City Attorney's Department, League of California Cities,
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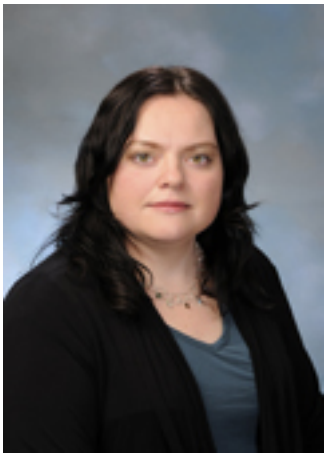
HOW TO AVOID OR REDUCE ATTORNEY'S FEES AWARDS UNDER CALIFORNIA CODE OF CIVIL PROCEDURE § 1021.5.



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Introduction

So, your City has been sued…and this time, the lawsuit has some merit and you're thinking about looking into the issue further and perhaps changing a few things to address issues raised by the litigant. The problem is that as soon as you acknowledge that the plaintiff may have a case, you may have difficulty resolving the dispute without being forced to pay attorney's fees under the private attorney general statute, California Code of Civil Procedure section 1021.5.

The private attorney general statute states as follows:

> Upon motion, a court may award attorneys' fees to a **successful party** against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

For public agencies, the two requirements of the statute that provide the most ammunition to beat back an eventual claim of fees are the "successful party" requirement and the "necessity and financial burden of private enforcement" requirement.

<u>"Successful Party"</u>

Under the statute, fees can only be awarded to a successful party. Determining the successful party is often obvious. There are, however, two exceptions.

First, the definition of "successful party" includes plaintiffs who can show that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and (3) the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit. (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 ("*Tipton*").)

Second, a party who received some relief is not a successful party if they did not obtain their primary litigation objective, as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 7 [hereafter *MBNA*].) Moreover, where a litigant in a writ proceeding obtains only partial relief, the relevant inquiry for the court is whether the issues on which plaintiffs prevailed were "substantial" when compared to the requests for relief which were denied. (See *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 1000.)

Necessity and Financial Burden of Private Enforcement

Not surprisingly, plaintiffs suing public agencies often trumpet the public benefits and seek to disguise their own financial interests. But to be entitled to fees under Section 1021.5, the cost of the litigation must place a burden on the litigant that is out of proportion to the litigant's personal interest in the lawsuit. (*Woodland Hills Residents Association, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 941-42 ("*Woodland Hills*").)

Each one of these legal requirements create opportunities for public agencies to take steps to minimize—or avoid—an award of fees. Below are a few tips that you can use to accomplish this goal. Remember, though, for these strategies to work, it is extremely important that you create a real time record documenting all the underlying facts that you will rely on to beat back the plaintiff's attorney's fees requests.

Tip 1: Cast Doubt on the Litigant as a Catalyst

Many times, plaintiffs bring lawsuits against public agencies based on information obtained from other agencies that may be looking into the agencies' conduct. However, to be eligible for attorney's fees under a catalyst theory, a plaintiff must show that the lawsuit was the catalyst motivating the defendant to provide the primary relief sought. (*Tipton*, 34 Cal.4th at 608.) Courts have routinely held that a plaintiff that steps into a pre-existing regulatory investigation cannot claim fees as a catalyst. (*Id*. at 608-09; *see also Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 353 ("*Westside*"); *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 667 ("*Abouab*").)

Nor is it enough for a litigant to accelerate a pre-existing investigation. In *Westside Community* the issue was Section 11135 of the Government Code, which required the Health and Welfare Agency to issue regulations to implement

a law prohibiting employees from unlawfully discriminating against any person on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability. (*Westside*, 33 Cal.3d. at 350.) Defendants believed that the agency was not complying with its obligation to issue regulations, so they filed a Writ of Mandate requesting that the court order the Agency to issue final regulations. (*Id*.) Prior to final resolution of the Writ Action, the Agency issued final regulations, and plaintiffs subsequently sought fees under Section 1021.5. (*Id*. at 351.) The court denied the attorney's fees request, and held that because the agency was already in the process of considering regulations at the time the lawsuit was filed, plaintiffs were not entitled to fees as a catalyst. (*Id*. at 354.) The court in *Tipton* expounded on this when it held that awarding attorney's fees to plaintiffs on the theory that their lawsuits expedited public agency action would have detrimental consequences for the public because once an agency was sued, it would refrain from taking any steps to make the regulatory process go faster for fear that its actions would be perceived by the court as having been induced by the litigation. (34 Cal.4th 604, 609.) Thus, as a matter of law, attorney's fees may not be obtained by merely causing the acceleration of remedial measures. (*Id*.)

This can really be a complete knock-out to a request for attorney's fees, but to use it you have to make sure that you are cooperating with any outside investigation. You also may be able to use this defense if, after a claim is filed, you begin to initiate your own investigation with an eye toward corrective action. As with all of these tips, though, it is critical that you carefully document these efforts and that you inform the litigant of your efforts.

