 'would be an unwarranted burden and bad public policy.'" *Id.* at p. 1098. *See also Center for Biological Diversity v. County of San Bernardino*, 188 Cal. App.4th 603, 619 (2010) ("Chatten-Brown & Carstens commonly accepts reduced rates from clients. Here, for instance, the firm accepts reduced rates from plaintiffs, which does not affect its right to seek reasonable market rates….").

There are many ways to show the reasonable market rate of lawyers in the relevant locality. Indeed, many courts even hold that evidence of prevailing market rates is not necessary. *See, e.g., PLCM*, at p. 1096 ("The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony.") (emphasis added). Attorneys, however, are rightfully hesitant to seek a fee award without at least some evidence of prevailing market rates.

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There are generally three ways to show a reasonable fee. The first, and perhaps easiest, is to seek exactly what was charged. *See Matthews v. Wisconsin Energy Corp.*, 642 F.3d 565, 572–73 (7th Cir. 2011) (stating "[a] willingness to pay is an indication of commercial reasonableness."). Of course, even rates charged are not always deemed reasonable *per se*, such as in the case where an attorney from a higher rate locality performs work outside their general area where rates are lower.

Another way of showing a reasonable fee is to submit declarations of counsel—either from the billing attorney or of an expert—stating what the reasonable rates in the community are. Evidence of the reasonableness of an attorney's hourly rates in these instances should include:

> [A]ffidavits from attorneys with similar qualifications stating the precise fees they have received for comparable work or stating the affiant's personal knowledge of specific rates charged by

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other lawyers for similar litigation, data about fees awarded in analogous cases, evidence of the fee applicant's rates during the relevant time period, and evidence submitted by other fee applicants in like cases.

Healey, at p. 456; *see also United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) ("Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate.").

Finally, yet another accepted method is to use a national database of fees, such as the Laffey Matrix, and adjust it based upon the locality in which the fees are sought. The Laffey Matrix is a matrix of hourly rates for attorneys of varying experience levels, paralegals, and law clerks that is prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. It is intended to be used in calculating a "reasonable" fee and is based upon the hourly rates allowed by the District Court in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). Fees are then adjusted for cost of living in the Washington D.C. area on a yearly basis.

As the Court in *In re: HPL Technologies, Inc. Securities Litigation,* 366 F.Supp.2d 912, 921–22 (N.D.Cal. 2005) explained, the Matrix should be adjusted, either upwards or downwards, to account for cost of living in various different regions of the United States. *Id.* at p. 921–22. This was the formula used in both *Nemecek & Cole v. Horn* and *Syers Properties III, Inc. v. Rankin*, discussed above.

Lodestar Multipliers

The final step in the lodestar calculation, after determining the reasonable fee by multiplying the reasonable hourly rate by the hours reasonably worked, is to apply any applicable multipliers. One of the main factors at play in applying a multiplier is the contingent nature of an action, which generally is not an issue when the fees are being awarded to defense counsel. Indeed, the U.S. Supreme Court has held that "such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Pa. v. Del. Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986) (stating factors such as the novelty and complexity of the issues, skill of counsel, quality of representation and results are all generally subsumed in the reasonable hourly rate portion of an award). Accordingly, while a multiplier is something to be considered, particularly in a pro bono situation, they are not as common in defense awards, which rarely arise out of a contingency fee arrangement, and thus are not discussed in detail in this article.

Concerns After Fees Are Awarded

While this article focused on getting the defense fee award, that is rarely the end of the matter. For instance, a big question that can arise once an award is made, particularly one not based upon fees actually paid or incurred, is who owns the award. Is it the attorney? Is it the client? Or is it the insurance company that actually paid the fees? Depending on the jurisdiction, the answer to this question may be significantly different. Even after determining who owns the fees, the hardest part of all may be collecting from the plaintiff, who is often less able to pay than the defense.

Conclusion

Fee shifting provisions, while most often thought of as an advantage to plaintiffs, can also provide a significant benefit to the defense bar, both in the ability to negotiate during a case and in recovery of fees following a successful judgment. They can and should be used to your advantage whenever possible and you will get the most out of them if the analysis is performed from the outset of the representation. FD