THE LODESTAR METHOD FOR CALCULATING A REASONABLE ATTORNEY FEE IN WASHINGTON

Philip A. Talmadge* and
Thomas M. Fitzpatrick+

CONTENTS

INTRODUCTION

When there is a fee-shifting principle at play in civil litigation and a party is entitled to recover its attorney fees and expenses from the opposing party,[1] counsel and the courts too often give insufficient attention to the proper calculation of the reasonable fees and expenses. Although tens of thousands of dollars may be at issue in such a calculation, the process for such a decision is often a busy trial judge's afterthought. It is far too easy to slip into a decision

---

* Philip A. Talmadge is a graduate of West Seattle High School as a National Merit scholar. He has a B.A. (magna cum laude) from Yale and a J.D. from the University of Washington where he was on the WASHINGTON LAW REVIEW. Mr. Talmadge served in the Washington State Senate from 1979 to 1995. He chaired the Judiciary and Health Care Committees in the Senate, where he was a leader in court reform, alternate dispute resolution, crime victims' rights, domestic violence prevention, public health, mental health, and health care reform. He served on the Washington Supreme Court from 1995 to 2001. He promoted the judicial information system, privacy of court records, and court reform. He has taught appellate advocacy at the Seattle University and University of Washington Law Schools. He is the author of a number of articles on legal issues, including a treatise on attorney fees. Mr. Talmadge has built and operated a small business, Talmadge/Fitzpatrick/Tribe. He has been a Super Lawyer since 2001. He is a fellow of the National American Academy of Appellate Lawyers, and a member of the Washington Appellate Lawyers Association.

+ Thomas M. Fitzpatrick is a graduate of the University of Montana and the University of Chicago Law School. He is a former partner in the firms of Karr Tuttle Campbell and Stafford Frey Cooper. He served as Assistant Chief of the Snohomish County Prosecuting Attorney's Office, Civil Division. In 2005, he was selected as Executive Director of Snohomish County. In 2006, he returned to private practice, joining Phil Talmadge with whom he previously practiced, at the Talmadge/Fitzpatrick/Tribe firm. He was named a Super Lawyer by the publication Washington Law and Politics in 2004. His practice has an emphasis in professional responsibility, attorney fees, and litigation. Mr. Fitzpatrick served on the Board of Governors of the American Bar Association (1998–2001) and the ABA House of Delegates (1989–present). He also served on the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Ethics (2001–2004), the ABA Lawyer Professional Responsibility Committee, and on the committee which wrote the Model Rules of Judicial Discipline, and the Joint Commission which rewrote the Model Code of Judicial Conduct. He served for six years and as chair of the Policy Implementation Committee of the ABA Center for Professional Responsibility. He is an adjunct professor at Seattle University School of Law teaching professional responsibility.

1. *See generally* Philip A. Talmadge, *The Award of Attorney's Fees in Civil Litigation in Washington*, 16 GONZ. L. REV. 57 (1980). Washington law by contract, statute, or equity allows a prevailing party in litigation to recover their reasonable fees. *Id.* at 60, 62–63, 65. The so-called "American Rule" in which each party bears its own litigation fees has often been swallowed up by exceptions to that rule. *Id.* at 60–69. Where a party secures a favorable result by settlement, the party should also be entitled to an award of attorney fees if otherwise permitted by statute, contract, or equity to receive fees. *See generally* 42 U.S.C. § 1988 (2016); Emily M. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under* 42 U.S.C. § 1988, 55 U. COLO. L. REV. 341 (1984).

based on a general impression that the fees requested are reasonable or unreasonable, rather than a more disciplined analytical approach. Moreover, Washington appellate decisions have on some occasions facilitated such a result. Rather than relying on an amorphous, ill-defined series of "factors,"[2] parties facing a fee award should be able to rely on a more objective, predictable method of calculating a reasonable fee. This article will contend the default principle for the calculation of a reasonable fee in a fee-shifting situation in Washington should be the lodestar methodology—a simple, clear means of calculating a reasonable fee.[3]

THE GENERAL PRINCIPLES OF THE LODESTAR METHOD

The lodestar fee methodology involves the multiplication of reasonable hourly rates times the reasonable hours necessary to secure a successful result for the client.[4] The central feature of the method is the requirement for parties and courts alike to utilize a demonstrable method for calculating a fee.[5] Ultimately, a reasonable fee involves the time it should take a competent practitioner to perform the necessary work upon which the client's successful result is predicated.[6]

But it is important to recall why Washington and federal courts believed this methodology was necessary. Washington first noted and applied the lodestar method in 1983,[7] but made it the prevailing rule for fee calculation in 1990.[8] In *Scott Fetzer Co.,* the Washington Supreme Court rejected the more amorphous approach to fees of simply looking to the various factors for a reasonable fee articulated in RPC 1.5(a).[9] The Court abandoned the factors analysis precisely

2. RPC 1.5(a) articulates a series of factors that support an ethical, reasonable fee. WASH. CT. RPC 1.5.

3. The lodestar methodology has long been the basis for the calculation of a reasonable attorney fee in federal law. *See Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168 (3d Cir. 1973)*; see also* Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69–70 (9th Cir. 1975). *See generally* Court Awarded Attorney Fees: Report of the Third Circuit Task Force (1985), *reprinted in* 108 F.R.D. 237, 242–43.

4. Mahler v. Szucs, 957 P.2d 632, 650–51 (Wash. 1998); Travis v. Wash. Horse Breeders Ass'n, Inc., 759 P.2d 418, 425–26 (Wash. 1988).

5. *See Mahler*, 957 P.2d at 651.

6. Scott Fetzer Co. v. Weeks (*Scott Fetzer II*), 859 P.2d 1210, 1216 (Wash. 1993).

7. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 201–03 (Wash. 1983).

