

Fee shifting - what are we worth by the hour? A recent survey of hourly rates of plaintiff's tort trial lawyers

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Introduction

Several of my WSAJ EAGLE friends remarked not too long ago that one of the major benefits of doing plaintiff's personal injury work was not having to keep hourly time records. While some plaintiff's contingency fee lawyers do keep time records, for various reasons, most do not. One aspect of hourly time keeping is selecting an hourly rate for both the lawyer and his/her paralegal.

Where you get paid on a contingency fee basis, why should you even care what is your reasonable hourly rate? Several reasons come to mind. First, every client in a contingent fee case has a statutory right to have a court determine the reasonableness of the fee. RCW 4.24.005. Two of the statutory criteria for determining reasonableness are the time and labor required, and the fees customarily charged in the locality. Second, the court will be called on to determine the reasonableness of your contingent fee for the settlement of a minor's claim. (*See In Re The Settlement/Guardianship of AGM and LMM, Minors*, 154 Wn. aPP. 58, 233 p.3D 1276 (2010)). Third, some clients may want to consider the alternative of hiring you by the hour for some matters. If you are called to serve as a UIM or contract arbitrator, you will charge by the hour.

The most important reason, however, relates to fee shifting. Fee shifting is the process whereby a prevailing party is entitled to an award of attorney's fees against the opposing party. *See generally* Talmadge and Jordan, *Attorney's Fees in Washington*, (Lodestar Publishing 2007), Chap. 4, pp. 21 – 25. Plaintiff's contingency fee lawyers are entitled to awards of fee shifting fees in specific contexts, for instance, when the plaintiff is the prevailing party in MAR *de novo* appeals, or in the case of prevailing against a first party insurer under *Olympic Steamship v. Centennial Insurance Co.*, 117 Wn. 2d 37, 8911 P.2d 673 (1991). A further obvious instance is where the plaintiff's counsel is the prevailing party in cases brought under the Washington Law against Discrimination, RCW 49.60.030(2), and its federal analogs. The Washington Wages and Hours Statute, RCW 49.52.070, affords a fee shifting entitlement to the prevailing party. The recently passed Washington Insurance Claims Practices statute, RCW 48.30.015(3), also affords the prevailing party in such a case an award of reasonable attorney's fees. There are awards of fees available under the Consumer Protection Act, RCW Chap. 19.86 and under other civil rights statutes, state and federal.

Many contingency fee lawyers have never thought about what is a reasonable hourly rate for their work. In the survey discussed below, many openly admitted this. So - maybe in some cases we can get some or all of our fee value awarded against the opposing party.

Why is the hourly rate important? First of all, the fee shifting award belongs to our client, unless the contingency fee agreement says otherwise. *Luna v. Gillingham*, 57 Wn. App. 574, 581, 789 P.2d 801 (1990). In fact, Division I ruled in *Luna* that where the lawyer failed to provide in the fee agreement he drafted how the court-awarded fees would be apportioned between lawyer and client, those court-awarded fees belonged to the client and the lawyer's contingency fee was applicable only to the main recovery, and not to the court-awarded fees. *Luna*, 57 Wn. App. at 581.¹ Thus, whether the court-awarded fee belongs solely to the lawyer, solely to the client or is included in the

pot to which the contingency percentage applies, it is in the lawyer's and client's best interests to have an hourly rate that is as high as justifiable.

I am frequently asked to provide expert opinions on the reasonableness of attorney's fees in litigation. These expert witness engagements range from providing opinions on the reasonableness of attorney's fees charged by lawyers, in the contexts of lawsuits to collect attorney's fees, the foreclosure of an attorney's lien, the inherent valuation of attorney's work under RPC 1.5(a), or where a tort client may ask the court to determine the reasonableness of fees charged under RCW 4.24.005. I have also been involved both as an expert and as counsel in fee shifting contexts, where a prevailing party is entitled to an award of attorney's fees against an opposing party under the terms of a contract, or as a result of a fee shifting provision in a statute or case law such as those mentioned above.

As all fee shifting or other reasonableness determinations are performed by a court based on the *lodestar* method, the analysis of any hourly fees must begin with a determination of the reasonableness of hourly rates used by the lawyers. The Bar does not regulate hourly rates; only the market place does that, with oversight from judges when attorney's fees are challenged.

Secondly, the reasonable hourly rate for the lodestar is important for yet another reason. The lodestar process for determining reasonable fee shifting fees, including the concept of a multiplier on the lodestar fee, was developed by the Third Circuit Court of Appeals in *Lindy Bros. Builders, Inc., v America Radiator*, 487 F.2d 161 (3 Cir. 1973), which was adopted by the Washington Supreme Court in *Bowers v Transamerica Title*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Under *Bowers/Lindy*, a court may make **an upward adjustment to the lodestar amount** to compensate attorneys for the risk "that the litigation would be unsuccessful and that no fee would be obtained, . . ." *Bowers v. Transamerica*, 100 Wn.2d 581, 598-99; 675 P.2d 193 (1983) (quoting *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C.Cir.1980)). This is the *Lindy/Bowers* multiplier. The hourly rate is effectively "multiplied" for risk.