Tip 2: Engage the Litigant in Settlement Discussions

In *Graham v. Daimler Chrysler Corp*. the California Supreme Court held that section 1021.5 does not permit an award of attorney's fees in catalyst cases when "reasonable efforts short of litigation" would have vindicated the rights that a litigant purports to advance. (34 Cal.4th at 577.) The court therefore concluded that to be entitled to fees, a litigant must notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time before initiating litigation. (*Id*.).

In *Abouab v. City and County of San Francisco,* the court considered this situation in the context of a lawsuit against a public agency. (141 Cal.App.4th 643.) In *Abouab*, the lawyer requesting fees obtained information in the course of his investigation in another action that led him to believe that the ownership of

One Market Plaza had changed. If true, this change in ownership should have triggered a reassessment of the building, which would have resulted in a significant increase in the building's property taxes. (*Id*. at 648-49.) A few months after obtaining the ownership information, Mr. Abouab, the attorney seeking fees, informed the City about a "possible change of ownership of a large downtown building" and suggested that the City initiate action against the downtown building and that he be paid a portion of any back property taxes that were due. (*Id*. at 649-50.) The City declined this request, and shortly thereafter, Mr. Abouab filed a writ petition to compel the City to investigate an unreported change in ownership at One Market Plaza. (*Id*. at 650.) Following receipt of the petition, the City began an investigation into the underlying allegations, and informed Mr. Abouab that there was no longer cause for the suit because the "City would seek to recover such taxes as the facts indicate are due." Instead of dismissing the lawsuit, Mr. Abouab proceeded to engage in thousands of hours of needless litigation. The court concluded that, under these facts, Mr. Abouab had not made any effort at pre-suit resolution of the claim, and that, as a result, he was not entitled to fees under section 1021.5. (Id. at 672.)

The *Abouab* case provides a good blueprint for how you can combine tip one and tip two to create a powerful defense against an eventual claim of attorney's fees. However, to use this defense effectively, you will need to evaluate the case as soon you receive a claim (or some other indication of a dispute) to see if there is a reasonable way to settle the dispute. Once that is done, you should respond to the plaintiffs in writing with your offer.

This is also a good opportunity to test whether the plaintiffs are really after change, or are instead after money. If the plaintiffs refuse a settlement offer because they, themselves, don't get enough money, that is good evidence that the driving force behind the lawsuit is their own financial interest, not the public good.

Tip 3: Show that the Litigant Didn't Get What They Were After

In non-catalyst cases, the determination of whether a party is successful within the meaning of section 1021.5 requires an analysis of the surrounding circumstances of the litigation and a pragmatic assessment of the gains achieved by a particular action. (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685.) To make this determination, the court will compare the results of the litigation to the parties' demands and their "litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources."

(*MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 7.) When a litigant in a writ proceeding obtains only partial relief, the relevant inquiry for the court is whether the issues on which plaintiffs prevailed were "substantial" when compared to the requests for relief which were denied. (See *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 1000.)

If the other side got a judgment in their favor giving them everything they sought in the lawsuit, then this tip won't work. But if, as is often the case, they got some but not all of the relief they requested, this can be an effective strategy. To use this tip, you will need to point to evidence to establish what the plaintiff's litigation objectives were. One obvious way to get this evidence is to ask for it by querying the litigant about what he or she wants right after the lawsuit is filed. Even better, see if you can get a list of those objectives in writing. Note, though, it is best to do this early in the process, as that is when the litigant is most likely to give you a straight answer. If they won't tell you what they want voluntarily, draft discovery designed to get at that issue. At the claim stage, respond by requesting clarification. Ultimately, the more you do to get a clear idea early on of what the litigant is looking for, the more effective this strategy will be.

Tip 4: Show that the Litigant Was Really Looking After His/Her Own Interest

The purpose of section 1021.5 is to "provide an incentive for private plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation." (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 79.) To be entitled to fees, the litigant bears the burden of showing that their personal stake was not sufficient by itself to justify the lawsuit. (*Beach Colony II Ltd. v. California Coastal Comm'n* (1985) 166 Cal.App.3d 106, 113 ("*Beach Colony*").) At issue in *Beach Colony* was whether attorney's fees should be awarded to a litigant who obtained a judicial decision that "recognized the legislative need to protect the natural resources in the coastal zone by balancing coastal developmental concerns with maximizing public access consistent with sound resources conservation, while at the same time constitutionally protecting the rights of affected private property owners." (*Id*. at 111-12.) The court held that this decision satisfied the public interest prong of section 1021.5, but did not satisfy the financial benefit prong because the decision arose from a lawsuit about Beach Colony's ability to construct condominium units, which gave Beach Colony a significant financial incentive to pursue the litigation. (*Id*. at 113-14.) *Beach Colony* also held that, in cases like this where a plaintiff has a personal financial incentive to pursue the lawsuit, it is

the plaintiff's burden to establish that the litigation costs transcended its personal interest. (*Id*. at 113.)