8. *See* Scott Fetzer Co. v. Weeks (*Scott Fetzer I*), 786 P.2d 265, 273 (Wash. 1990).

9. *Id.*

because of its imprecision, an imprecision that allowed trial courts to free hand in making impressionistic fee awards.[10]

EXCEPTIONS TO THE LODESTAR METHOD FOR POLICY REASONS

Although Washington courts generally recognize the lodestar method as the default principle for calculating a reasonable attorney fee, the courts have on occasion determined the lodestar method does not apply.[11] In *Brand*, the court seemed to treat all industrial insurance cases as ones in which parties were seeking a unitary recovery.[12] But this analysis was simplistic, as suggested by the concurrence,[13] because an injured worker could seek a variety of recoveries including temporary time loss up to a full pension.[14] In the sanctions setting, a court may award a modest amount as terms, but where the court imposes fees as a sanction and those fees appear to be more in the nature of a fee shift, the application of the lodestar analysis makes sense.[15]

Washington courts should not expand the circumstances in which the discipline of the lodestar analysis is avoided. Indeed, the Supreme Court should overrule the cases referenced above.

BURDEN OF PROOF AS TO A REASONABLE FEE

The party seeking a fee award has the burden of proving that its request is reasonable.[16] Further, the party must provide documentation that shows the time spent by various attorneys on the case, while also giving an appellate court a

10. Indeed, both *Fetzer* decisions offer a rare glimpse at a court clearly frustrated by the failure of counsel and the trial court alike to properly analyze fee issues. See *id.* at 273; *Scott Fetzer II*, 859 P.2d at 1216–17.

11. *See, e.g.*, Brand v. Dep't of Labor & Indus., 989 P.2d 1111, 1118 (Wash. 1999) (worker compensation fee awards); Mayer v. STO Indus., Inc., 132 P.3d 115, 122–23 (Wash. 2006) (attorney fees as a discovery sanction); Highland Sch. Dist. No. 203 v. Racy, 202 P.3d 1024 (Wash. Ct. App. 2009) (affirming sanctions that were not based on the lodestar method).

12. *Brand*, 989 P.2d at 1118.

13. *Id.* at 1119–20 (Talmadge, J., concurring).

14. *See* WASH. REV. CODE § 51.32.090 (2016) (temporary total disability); WASH. REV. CODE § 51.32.080 (2016) (compensation for permanent partial disability); WASH. REV. CODE § 51.32.060 (2016) (pension for permanent total disability).

15. Philip Talmadge, Emmelyn Hart-Biberfeld & Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 SEATTLE U. L. REV. 437, 459–61 (2010). In fact, in *Racy*, The court indicated that a sanctions award was not subject to the lodestar analysis, 202 P.3d at 1028, but then applied that analysis nonetheless, *id.* at 1029. Where the sanctions fee award amounts to a shifting of the fee obligation to the opposing party, the rationale for the application of the lodestar analysis remains pertinent.

16. *Scott Fetzer II*, 859 P.2d 1210, 1216 (Wash. 1993).

basis upon which it can review the trial court's decision.[17] Counsel should err on the side of more information for the trial court record, rather than less.

A corollary issue that has arisen is whether the obligation to excise unrecoverable time rests with counsel or the court. The answer is clear: the attorney seeking an award should not wait for the court to excise unrecoverable time from the lodestar. That is part of the burden of the attorney seeking a fee award.[18] A court addressing the fee award issue should not have to search through the prevailing party's billing invoices or other documentation to excise time that related to theories upon which fees are not recoverable, or time that is patently wasteful or duplicative.

NECESSITY OF SUBMITTING CONTEMPORANEOUS TIME RECORDS

Consistent with the requirements of appropriate documentation of a party's fee request, that party's attorney must keep specific time records of fees incurred.[19] *Bowers* indicates these records need not be exhaustive,[20] but the timekeeping should be contemporaneous because reconstructed time has been rejected as the basis for an award.[21] It has also resulted in fee reductions in federal court.[22] However, in *Miller v. Kenny*, the Court of Appeals approved of time records reconstructed, in some instances, eight years after the performance of the work.[23] It is still preferable that the records reflect the actual claim or theory to which the work related, as the *Miller* Court also acknowledged.[24] It simply defies logic that parties can accurately reconstruct time spent on matters by their counsel, especially when many years have passed since the work was performed. Such an exercise is an invitation to inflated billing by the successful litigant.

---

17. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 203 (Wash. 1983).

18. Berryman v. Metcalf, 312 P.3d 745, 753 (Wash. Ct. App. 2013), *review denied*, 320 P.3d 718 (Wash. 2014); *see Bowers*, 675 P.2d at 203.

19. 625 P.2d at 203.

20. *Id*.

21. Johnson v. Dep't of Transp., 313 P.3d 1197, 1206 (Wash. Ct. App. 2013), *review denied*, 320 P.3d 718 (Wash. 2014) (affirming trial court's determination that reconstructed time was not proven to be reliable).

22. *See, e.g.*, Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1557 (9th Cir. 1989) ("Plaintiffs' counsel's inadequate showing has invited substantial discounting of his fee.").

23. Miller v. Kenny, 325 P.3d 278, 303, 305 (Wash. Ct. App. 2014).

24. *See id.* at 303–04. Plaintiffs' counsel working on a contingent basis, for example, should keep time records to document fee requests to a court. *Id.* at 303. Courts are justifiably skeptical about fee declarations creating time records after the fact. *See Johnson*, 313 P.3d at 1206. Also, plaintiffs' counsel will want to know if cases are economically beneficial by comparing hours spent on cases with contingent fees received.

An attorney should be careful about time entries. Courts are reluctant to award fees where block billing is present and federal courts have reduced fees because of block billing.[25] Washington courts appear to be headed in the same direction.[26] Within reason, lengthy time entries pertaining to multiple tasks should be broken down into manageable segments.

