

FOCUS

LOS ANGELES DAILY JOURNAL • TUESDAY, AUGUST 7, 2007 • PAGE 7

By John P. Dacey

You have just survived the post-trial motions attacking the verdict and judgment, and now you are focused on recovering substantial attorney fees from the other side.

As has been mentioned in the five prior articles in this series, this should not be the first time you have focused on the attorney fee issue. Rather, before the litigation starts, you should have (1) analyzed and evaluated all possible bases for entitlement to fees (and understood the applicable nuances of each legal theory for recovery), (2) determined a proper lodestar rate and reasonableness factors, (3) considered the issue of discretion (yours and the court's wide discretion on fee awards), (4) evaluated the competing concepts of apportionment and "inextricably intertwined" and (5) organized your billing statements from the start of the case through the end to make the trial judge's job of ruling on your fee award as easy as possible.

If you have done all these things, you are in pretty good shape as you sit down to write your fee motion. However, you are missing a step in the analysis — one that could result in your obtaining smaller fees than you otherwise may be entitled to. The missing step is the proper use of positive and negative multipliers in connection with attorney-fee awards.

Once you have marshaled your proof to support the lodestar amount you will argue for, remembering that lodestar properly calculated is "the applicable market rate attorneys are charging in your locale for similar work times a reasonable number of hours billed for the work performed" (for example, $\$275 \times 750 \text{ hours} = \$206,250 = \text{lodestar amount}$), your next step in the analysis is to determine whether you can apply a positive multiplier to increase the amount of the fee request.

Relevant Factors

A multiplier is a number or a percentage that a court may use, based on one or more factors established over the years by California case law, to increase or decrease a fee award. Keep in mind that the trial court ruling on your fee request has considerable discretion over the multiplier, provided that the court has focused on the proper factors. Therefore, your task is

to make sure that the court does so.

In *Serrano v. Priest*, 20 Cal.3d 25 (1977), the California Supreme Court affirmed that a proper lodestar amount in the case was \$571,172.50. After evaluating applicable factors, the high court also affirmed the trial court's increase of the award to \$800,000. If you want to increase the potential size of your fee recovery, you must know and properly use the multiplier factors.

Although not an exhaustive list, the positive multiplier factors commonly seen in published cases comprise (1) the novelty and complexity of the issues in the case, (2) the difficulty of the case, (3) the skill of the attorneys in handling the case, (4) the result(s) obtained, (5) the contingent risk involved, if any, (6) the extent to which the case prevents the attorney from taking on other cases, (7) the undesirability of the case or the client in the community, (8) any long delay in receiving the court-awarded fee, and (9) whether the case has a public service element and/or the motivation is to represent consumers and enforce laws.

The first three factors are often referred to as the "quality" factor(s). If these factors are to apply, the case must involve novel and/or extremely complex legal and/or factual issues. The case cannot just be hard; it must push the limits of the attorney's skill and talent. The trial court will look at whether the skills exhibited by the attorney are exceptional. The evidence needed to establish these factors can come from attorney-fee experts and/or other attorneys from the community who have specific qualifications and personal knowledge to speak on the novelty, complexity, exceptional difficulty and exceptional legal skills of the attorney seeking the fees.

The "results obtained" factor can, like most of the other factors, cut two ways. Obtaining an extraordinary result may support an enhanced award. Conversely, partial success may justify using a negative multiplier, resulting in a decrease in the award. California case law often discusses the "results obtained" factor along with the three quality factors set forth above: to wit, "an exceptional effort produced an

exceptional benefit." See, *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004).

Rewarding Risk

Under California law, when a case presents a contingent-risk situation, the court must evaluate this factor as part of the fee award. The main reason the risk factor must be considered in contingency cases is to compensate for the risk of loss in contingency cases as a class. California law generally is much more flexible in its use

of positive and negative multipliers than is federal law. As such, how multipliers are treated and used depends on which law applies to your case. A poignant example of these differences, involving the subject of contingent-risk multipliers, can be seen by reading *Ketchum v. Moses*, 24 Cal.4th 1122 (2001), wherein the California Supreme Court reached a position diametrically opposed to the United States Supreme Court's reasoning in *Burlington v. Dague*, 505 U.S. 557 (1992).

