Maximizing your attorneys' fees recovery in the trial court following a successful FEHA judgment

It's a process that begins long before the final judgment day

By Norman Pine & Scott Tillett

Attorneys taking on employment or other civil-rights cases on a contingency basis often spend years of their valuable time litigating those cases to victory, only to wind up blowing their own financial remuneration when their fee motions are decided. What is aggravating beyond measure is that the resultant attorneys' fees travesty was so avoidable. The simplest of steps taken along the way could have radically changed the final result.

The purpose of this article is to point out some of the hazards in curating and presenting fee petitions. Note carefully that some of these steps (e.g., keeping contemporaneous and meaningfully descriptive time records) have to be instituted long before that final judgment day.

California law demands that statutory attorney fee awards be *determined* using the lodestar method. The lodestar amount reflects the reasonable hourly rate times the reasonable number of hours incurred, which is then adjusted through the application of a "multiplier" based on various factors. (*Serrano v. Unruh* ("*Serrano IV*") (1982) 32 Cal.3d 621, 639.)

Once established, the lodestar must be applied according to the principles the California Supreme Court has long demanded. In *Ketchum v. Moses* ("*Ketchum*") (2001) 24 Cal.4th 1122, 1133, the Court held that the award "should be fully compensatory," and absent "circumstances rendering the award unjust, an ... award should ordinarily include compensation for *all* the hours *reasonably* spent." (Emphasis added.)

Keep contemporaneous time records

California's fee statutes assure that a plaintiff's attorney who takes a statutory case such as FEHA can anticipate receiving full compensation for "all hours reasonably spent unless special circumstances" demand otherwise. (*Vo v. Las Virgenes Muni Water Dist.* (2000) 79 Cal.App.4th 440, 446.)

So, just what is a special circumstance? In *Serrano IV*, our Supreme Court stated: "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. 'If ... the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands ….' [Citation]." (32 Cal.3d at 635.)

In determining the "lodestar," the court has broad discretion to decide the appropriate number of hours "reasonably spent" by the attorneys. (*Hammond v. Agran* (2002) 99 Cal.App.4th 115, 133-136.) "California courts have consistently held that a computation of time spent on a case and the reasonable value of that time *is fundamental* to a determination of an appropriate attorneys' fee award.'" (*PLCM Group, Ins. v. Drexler* ("*PLCM*") (2000) 22 Cal.4th 1084, 1095, emphasis added.)

The lodestar amount is *presumed* to be valid and fully compensable. In *Horsford v. Board of Trustees* ("*Horsford*") (2005) 132 Cal.App.4th 359, 396, the Court of Appeal held that the trial judge had abused his discretion by rejecting counsels' verified time records:

> We think the verified time statements of the attorneys, as officers of the court, are entitled to credence *in the absence of a clear indication* the records are erroneous. Attorney Gordon, for example, stated in his verified declaration that his listing of hours "included only the hours *that I believe were reasonably necessary* to achieve our clients' goals."

(Emphasis added.)

Establishing the reasonable hourly rate

You must marshal competent evidence to establish "the reasonable hourly rate" for comparable attorneys working on comparable cases in the relevant community. A "reasonable" hourly rate is ordinarily the prevailing rate charged by attorneys of similar skill and experience in the relevant community or market. (*PCLM*, *supra*, 22 Cal.4th at 1095.)

When it comes to supporting your hourly rate, location cannot be ignored. This is especially true if you practice in a large metropolitan area, but try a case in a smaller venue. Local hourly rates will almost always be lower in rural areas and the court has discretion to reduce your rate to bring it in line with the rates that local lawyers charge.

You should submit evidence reflecting rates for attorneys of comparable skill, experience, and reputation *in the local market*. But be aware that courts often rely upon their own familiarity with local market rates and the court's perceptions on this subject are difficult to challenge.

One way to avoid a reduction of your out-of-market rate is to demonstrate that the client looked for local counsel before hiring you. If local counsel was unavailable (or if the circumstances of the lawsuit required a particular specialty requiring out-of-town counsel), you should be entitled to your normal rate.