In documenting the fees being sought, a party should offer more than conclusory declarations from its counsel in support of fees.[27] Declarations should reflect hours worked, the nature of the work, and the applicable rate.[28] A question that often arises as to fee requests is whether sound practice requires expert testimony to evaluate the reasonableness of counsel's time. In large cases, such testimony is a "must." It is also often useful to discover the fees charged by counsel for the non-prevailing party as a comparison for the fees requested of the court.[29]

REASONABLE HOURLY RATES

The lodestar formula requires the party seeking fees to establish reasonable hourly rates for the professional services rendered.[30] A court must also determine

25. *See, e.g.*, Welch v. Metro. Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007) (affirming reduction of hours due to block billing). "Block billing" is the process of incorporating all sorts of undifferentiated activities in a single block of time. *Id*. In the authors' view, a certain amount of block billing may be a practical necessity because keeping timesheets that constitute a running log could be impractical. However, block billing must be sufficiently detailed to satisfy the applicant's "burden of documenting the appropriate hours expended in the litigation." *Id*.

26. *See* Berryman v. Metcalf, 312 P.3d 745, 756–57 (Wash. Ct. App. 2013), *review denied*, 320 P.3d 718 (Wash. 2014).

27. Certain billing practices in fee declarations constitute "red flags," virtually dead certain to raise questions in the minds of opposing counsel and judges reviewing fee requests. For example, a declaration containing entries of an extraordinary number of hours in a day is open to question. Billing 24 hours for a day (the authors have seen such a declaration) raises obvious questions. Multiple billing attorneys and paraprofessionals are also questionable; it is patently duplicative to have so many attorneys and paralegals involved in a file because each new biller must be brought up to speed. Seemingly endless interoffice conference hours are also indicative of time spent unproductively by counsel. Excessive hourly rates, reconstructed time, and poor documentation of work performed are also problematic. *See supra* notes 21–25 and accompanying text.

28. *Berryman*, 312 P.3d at 757.

29. Boeing Co. v. Sierracin Corp., 738 P.2d 665, 682 (Wash. 1987) (comparing rates charged by opposing counsel); Fiore v. PPG Indus., Inc., 279 P.3d 972, 988 (Wash. Ct. App. 2012), *review denied*, 291 P.3d 254 (Wash. 2012) ("[a] comparison of hours and rates charged by opposing counsel is probative of the reasonableness of a request for attorney fees by prevailing counsel." (quoting Heng v. Rotech Med. Corp., 720 N.W.2d 54, 65 (N.D. 2006))).

30. *Fiore*, 279 P.3d at 988.

the "reasonable hourly rate" for each attorney involved in the litigation.[31] "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate."[32] A factor in assessing the hourly rates is the fee customarily charged in the locality for similar legal services.[33]

The hourly rates for which the party seeks recovery must be the rates actually charged by professionals and must be reasonable for professionals with similar experience and skills.[34] The court must determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for services.[35] In *Mahler*, the Washington Supreme Court reaffirmed the rule that contemporaneous rates actually billed, not rates later adjusted upward for inflation or current rates, must be used in calculating the lodestar.[36] In *Fisher*, a commercial case, the Court specifically declined to allow the employment of current rates or historical rates adjusted for inflation.[37] But Washington courts have not always been consistent in applying this rule.[38] As an exception to the general rule allowing rates actually charged, in the civil rights context, Washington courts recognize the allowance of current rates.[39]

Simply because a law firm charges a client an hourly rate does not make that rate reasonable in the fee-shifting setting.[40] Moreover, rates may vary

---

31. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 203 (Wash. 1983).

32. *Id.*

33. WASH. CT. RPC 1.5(a)(3).

34. WASH. CT. RPC 1.5(a)(7).

35. Fisher Prop., Inc. v. Arden-Mayfair, Inc., 798 P.2d 799, 806–07 (Wash. 1990) (indicating outside a civil rights context, contemporaneous rates actually billed rather than current rates or contemporaneous rates adjusted for inflation will be employed).

36. *See* Mahler v. Szucs, 957 P.2d 632, 651 (Wash. 1998); Cobb v. Snohomish Cty., 935 P.2d 1384, 1392 (Wash. Ct. App. 1997), *review denied*, 953 P.2d 96 (Wash. 1998).

37. *See Fisher Prop*., 798 P.2d at 807 (refusing to "extend fee enhancement beyond civil rights litigation" where the plaintiff failed to demonstrate "important public policies [were] involved or that its attorneys . . . suffered from any delay in payment.").

38. *See, e.g.*, Roberson v. Perez, 96 P.3d 420, 432 (Wash. Ct. App. 2004), *review denied*, 120 P.3d 578 (Wash. 2005) (allowing contemporary rate in discovery sanction case).

39. *Fisher Prop*., 798 P.2d at 806; Blair v. Wash. State Univ., 740 P.2d 1379, 1386 (Wash. 1987).

40. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 203 (Wash. 1983) ("Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate. . . . however, [it is not] conclusively a reasonable fee and other factors may necessitate an adjustment." (citing Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982)).

geographically.[41] In *West*, the use of a blended rate (one rate for partners and associates) was also approved.[42]

In some instances, counsel may not actually bill hours to a client in the traditional sense. Plaintiffs' personal injury attorneys often do not keep time records.[43] In-house counsel, *pro bono* counsel, and government attorneys do not have hourly rates. Under the lodestar method, some form of an hourly rate is still employed. In *Metropolitan Mortgage & Securities Co. v. Becker*, the Court of Appeals allowed recovery of fees to a party even though its salaried corporate counsel performed the legal work.[44] For example, public interest counsel may recover prevailing market rates, and their fees may not be reduced because the representation is *pro bono publico*.[45] Similarly, courts have permitted government counsel to obtain fees.[46] No reported Washington case, however, has allowed a pro se party to recover an hourly rate.