Whether the burden placed on the litigant is out of proportion to the litigant's individual stake in the matter is determined by "a realistic and practical comparison of the litigant's personal interest with the cost of suit." (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 515 [hereafter *Families Unafraid*].) To utilize this strategy, you will therefore need to take some steps to determine what the plaintiff's financial stake is in the lawsuit. One way to do this is to utilize tip two, and engage the litigant in settlement discussions. There is no better way to get the litigant to establish that they have a large personal stake in the lawsuit then by asking them to respond to a settlement offer in writing. In most cases, the litigant will significantly inflate their demand as a bargaining chip. That's exactly what you want, because that inflated demand can become evidence of their actual financial stake in the lawsuit if and when you get into an attorney's fees fight. The other way to get this information is to propound damages discovery. Either by special or form interrogatories, get the litigant to commit to their theory of damages.

Tip 5: Make a 998 Offer

Code of Civil Procedure section 998 ("Section 998") provides that a defendant may terminate a prevailing party's ability to recover statutory attorneys' fees if it tenders an offer that is not accepted and the prevailing party fails to achieve a more favorable result in the litigation. (Code Civ. Proc., § 998, subd. (c)(1); *Scott Co. v. Blount*, *Inc*. (1999) 20 Cal.4th 1103, 1115.) While most 998 offers include monetary terms, they can also include nonmonetary terms.

In *Elite Show Services, Inc. vs. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 14 Cal.Rptr.3d 184, the defendant agreed in its 998 offer to the precise injunctive relief sought by the plaintiffs. The defendant also agreed to pay a sum equal to the amount of the reasonable attorney's fees and taxable costs that the plaintiff had incurred in prosecuting the action up until the date of the offer. The court of appeal held that the offer was sufficiently certain under section 998 as there are specific statutory and rule provisions which set forth a procedure for determining the amount of attorney's fees. The fact that the amount of costs and fees must be determined after acceptance of the offer does not render the offer fatally uncertain.

While utilizing this tip alone won't completely insulate you from fees, it can significantly limit the amount of the fee award.

Tip 6: Scrutinize the Other Side's Fees

You'll find this hard to believe, but lawyers have been known to waste time and money on tasks that are unnecessary. Litigant's purporting to proceed in the public interest sometimes waste time on purpose. There are a series of cases that allow a trial court to reduce a fee request on the basis that the fees incurred were wasteful. In *Enpalm v. Teitler*, the court held that, where an attorney requests time for superfluous litigation, the court has the discretion to reduce an attorney's fees request. ((2008) 162 Cal.App.4th 770, 775.) And in *Meister v. Regents of the University of California*, the court held that when an attorneys efforts accomplished nothing, it is appropriate for the court to find that the hours were unreasonably spent. (*Meister v. Regents of the University of California* (1998) 67 Cal.App.4th 437, 450 ("*Meister*").) These are just two examples: there are no shortage of examples of courts significantly reducing fee awards because of wasted efforts. The trick to this tip, therefore, is not finding the right case, it is reviewing the other side's fee statements with a fine tooth comb to identify wasted or duplicative effort.

Tip 6: Challenge the Rate

The higher the rate of the lawyer on the other side, the more you'll have to pay in fees. There is at least one case that holds that, as a matter of public policy, whether or not the rate charged to a public entity is reasonable must be judged "by an objective standard *from the point of view of the public entity*." (*Estate of Baum* (1989) 209 Cal.App.3d 744, 753 (emphasis added).) In *Estate of Baum*, the court considered what would constitute a reasonable rate under statutes where "the successful party in an action is entitled to recover attorneys' fees from the adverse party." (*Id*. at 752.) According to *Estate of Baum,* there is "no assurance that an award of fees under one of these statutes will fully reimburse the prevailing party for the sums actually incurred or paid to his attorney." (*Id*.) Instead, under these kinds of statutes, what constitutes a reasonable fee between attorney and client may not be a reasonable fee award against the public entity defendant. (*Id*.) For purposes of fee-shifting statutes, reasonable attorney's fees must be judged by an objective standard from the point of view of the public entity. (*Id*. at 752-53.)

For this tip to be effective, you need to make sure that the rate that you are paying is lower than the rate being requested by the other side. If so, you can

argue that the rate you paid is good evidence of what constitutes a reasonable rate from the standpoint of a public agency. Be warned, however, that this is the only case that I have found that stands for this proposition. There are other cases that suggest that public agencies are required to pay the actual rate paid by the other side. But the *Estate of Baum* analysis makes sense, and making this argument is painless. If it works, you will almost certainly have significantly reduced the amount of fees you'll be required to pay.

Conclusion

Having to pay fees under Section 1021.5 to a lawyer who has just bested you in a lawsuit can really add insult to injury. But if you are aware of this risk early on in the process and take steps to create a strong factual record on the requirements of Section 1021.5, you will substantially increase your chances of either beating back or reducing that fee request or award.