Another way to sidestep low local rates is if the defendants themselves had retained expensive metropolitan counsel. The seminal CEB treatise, Pearl on "California Attorney Fee Awards" ("*Pearl*") (3rd ed. 2020) section 9.115, makes clear that once the defendant chooses to select a national law firm officed in San Francisco, for example, the plaintiff's hiring of a similarly capable (and higher-priced) law firm should not be second-guessed. *Pearl* cites *Metavante Corp. v. Emigrant Sav. Bank* (7th Cir. 2010) 619 F.3d 748, 775, as an example, noting that it affirmed the higher rates after explaining "while criticizing [plaintiff] for retaining an out-of-town firm to handle the trial, [defendant] itself proceeded with a comparable out-of-town firm of its own." (*Pearl*, section 9.115.)

To maximize your position, you should obtain declarations from "experts" (e.g., experienced and successful employment law attorneys) to offer competent evidence of prevailing hourly rates of similar practitioners in the relevant market and their opinions respecting the reasonableness of the rates sought. You will have no trouble finding plaintiffs' attorneys (or, rarely, the occasional defense attorney) willing to provide declarations to support your rate request.

Those of you who plan to handle more than the rare employment case should ascertain whether you are eligible to join the California Employment Lawyers Association ("CELA"). One of the benefits of CELA membership is access to the listserv and brief bank, which each contain extremely useful information concerning rates recognized, fee awards, and briefing on these issues.

A final word on unhesitatingly asking for the rates you are entitled to. Contrary to arguments made regularly by defendants (and, unfortunately, sometimes accepted by ill-informed judges), plaintiffs' attorneys are not "second fiddles" to the haughty defense counsel who they often encounter.

The elitism takes a few different forms. For instance, defendants often argue that a plaintiff's lawyer should be restricted to seeking only rates that he/she actually charges paying clients. Absolutely not. Citing multiple authorities, *Pearl* notes that "[p]rivate attorneys who charge their clients at billing rates lower than the reasonable market value of their services or work pro bono are not restricted to those rates. . . ." (*Pearl*, section 9.97, citations omitted; see also, *Queseda v. Thompson* (1988) 850 F.2d 537, 543.)

Another example of this same double standard arises when defense counsel fly-speck fee applications with expert testimony opining that certain tasks could have been performed more cheaply if done by associates (or even paralegals). That logic may theoretically work at O'Melveny & Myers but does not justify punishing lawyers at small firms who may not have the luxury of any associates or paralegals. In *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1115, the court drove a dagger into the heart of this argument, noting that a court:

> may not *attempt to impose* its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved – not whether it would have been cheaper to delegate the work to other attorneys – must drive the district court's decision.

(Emphasis added.)

For the same reason, the frequently heard argument that plaintiffs' firms can charge lower rates because they have lower overhead makes no sense.

Request a significant multiplier

Most importantly, you must request a significant multiplier and aggressively fight to secure your rights to it. Many lawyers are reluctant to ask for a significant multiplier, but this is *not the place* to be shy. Requesting a significant multiplier is perhaps the most important consideration for maximizing an attorneys' fee award in FEHA cases.

Barring unique circumstances, courts should be expected (we argue required) to grant a reasonable multiplier in all purely contingent cases, or to explain why they are declining to do so. Nothing less will fully compensate counsel for the fair market value of their services.

In *Ketchum*, the California Supreme Court discussed the *virtual necessity* of awarding multipliers to compensate for contingent risk in cases brought under fee-shifting statutes. (24 Cal.4th 1122 at pp. 1132-33.) Two of the four disjunctive factors *Ketchum* highlighted in analyzing the multiplier included: (1) the extent to which the nature of the litigation precluded other employment by the attorneys and, especially, (2) the contingent nature of the fee award. (*Id.* at p. 1132.)

After stressing that the contingency attorney must be "fully" paid the "fair market value" of the services rendered, the Court made clear that *unless* a multiplier is used, a contingency attorney cannot be fairly compensated (compared to his or her hourly fee counterpart) given the great risk of *no payment* and the *certainty* that even if payment is received, it will be long delayed: "A lawyer who both bears the risk of not being paid and provides legal services is *not receiving the fair market value* of his work if he is paid *only* for the second of these functions. If he is paid no more, *competent counsel* will be *reluctant* to accept fee award cases." (*Ketchum*, *supra*, 24 Cal.4th at pp. 1132-33, citations omitted, emphasis added.)

Thus, *Ketchum*'s logic dictates that a positive multiplier must be the norm. "The experience of the marketplace indicates that *unless a premium* above the adjusted lodestar is awarded, lawyers generally will not provide legal representation on a contingent basis." (*Id.* at p. 1136, internal quotation marks and citation omitted, emphasis added.)