The Washington Supreme Court in *Allard v. First Interstate Bank of Washington, N.A.*, held that the contingent fee may be considered in calculating a reasonable fee.[47]

41. West v. Port of Olympia, 192 P.3d 926, 934 (Wash. Ct. App. 2008) (upholding trial court decision to limit fee rate to that customarily charged by trial counsel in Thurston County). *But see*, Miller v. Kenny, 325 P.3d 278, 302–03 (Wash. Ct. App. 2014) (noting that rates customarily charged in a locale may be considered by a court, but declining to reduce rates for Seattle attorneys in Skagit County case).

42. 192 P.3d at 934.

43. This practice is unwise because counsel will need to reconstruct their hours retrospectively. *See supra* notes 20–25 and accompanying text. The practice is particularly problematic where a fee-shifting statute is present in the case.

44. Metro. Mortg. & Sec. Co. v. Becker, 825 P.2d 360, 364 (Wash. Ct. App. 1992).

45. Blair v. Wash. State Univ., 740 P.2d 1379, 1385–86 (Wash. 1987); *see also* Fahn v. Cowlitz Cty., 610 P.2d 857, 866 (Wash. 1981).

46. W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick, 694 P.2d 1101, 1107 (Wash. Ct. App. 1985) (allowing fees for city attorney, but no analysis of issue).

47. Allard v. First Interstate Bank of Wash., N.A., 768 P.2d 998, 1002 (Wash. 1989).

REASONABLE HOURS OF COUNSEL

A court may award the reasonable hours of various counsel,[48] as well as paralegals.[49]

Washington courts seem to be of two minds at times on the question of how to address hours spent by successful counsel in securing a favorable result for their client. On the one hand, courts have clearly held that in determining the number of hours reasonably spent by counsel, the "court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time."[50] The fee award must properly reflect a segregation of time spent on such matters in

48. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 204 (Wash. 1983).

49. Johnson v. Dep't of Transp., 313 P.3d 1197, 1201 (Wash. Ct. App. 2013), *review denied*, 320 P.3d 718 (Wash. 2014) (including paralegal hours within lodestar calculation). Under the lodestar method, the time of paralegals may be recovered as a part of a reasonable attorney fee, provided the work is legal in nature rather than merely clerical. *See* Absher Constr. Co. v. Kent Sch. Dist. No. 415, 917 P.2d 1086, 1088 (Wash. Ct. App. 1995). In *Absher Constr. Co.*, the Washington Court of Appeals articulated the standard for recovery of non-lawyer time as follows:

> (1) the services performed by the non-lawyer personnel must be legal in nature;
> (2) the performance of these services must be supervised by an attorney;
> (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work;
> (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical;
> (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and
> (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.

Id. The *Absher* court considered a fee request by counsel for the Kent School District. *Id.* at 1089. The court allowed only part of the time requested for a legal assistant, and declined to allow recovery of time spent on preparing pleadings for duplication, preparing and delivering copies, requesting copies, and obtaining and delivering a docket sheet. *Id.* It allowed some time for a staffer described as a "legal editor" for time spent verifying citations and quotations. *Id.* It disallowed all time spent by a staffer referred to as a "legal clerk" whose function was obtaining copies of pleadings and organizing working copies of the pleadings. *Id.*

50. *Bowers*, 675 P.2d at 203.

which fees may be recovered from time spent on other issues.[51] The trial court must not rely unquestioningly on the fee affidavits of counsel.[52]

Even where other legal theories are claimed to be "overlapped," "intertwined," and "inextricably related" to a claim, the court must segregate attorney fees.[53] In *Smith*, the trial court actually made a finding that it could not segregate the hours that the attorneys spent on the CPA from those spent on other theories because the work was so intertwined.[54] The Court of Appeals reversed the trial court fee award and remanded the case to the trial court for recalculation of the fee award.[55]

In *Pham v. City of Seattle*,[56] the Supreme Court indicated that, in determining whether hours should be allowed, a court could exclude: attorney time spent on unsuccessful motions, the preparation of a complaint that was never filed, and media contacts.[57] The Court rejected the idea that this time related to a common core of facts and related legal theories.[58]

---

51. For example, numerous Washington cases discuss the necessity of segregating attorney fees necessary to establish elements of a Consumer Protection Act (CPA) claim from attorney fees pertaining to other legal issues. *See* Nordstrom, Inc. v. Tampourlos, 733 P.2d 208, 212–13 (Wash. 1987) (holding an award of attorneys' fees to CPA claimant for issues unrelated to the CPA claim would confer an unfair advantage); Schmidt v. Cornerstone Invest., Inc., 795 P.2d 1143, 1153–54 (Wash. 1990) (rejecting award of attorneys' fees for time spent on appeal because the request included "approximately 13 issues" unrelated to the CPA); Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 825 P.2d 714, 721 (Wash. Ct. App. 1992) ("Time spent developing theories essential to the CPA claim must be segregated from time spent on legal theories relating to other causes of action"); Styrk v. Cornerstone Invest., Inc., 810 P.2d 1366, 1372 (Wash. Ct. App. 1991) (reducing attorney fees by excluding litigation "falling outside the sphere of the Consumer Protection Act," given the trial court's "concern over extensively litigated issues not directly involved in proving a claim under the Consumer Protection Act"); *see also* Hume v. Am. Disposal Co., 880 P.2d 988, 996–97 (Wash. 1994) ("[T]he attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues.").

52. Mahler v. Szucs, 957 P.2d 632, 651 (Wash. 1998) (citing *Nordstrom, Inc.*, 733 P.2d at 208).

53. Smith v. Behr Process Co., 54 P.3d 665, 685–86 (Wash. Ct. App. 2002); *see* Travis v. Wash. Horse Breeders Ass'n, 759 P.2d 418, 425 (Wash. 1988).

54. 54 P.3d at 685–86.