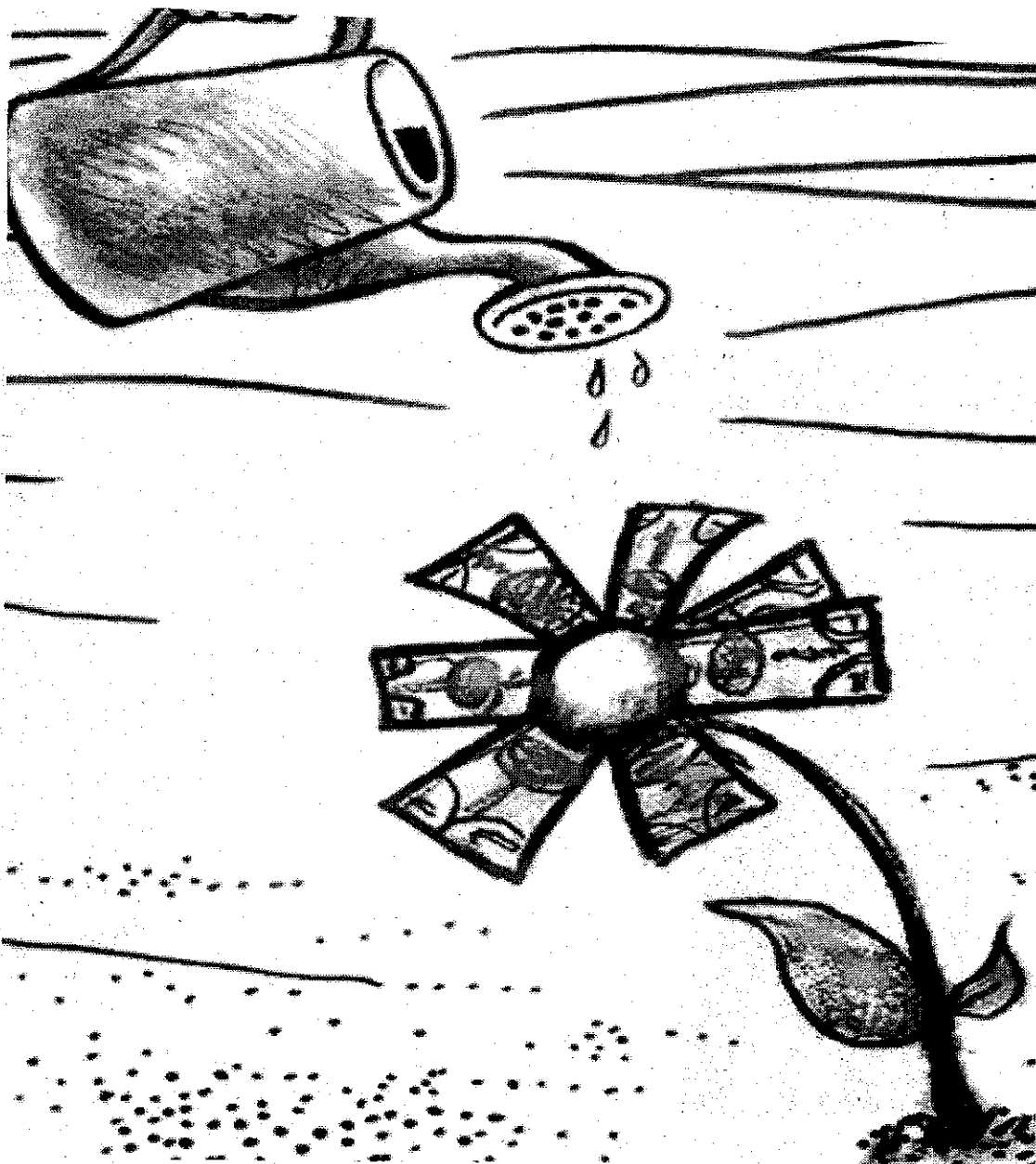
When a lawyer must devote all of his or her time to one client's case, thus pre-

cluding acceptance of other work, the application of a multiplier is probably warranted. The risk presented to the attorney's business when handling just one case is increased and very real.

An attorney takes on an undesirable client or case with considerable risk. The attorney must face the potentially harsh consequences that come with such representations, not only from the community at large but also from the attorney's client base and other attorneys. Courts recognize that application of this factor is sometimes appropriate to determine a reasonable fee award.

When a court enhances a fee award based on a long delay in payment, the court, in essence, is finding a way to compensate the successful attorney fairly for the delay. Sometimes likened to interest on fees, the delay enhancement is often arrived at by the court's using the current applicable market rate, rather than the rate in use when the case began, to calculate a reasonable fee award.

When a lawyer must devote all of his or her time to one client's case, thus precluding acceptance of other work, the application of a multiplier is probably warranted.



Private enforcement to vindicate the legal rights of large groups is a well-entrenched principle under California law. The importance of the issues raised in a case and their applicability to a wider cross-section of the population may require fee enhancement. Our courts have concluded that enhancing fee requests in such cases serves the legitimate purpose of encouraging the few to enforce rights that will benefit the many.

Precautions and Considerations

The use of a multiplier, positive or negative, may not be available in every case. When used, the multiplier(s) must result in a reasonable fee award that does not cross the line into excess. While you are contemplating how to get the trial judge to exercise the court's very wide discretion in connection with your fee request, be

careful not to overreach and inadvertently cause him or her to abuse that discretion.

Be mindful also that the "reasonableness factors" used in connection with establishing the lodestar amount are, in many instances, very similar to the "multiplier factors." In fact, many attorneys mix the two groups up and cannot explain the differences between them when asked to do so by the trial judge. Confusing the two sets of factors can result in fatal (read: "reversible") consequences.

The law does not permit double counting of the factors. For example, if you have directed the court to the extraordinary number of hours you worked because the case was so complex and you argued to the court that all such hours were reasonably expended because of the difficult, novel or complex legal issues in the case, those hours have been used to establish your lodestar amount. You

cannot now argue for a difficulty, novel, or complex multiplier. If you did so, you and the court would, in effect, be double counting. However, if the large number of hours was caused by court continuances over which you had no control or difficult or obstreperous opposing counsel and the number of hours was therefore reasonable under the circumstances, you may be able to argue for a novel/complex or some other applicable multiplier if supported by the facts of your case.

As you sit at your desk and contemplate the outline of your fee request, do not forget to analyze whether you can multiply. That should be the last question before you begin to write.

John P. Dacey is a partner at Bergman & Dacey, a litigation firm in Los Angeles with a specialty in attorney-fee litigation.