Do not be cowed by the "abuse of discretion" standard

You may be thinking that our thesis

is incorrect because *Ketchum* plainly states: "Of course, a multiplier is not required." (24 Cal.4th at p. 1138.) That language will be thrown at you in every opposition brief you ever see and probably cited by every judge who decides to deny a multiplier.

But there is a powerful response. The Supreme Court's broad statement must be read in the context of the entire opinion. In addition to the foregoing troublesome language, the Court also stated that a multiplier to compensate for contingent risk "constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (24 Cal.4th at p. 1138.)

Given those proclamations, it should be clear that the "not required" language is not an open invitation to simply do whatever the judge feels like. Rather, that one passing sentence is merely an assertion that, as with any rule, there can be exceptions if special circumstances exist. And, if they do, the judge should be required to spell them out.

This discussion raises a much bigger point. At least in cases involving fee-shifting statutes (where the Legislature has expressed its desire to advantage one group [plaintiffs] vis-à-vis another [defendants]), the "abuse of discretion" standard is more limited than it is in other cases.

The reason is spelled out in *Horsford*. Its analysis began by noting that, "because judicial discretion does not exist in a legal vacuum, the abuse of discretion standard is *delimited by the particular legal principles* being applied: '[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.'" (132 Cal.App.4th at 393, emphasis added, citation omitted.)

In short, even an otherwise reasonable decision, if rooted in a mistaken legal premise, amounts to abuse of discretion. As *Horsford* explained, a court could reasonably mistake the scope of its discretion and form a reasoned decision stemming from that reasonable mistake, "[b]ut a reasoned decision based on the reasonable view of the scope of discretion is still an abuse of judicial discretion when it starts from a mistaken premise, even though nothing about the exercise of discretion is, in ordinary-language use of the phrase, 'beyond the bounds of reason.'" (132 Cal.App.4th at 393, citation omitted.)

Given *Ketchum*'s logic and virtually all of its discussion, it would be a "mistaken premise" for a judge to assume the freedom to simply refuse to provide a reasonable "premium" for contingent risk merely because the judge does not believe multipliers should be granted. (See also, *Vines v. O'Reilly Auto Enterprises, LLC* (2022) 74 Cal.App.5th 174 (2022 WL 189840 at p. *6) [wherein Presiding Justice Perluss explained that the ""abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review."" (Citations omitted.)].)

Events since *Ketchum* have simply confirmed that, although a trial court's analysis must consider the *individual* circumstances of the case, multipliers should be expected in all but truly extraordinary circumstances. For example, in its post-*Ketchum* decision in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054, fn. 14, our Supreme Court stressed that the FEHA advances "fundamental public policy," it must be "construed broadly and liberally," and it must be interpreted so as to provide "*effective remedies*." (Emphasis added.)

Multipliers must not be granted sparingly

The risk of total nonpayment and the certainty of delay dictate that to be effective, multipliers must not be granted sparingly. Many acts of employment discrimination go unredressed because the victimized employees cannot obtain competent counsel. This problem is compounded by the fact that, because of the inherent complexity of (and delays in) employment cases, there is a dearth of competent counsel willing to represent plaintiffs on a purely contingent basis.

Yet, most employees could never afford to retain an attorney if they were required to pay market rates on an hourly basis. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 ["There is no doubt that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions [, … and] [a]ttorneys considering whether to undertake cases that vindicate fundamental public policies may require *statutory assurance* that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees provided for by the Legislature and computed by the court." (Emphasis added.)].)

Why would plaintiffs' attorneys be willing to turn away hundreds of thousands of dollars of risk-free and immediately paying hourly work to accept a risky contingent litigation war with remuneration solely dependent upon a final victory? The answer is simple. They will not accept such work unless they are confident that they can rely on *Ketchum*'s assurance that, in return for serving the public interest, they can count upon receiving a significant premium in return for the risks and delays undertaken.

The moral: You cannot get what you do not ask for. Given the substantial risks, courts have found contingent risk multipliers of 2.0 (and above) to be reasonable. (See, e.g., *Coalition for L.A. City v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251 [affirming multiplier of 2.04]; *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 82, 85 [affirming multiplier of 2.34]; *Graham v. Daimler Chrysler Corp.* (2004) 34 Cal.4th 553, 578-579 [implicitly approving multiplier of 2.25]; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 32, 66 [affirming multiplier of 2.53]; *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 487-488, 506 [affirming fee award

with a lodestar cross-check multiplier of 2.03 to 2.13].)