55. *Id.* at 686.

56. Pham v. City of Seattle, 151 P.3d 976 (Wash. 2007).

57. *Id.* at 981–82. *Pham* represents a significant statement by the Supreme Court that trial courts must be very aggressive about excluding attorney time spent on unsuccessful portions of an overall successful litigation effort. Justice Sanders' dissent notes that such an aggressive posture may very well have a chilling impact on attorneys' willingness to take risky cases. *Id.* at 984 (Sanders, J., dissenting).

58. *See id.* at 981–82 (majority opinion).

The Washington Court of Appeals decision in *Berryman* provides a very clear-cut assessment of the types of hours that are separable from the hours spent on the successful theories in a case: duplicative time due to overstaffing, unproductive time, too much spent on unsuccessful efforts, and too much witness preparation.[59]

However, Washington courts have also held that if the legal theories arise out of a common core of operative facts and the legal theories are so intertwined that they cannot effectively be segregated, the court may award the entire requested amount.[60] For example, in *Mayer v. STO Industries Inc.*, the Supreme Court reversed a Court of Appeals decision that had mandated segregation of hours spent.[61]

Similarly, in *Miller v. Kenny*, the Court of Appeals upheld a fee award in which the trial court did not excise a single penny from the lawyer's reconstructed time records and did not require segregation of time even though the plaintiff's recovery involved a number of theories on which fees were not recoverable.[62]

Generally, the decisions offer little direction as to what should guide a court in determining when the theories arise out of a common core of facts or what constitutes such an "intertwining" that segregation is not feasible. In *Bright v. Frank Russell Investments*,[63] the Court of Appeals upheld a trial court decision where the trial court entered extensive findings on how the theories arose out of a common factual basis and how the legal theories were intertwined, citing the analysis in *Hensley*.[64]

The default principle should continue to be that time spent on unsuccessful activities or theories, and time that is wasteful or unnecessary, should not be allowed. As noted *supra*, the burden should be on the party seeking fees, not the court, to exclude those hours.[65] The trial court should, as in *Bright*, carefully articulate its precise reasons for not segregating time.[66] Where the hours do arise from a common use of facts or law, making the time of the lawyers for the successful party truly impossible to segregate, such as time spent on deposing witnesses pertinent to all of the legal theories at issue, a court should have discretion not to segregate the time. Again, the key is in the detailed findings of the trial court.

---

59. *See* Berryman v. Metcalf, 312 P.3d 745, 755–57 (Wash. Ct. App. 2013).
60. *See, e.g.*, Hume v. Am. Disposal Co., 880 P.2d 988, 997 (Wash. 1994).
61. Mayer v. STO Indus., Inc., 132 P.3d 115, 122–24 (Wash. 2006).
62. Miller v. Kenny, 325 P.3d 278, 303–04 (Wash. Ct. App. 2014).
63. Bright v. Frank Russell Invs., 361 P.3d 245 (Wash. Ct. App. 2015).
64. *Id.* at 249–51 (citing Hensley v. Eckerhart, 461 U.S. 424, 434–35 (1983)).
65. *See supra* notes 16–19 and accompanying text.
66. *See Bright*, 361 P.3d at 247–51.

A trial court has another useful tool at its disposal when deciding if segregation of requested time may occur. It has discretion to make a percentage reduction in the hours spent by counsel rather than reducing the requested hours with particularity. In *Clausen v. Icicle Seafoods, Inc.*, the Washington Supreme Court specifically affirmed a trial court's percentage reduction in fees, rather than the excising of specific hourly record entries, "where the specifics of the case make segregating actual hours difficult."[67] Percentage reductions after a lodestar calculation are routinely approved in the Ninth Circuit, so long as the trial court carefully explains its rationale for such a reduction.[68]

Finally, in certain narrow circumstances, legal expenses may be part of the reasonable attorney fees of the party. The Supreme Court in *Panorama Village Condominium Owners Ass'n Board of Directors v. Allstate Insurance Co.*, held that recovery of reasonable expenses necessary to secure insurance coverage was appropriate, including computerized legal research, expert witness fees, copy charges, and travel.[69] Fees may also be recovered for presenting a request for attorney fees in Washington or defending the entitlement to fees.[70]

Ultimately, this aspect of the lodestar calculation calls for common sense by counsel seeking a fee award. Time spent on theories for which fees may not be awarded, time spent spinning wheels, time involving too many attorneys and staff, and time spent on unsuccessful activities associated with otherwise successful activities should be excised from a fee request.

UPWARD AND DOWNWARD ADJUSTMENTS OF THE LODESTAR

After calculating the lodestar fee, the court may adjust the lodestar for two reasons: (1) the contingent nature of success, and, (2) in exceptional circumstances, also based on the quality of work performed.[71] The general rule in Washington is that the lodestar fee is presumed to adequately compensate an

67. Clausen v. Icicle Seafoods, Inc., 272 P.3d 827, 834 (Wash. 2012).

68. Gates v. Deukmejian, 987 F.2d 1392, 1399 (9th Cir. 1992); Welch v. Metro. Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007) (affirming 20% reduction where fee applicant utilized block billing).

69. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 26 P.3d 910, 916–17 (Wash. 2001); *see also* La.-Pac. Corp. v. Asarco, Inc., 934 P.2d 685, 694 (Wash. 1997) (holding "reasonably necessary expenses of litigation" are available under the Model Toxics Control Act). *But see* Miller v. Kenny, 325 P.3d 278, 305–06 (Wash. Ct. App. 2014) (confining costs to statutory costs in action for insurer bad faith).

70. Fisher Props., Inc. v. Arden-Mayfair, Inc., 798 P.2d 799, 807 (Wash. 1990).

71. *See* Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1073 (Wash. 1993); Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 204 (Wash. 1983).

attorney for his or her services.[72] The presumption makes sense because counsel is essentially being compensated on a reasonable hourly basis. Thus, multipliers are not favored under Washington law and should be allowed only in "rare instances,"[73] and "should be reserved for exceptional cases where the need and justification . . . [are] readily apparent[.]"[74]

In Washington, a court may only award a multiplier to account for contingency risk and/or exceptional work.[75] Successfully and competently litigating a case does not justify the award of a "quality" multiplier.[76] Quality of work multipliers are exceedingly rare. In *Miller*, the Court of Appeals referenced such a basis for a multiplier, but did not discuss the basis for such determination.[77]

The fact that attorneys performed some of their services on a contingent fee basis does not necessarily mandate an award of a contingency risk multiplier.[78] Rather, a court should only award such a multiplier if an award would further the purpose behind the multiplier itself.[79] A contingency risk multiplier is intended to serve two very specific purposes: to "mak[e] it possible for poor clients with good claims to secure competent help"[80] and to encourage attorneys to accept "risky" cases.[81]

In *Pham*, the Washington Supreme Court expressed misgivings about contingent risk multipliers similar to those expressed by the United States Supreme Court in *City of Burlington v. Dague*.[82] Noting that the lodestar fee "likely duplicated[,] in substantial part[,] factors already [taken into consideration]" by the attorney in setting his or her rate and in expending the

---

72. Berryman v. Metcalf, 312 P.3d 745, 757–58 (Wash. Ct. App. 2013); Henningsen v. Worldcom, Inc., 9 P.3d 948, 959 (Wash. Ct. App. 2000).

73. Mahler v. Szucs, 957 P.2d 632, 651 (Wash. 1998); *see* Travis v. Wash. Horse Breeders Ass'n, 759 P.2d 418, 426 (Wash. 1988).

74. Xieng v. Peoples Nat'l Bank of Wash., 821 P.2d 520, 528 (Wash. Ct. App. 1991) (quoting Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air, 483 U.S. 711, 728 (1987)).

75. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 204 (Wash. 1983).

76. *See Travis*, 759 P.2d at 426.

77. Miller v. Kenny, 325 P.3d 278, 304–05 (Wash. Ct. App. 2014).

78. *See, e.g.*, *Travis*, 759 P.2d at 426 (Wash. 1988) (refusing to award a contingent fee multiplier to counsel in a contingent fee case).

79. *Id.* at 425–26.

80. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 730–31 (1987).

81. *See Bowers*, 675 P.2d at 204.

82. *Compare* Pham v. City of Seattle, 151 P.3d 976, 983 (Wash. 2007), *with* City of Burlington v. Dague, 505 U.S. 557, 563 (1992).

numbers of hours to achieve a result,[83] the Court remanded the case to the trial court for an assessment of whether the hourly rates took into consideration the risks associated with the contingent fee.[84] This is an essential aspect of proving an entitlement to a multiplier.[85]

In *Fiore v. PPG Industries, Inc.*, the Court of Appeals thoroughly discussed fees and considered whether a 1.25 multiplier was appropriate in a wage recovery case.[86] The Court noted the general rule that the lodestar fee presumptively represents a reasonable fee.[87] It was then concluded that a multiplier was not appropriate because the case was not the rare case where a multiplier should be awarded—the litigation was not "high risk," and "no risky trial strategies or . . . novel problems of proof" were present.[88] In sum, it was a "straightforward wage and hour case."[89]

Parties seeking a multiplier bear the burden of proving that theirs is the exceptional case that requires one:

> In adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation. This is necessarily an imprecise calculation and must largely be a matter of the trial court's discretion. Nevertheless, certain guiding principles should be followed. Most important, "the contingency adjustment is designed solely to compensate for the possibility . . . that the litigation would be unsuccessful and that no fee would be obtained." Therefore, the risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case. Moreover, to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made. Finally, the risk factor should be applied only to time expended before recovery is assured; for example, time expended in obtaining the fees themselves should not be adjusted.[90]

In seeking a multiplier, counsel should be careful to ensure that a multiplier is truly merited, the case is the "rare" one to which a multiplier should apply, and

---

83. *Pham*, 151 P.3d at 983 (quoting *Dague*, 505 U.S. at 562).

84. *Id.* at 984.

85. *See id.* at 983–84.

86. *See* Fiore v. PPG Indus., Inc., 279 P.3d 972, 985 (Wash. Ct. App. 2012), *review denied*, 291 P.3d 254 (Wash. 2012).

87. *Id.* at 988.

88. *Id.* at 989.

89. *Id.*

90. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 204 (Wash. 1983) (citation omitted).

the basis for the multiplier is amply documented.[91] After *Pham*, counsel must also demonstrate to the court that the hourly rates charged did not contain a contingency factor.[92]

When a multiplier has been awarded under Washington law, 1.5 times the lodestar fee seems to be the ceiling for multipliers.[93] The *Berryman* court reversed a fee award with a 2.0 multiplier,[94] and provided confirmation that few, if any, Washington cases have approved of multipliers exceeding 1.5.[95]

HEARINGS ON FEES

Live evidentiary hearings are not mandatory on attorney fee issues.[96] In fact, decisions on attorney fees are often made in proceedings based on the declarations of counsel for the parties and perhaps declarations from experts.[97]

Washington courts are reluctant to increase the expense of litigation by permitting extensive proceedings in what they have deemed to be a collateral matter.[98] In *Watson*, the court indicated that discovery on CR 11 sanctions, for example, should be allowed only in "extraordinary circumstances."[99] The court found that a jury trial on such sanctions was not required, nor was a full

---

91. Berryman v. Metcalf, 312 P.3d 745, 759 (Wash. Ct. App. 2013); *see* Welch v. Metro. Life. Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007).