Experienced attorneys have frequently obtained 2.0 multipliers; indeed, some have opined that it is arguably the norm. In fact, in particularly difficult cases involving matters of first impression, small monetary damages, or clients who present as unsympathetic, we recommend that you consider asking for a 2.5 or even 3.0 multiplier.

Inform the court of the difficulties of your case and the risks that you faced at trial. If you are seeking fees, then you have already won. Therefore, you should not be afraid to remind the court of the bad facts that threatened any recovery at all. This can effectively be juxtaposed against the certainty of the recovery that the hourly defense lawyers received whether they won or lost the case.

Beware of limited success

Where a prevailing plaintiff succeeds on only some claims, courts engage in a two-part inquiry: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 434; see also, *Harman v. City and County of San Francisco* ("*Harman*") 2007) 158 Cal.App.4th 407, 413-418 & fn. 6 [discussing the "two-step analysis dictated by *Hensley*" and explaining courts have applied that analysis in FEHA cases].)

If "a plaintiff ... present[s] in one lawsuit distinctly different claims for relief that are based on different facts and legal theories … counsel's work on one claim will be unrelated to his work on another claim… [and] no fee may be awarded for services on the unsuccessful claim." (*Hensley*, *supra*, 461 U.S. at pp. 434-435; accord *Chavez*, *supra*, 47 Cal.4th at p. 989.)

However, where a plaintiff obtains "substantial relief" on related claims, the fee award should not be reduced for each unsuccessful claim. (*Hensley*, *supra*, 461 U.S. at p. 440.) *Hensley* made clear that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." (*Id*. at p. 435.)

In the FEHA realm, this issue may arise where your client is unsuccessful on their discrimination claim (e.g., where the jury determines that the motive for the adverse employment action was not motivated by a prohibited factor (e.g., race), but prevails on their retaliation claim (e.g., if the jury finds that the employee reasonably believed that the employer's conduct was unlawful, and the employer retaliated against the employee for challenging the adverse employment action on that basis).

In such cases, evidence of the facts related to the alleged underlying discrimination that the plaintiff complained of may be relevant to establish, for the retaliation cause of action, the reasonableness of the plaintiff's belief that the conduct was unlawful. "Apportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units." (*Graciano v. Robinson Ford Sales, Inc.* ("*Graciano*") (2006) 144 Cal.App.4th 140, 159.) This is especially true in "employment discrimination cases [which], by their very nature, involve several causes of action arising from the same set of facts." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1251.)

We have also seen this concept applied in failure to engage/failure to accommodate cases. The jury's determination that the employer did not fail to provide an accommodation may be sound (e.g., where the plaintiff is unable to demonstrate that a suitable alternative position was available), but the jury may nonetheless find that the employer failed to engage in the interactive process to determine the availability of a suitable accommodation. In such cases, the same underlying facts are required to prove both the successful and unsuccessful claims and, therefore, plaintiff's counsel should recover for all hours spent working on both claims.

When the fee award is far greater than plaintiff's recovery

The fact that the fee award may dwarf the plaintiff's damage recovery is no excuse to violate the lodestar method. Another obstacle is presented where the attorney's fees sought are much greater than the recovery the plaintiff obtains. It is easy to understand why courts might have trouble awarding hundreds of thousands of dollars in attorney's fees where the plaintiff's recovery was only a small fraction of the fees sought.

Nonetheless, such courts would be wrong if they acted on that intuitive feeling. There is a thorough discussion of the reasons why in *Graciano*, *supra*, 144 Cal.App.4th at p. 164, which concerned an individual plaintiff suing under California consumer protection statutes involving mandatory fee-shifting provisions. The court held that "the legislative policies are in favor of Graciano's recovery of all attorney fees reasonably expended, without limiting the fees to a proportion of her actual recovery. Analogizing to federal law, it declared:

> A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting [42 United States Code section] 1988. Congress enacted [that statute] specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. [Citation.] … "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts."

(*Graciano*, *supra*, 144 Cal.App.4th at p. 164, quoting *Riverside v. Rivera* (1986) 477 U.S. 561, 578, 106 S.Ct. 2686.)

The foregoing language and logic were fully embraced in *Harman*, *supra*, 158 Cal.App.4th at p. 420. Indeed, based thereon, *Harman* approved a $1,113,905 fee award in a case in which plaintiff's recovery was a mere $30,300. (*Id*. at 419.)


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