92. Pham v. City of Seattle, 151 P.3d 976, 978 (Wash. 2007).

93. *See* Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1073 (Wash. 1993) (affirming a multiplier of 1.5 where partial contingency fee case was both *exceptionally* risky when it was accepted and *exceptionally* litigated); *Bowers*, 675 P.2d at 204–05 (affirming a multiplier of 1.5 where plaintiffs were faced with the exceptionally difficult task of establishing that seemingly-controlling authority was not binding on their action). Consistent with the rarity of multipliers, the *Berryman* court provided an extensive appendix to its opinion in which it set forth the cases in which multipliers had been awarded. 312 P.3d at 764–66. The court observed that in none of the listed cases had multipliers been granted solely for outstanding quality of work, *id*. at 758, and rarely, if ever, had multipliers in excess of 1.5 been sustained. *See id.* at 764–66.

94. 312 P.3d at 757–63.

95. *Id.* at 764–65.

96. Metro. Mort. & Sec. Co. v. Becker, 825 P.2d 360, 364–65 (absence of live evidentiary hearing on fees did not compel reversal of fee award).

97. *See, e.g.*, Krein v. Nordstrom, 908 P.2d 889, 891 (Wash. Ct. App. 1995). CR 54(d)(2) specifically notes that fee issues should be resolved by motion. WASH. CIV. R. 54(d)(2).

98. *See, e.g.*, Watson v. Maier, 827 P.2d 311, 317 (Wash. Ct. App. 1992), *review denied*, 844 P.2d 436 (Wash. 1992).

99. *Id.* at 317 (citing Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987); 2A MORRE'S FEDERAL PRACTICE 11.01[4], 11-26, 27 (2d ed. 1987)).

evidentiary hearing.[100] It was further discussed that generally the scope of the sanction proceeding was limited to the record, but an additional hearing might be required under some circumstances.[101] A court should assess:

> (1) the circumstances in general; (2) the type and severity of the sanction under consideration; (3) the judge's knowledge of the facts and whether there is need for further inquiry.[102]

A summary proceeding on attorney fees in the context of an attorney lien case does not offend due process.[103] In *Krein*, live witnesses were allowed to testify.[104] The decision to conduct a live evidentiary hearing on fees is discretionary with the court.[105]

A trial court's decision not to hold a live fee hearing is within its discretion, and such discretion is not abused so long as the court has sufficient information upon which to decide the fee issues.[106]

---

100. *Id.* at 316.

101. *Id.* at 317.

102. *Id*.

103. Krein v. Nordstrom, 908 P.2d 889, 892 (Wash. Ct. App. 1995).

104. *Id*. at 891.

105. *Id.* at 892.

106. WASH. CIV. R. 54(d)(2) (addressing attorney fee decisions). That rule requires that fee issues be presented to the court by motion within ten days after the entry of judgment, unless fees are an item of damages relevant to the trial itself. *Id.* The rule does not require that there must be a hearing on the motion generally, nor does it state that live witness testimony is necessary in connection with such a motion. *See id.*

Federal law generally treats whether a hearing on fees with live witnesses as a matter of trial court discretion. FED. R. CIV. P. 54(d)(2) generally addresses attorney fee awards. Subsection (C) of that rule provides that parties will be given an opportunity to provide submissions to the district court on fees. *Id*. Subsection (D) encourages the development of local procedures "to resolve fee-related issues without extensive evidentiary hearings." *Id*. The Advisory Committee official notes on the adoption of these sections of the rule in 1993 emphasize flexibility and state: "In some cases, an evidentiary hearing may be needed, but this is not required in every case." FED. R. CIV. P. 54 advisory committee's note (1993); *see, e.g.*, Etherton v. Owners Ins. Co., 82 F. Supp. 3d 1190, 1201 (D. Colo. 2015) (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)) (rejecting evidentiary hearing on fees and declining to turn fees into a "second major litigation").

FINDINGS AND CONCLUSIONS ON FEES

While live hearings may be a matter of trial court discretion, documentation of the trial court's fee decision must be clear.[107] Thus, Washington courts have made it clear that findings and conclusions on fees are *mandatory*.

While in some instances courts have upheld fee awards without findings and conclusions where there is enough in the record to explain a court's rationale for a fee award,[108] the better practice is that the trial court must enter findings and conclusions on its fee award.

The findings and conclusions are simply the best evidence of the trial court's reasoning on fees. In *Rhinehart v. Seattle Times Co.*, counsel for the newspaper submitted an affidavit supporting fees in the amount of $66,699.02, but the court, without explanation, allowed $40,000 in its findings.[109] Counsel for the newspaper did not provide a verbatim report of proceedings on this issue.[110] The court stated:

> While the determination of the fees at trial is best left up to the trial court, that court must make a sufficient record to enable the appellate court to conduct a proper review. Because there is no record of the hearing before us in this case, we cannot undertake a proper review and must remand to the trial court.[111]

Requiring findings on fees makes sense. Fee awards should not be an afterthought. Frequently, the fee award can equal or exceed the amount recovered.[112] While the parties and the court spend considerable time on the findings and conclusions on the merits, the fee award should not be a one-line item in the judgment summary.

---

107. *See, e.g.*, Svendsen v. Stock, 23 P.3d 455, 462 (Wash. 2001); Mahler v. Szucs, 957 P.2d 632, 651–52 (Wash. 1998); Berryman v. Metcalf, 312 P.3d 745, 753–54 (Wash. Ct. App. 2013); Eugster v. City of Spokane, 91 P.3d 117, 125 (Wash. Ct. App. 2004), *review denied*, 94 P.3d 959 (Wash. 2004).

108. Banuelos v. TSA Wash., Inc., 141 P.3d 652, 657 (Wash. Ct. App. 2006) (issuing letter opinion detailing its lodestar calculation and justification for a multiplier).

109. Rhinehart v. Seattle Times, 798 P.2d 1155, 1157–58 (Wash. Ct. App. 1990).

110. *Id*. at 1161.

111. *Id.*

112. *See, e.g.*, Beeson v. Atl.-Richfield Co., 563 P.2d 822 (Wash. 1977) (approving fee award of $3,600 when only $1,000 was at stake). As the *Mahler* Court noted, the amount of recovery is a factor in determining if a fee award is reasonable, but it is not a conclusive factor, stating "[w]e will not overturn a large fee award in civil litigation merely because the amount at stake in the case is small." 57 P.2d at 651.

Washington courts have expressed dissatisfaction with trial courts' refusal to seriously address fee decisions.[113] In *Berryman*, the court provided an exhaustive opinion on calculating fees that is a guidepost to attorneys and judges alike.[114] The court made clear that trial courts should not accept fee declarations from counsel unquestioningly, and they must take an active and independent role in assessing fee requests and award fees.[115] Fee decisions are not a mere "litigation afterthought."[116]

APPELLATE REVIEW OF FEE DECISIONS

Washington law recognizes that decisions on the calculation of a reasonable fee are entrusted to the discretion of the trial court and will be overturned on appeal only for an abuse of discretion.[117] Appellate courts will ordinarily address whether a trial court exercised its discretion appropriately by evaluating whether the trial court properly applied the lodestar method.[118] An appellate court may, however, also evaluate the reasonableness of a fee award in light of the factors set forth in RPC 1.5(a)(1) for a reasonable attorney fee.[119]

In exercising its discretion, a court may not simply rely on the amount of a contingent fee as the reasonable attorney fee. In *Allard*, the trial court awarded $2.5 million in damages to the plaintiffs and allowed plaintiffs' first firm to recover $225,000 in fees for the trial and first appeal; plaintiffs' second firm to recover $596,646 (representing the contingent fee), a firm hired by the second firm to recover $80,000 in fees on an hourly basis, and the guardian *ad litem* to recover $65,000.[120] Upon a challenge to the propriety of relying on the contingent fee and also allowing an hourly recovery, the Supreme Court affirmed on the ground that the fees were reasonable and essentially made the plaintiffs whole.[121] Justice Dore wrote a stinging dissent, arguing the contingent fee alone constituted adequate compensation and it is unreasonable to also allow hourly recovery for the same work.[122] Further, Justice Dore argued the majority

113. *See, e.g.*, *Scott Fetzer II*, 859 P.2d 1210 1217 (Wash. 1993); *Scott Fetzer I*, 786 P.2d 265, 270 (Wash. 1990).

114. *See* Berryman v. Metcalf, 312 P.3d 745, 755 (Wash. App. Div. 2013).

115. *Id.* at 753.

116. *Id.*

117. Allard v. First Interstate Bank of Wash., N.A., 768 P.2d 998, 999 (Wash. 1989).

118. Mahler v. Szucz, 957 P.2d 632, 651 (Wash. 1993); *Scott Fetzer I*, 786 P.2d at 273; Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 202–05 (Wash. 1983).

119. *Mahler*, 957 P.2d at 651 n.20 (citing *Allard*, 768 P.2d at 1000); Brand v. Dep't of Labor & Indus. of Wash., 989 P.2d 1111, 1114 (Wash. 1999).

120. *Allard*, 768 P.2d at 999.

121. *Id.* at 1001.

122. *See generally id.* at 1003–07 (Dore, J., dissenting).

confirmed the public perception that contingent fees were inherently unfair.[123] A court may consider the award under the contingent fee agreement, but the award under the terms of such an agreement is not determinative as to the reasonableness of the fee.[124]

Washington courts have stated on many occasions that the amount of the recovery is a factor in deciding the reasonableness of a fee award, but it is not the decisive factor. In *Beeson v. ARCO*, the Supreme Court rejected ARCO's argument that the fees were disproportionate to the recovery and allowed $3,500 in fees at trial, plus fees on appeal.[125]

In *Travis*, the Court noted that the amount in controversy is "merely listed as a factor to be considered."[126] The Court stated: "[t]he size of the attorney fees in relation to the amount of the award is not in itself decisive."[127] The Supreme Court rejected the defendant's argument that fees in excess of the award should be limited to cases where the defendant's acts injured many people.[128] The Court of Appeals in *Bright* reaffirmed the principle that a party's degree of success in litigation may be *a* factor in the Court's analysis of the reasonableness of a fee, but it is not the decisive factor.[129]

CONCLUSION

While contract principles and all of the factors of RPC 1.5(a) are relevant to the question of whether the fee charged by a lawyer to a client are reasonable, a different calculus is present when a court is asked to shift the obligation to pay fees from the client to another party under the court's aegis. Such decisions on fee awards must not be treated as an afterthought either by counsel or the courts.

Frequently, such decisions may implicate millions of dollars. The lodestar methodology, faithfully applied, provides a disciplined, objective means of

123. *Id.* at 1003.

124. Blanchard v. Bergeron, 489 U.S. 87, 94 (1989).

125. *See* Beeson v. Atl.-Richfield Co., 563 P.2d 822 (Wash. 1977) (where the plaintiff gillnetter recovered $1,000 as a result of damages to his nets caused by an ARCO supertanker). *But see* Singleton v. Frost, 742 P.2d 1224, 1228 (Wash. 1987) (instructing trial court to "take into account the amount involved and to set the award of fees with the amount recovered in mind").

126. Travis v. Wash. Horse Breeders Ass'n, 759 P.2d 418, 425 (Wash. 1988).

127. *Id.*

128. *Id.*; *see also* Mahler v. Szucs, 957 P.2d 632, 650–51 (Wash. 1998).

129. Bright v. Frank Russell Invs., 361 P.3d 245, 251 (Wash. Ct. App. 2015).

calculating a reasonable fee where a fee-shifting principle is at play. It requires counsel and courts alike to "show their work" in arriving at a fee award. That principle should be the default methodology for calculating a fee award in a fee-shifting scenario in Washington.