While I am very familiar with hourly rates for lawyers in the King County area and to a lesser extent in other areas, it occurred to me recently that conducting a survey of tort lawyers in Washington state, including the very best such tort lawyers, would likely generate data that would be useful in my attorney's fee dispute and expert witness practice. From this curiosity came the survey which is the subject of this article.

Methodology of the Survey Informal, Non-Scientific Nature

The survey consisted of sending boilerplate emails to targeted lawyers, occasionally with follow up emails to those lawyers to flesh out details of the initial response. The survey was targeted to tort lawyers on the plaintiff's side only. No effort was made to cover every known lawyer to perform some plaintiff's tort work. No effort was made to randomly sample tort lawyers statewide; in fact the majority of the survey's targets practice west of the Cascade crest.

This survey sought the hourly rate that these lawyers used in a fee shifting context in the past several years.² The responses ranged from a several-word response with an hourly rate and no details to an extensive explanation, some with copies of fee shifting pleadings. Some responding lawyers identified their hourly rates for other litigation work, but had never asked for fee shifting fees from a court. Others provided hourly rates that they used in their contingency fee agreement in the event the client discharged them and hired a new lawyer later. Some lawyers had established hourly rates for work such as serving as a UIM arbitrator, or as an expert witness on standard of care issues. Some merely stated that the rate they gave me was the rate they would charge if a plaintiff was willing to pay hourly. We collated the results that we received. We did obtain a fair

number of responses where lawyers had made fee shifting applications at hourly rates that were granted.

Targeted Lawyers

This survey was directed to WSAJ tort trial lawyers, including employment and civil rights lawyers. The survey reached out to lawyers handling garden variety tort case such as motor vehicle collisions, premises liability cases, jobsite injury cases, boating injury cases, medical and legal malpractice, products liability cases, insurance bad faith, civil rights and employment discrimination cases.

My original thought was to target this survey at the best tort trial lawyers in this state. For about 25 years, I have been privileged to be an active member of the Washington Association for Justice (formerly WSTLA), as a lawyer with a fairly typical personal injury practice. My service to WSTLA involved a number of years on the Board, as a frequent presenter at tort CLE seminars and also in a role such as chairing a task force. I was a WSTLA EAGLE member for 15 years. In the course of this work, I came to meet virtually all of the WSTLA Presidents since the late 1970s, and most of the WSTLA Trial Lawyers of the Year. I became acquainted with many of the very best and most successful trial lawyers in the state, and many other highly competent but less well-recognized tort lawyers. Since my practice has shifted to its current focus of fee dispute litigation, I have come to represent perhaps two dozen of these top lawyers in one capacity or another over the past 15 years. In this process, I learned a lot about reasonable hourly rates for such lawyers, even though most of them rarely charged clients on an hourly rate basis.

Accordingly, I set out to contact trial lawyers across Washington State handling tort cases by email, as described above. I initially focused on a number of discrete groups – former WSTLA presidents, and former WSTLA Trial Lawyers of the Year. Virtually without exception, WSTLA presidents are highly competent and experienced trial lawyers and the majority of them have been among the very best trial lawyers in the state. Trial Lawyer of the Year is about the highest honor bestowed by WSTLA on a lawyer – no person selected to this honor has ever been other than among the very best of the best. In the course of my 25 years of WSTLA/WSAJ membership, and later in my current practice, I had the opportunity to meet dozens of other highly competent and experienced trial lawyers but without the high kudos heaped on the few. Nearly all of these people were WSTLA Eagle members. I selected many of these people as representative of competence and experience, including some younger ones.

The lawyers contacted were asked to identify hourly rates they used when they did hourly work, rates that were approved by courts in fee shifting situations and rates used in fee agreements. We contacted literally 160 lawyers, male and female, younger and older, moderately experienced to highly experienced, and those with a more general tort practice to those who focused in narrower areas. We received back 112 responses.

Survey Results Generally

Of the total responses from all tort lawyers around the state, irrespective of duration of practice, experience, skill level or accomplishments, the average hourly rate used or claimed for use in fee shifting motions was \$326. The hourly rates provided me ranged from \$200 to \$500. These data are of limited value, because of the relatively large spread of years of experience,³ and the variance of locality where each practiced.⁴ The one clear indication from this survey overall is that no lawyer who responded claimed an entitlement to an hourly rate greater than \$500.

Specific Results Trial Lawyers of the Year

WSAJ has a fairly rigorous process of selecting the person it believes should be honored as the Trial Lawyer of the year. I am personally familiar with 24 of the 30 persons so honored since 1980 and four of them have been my clients. Of those still practicing, all of them would be considered by broad consensus as among the very best tort lawyers in this state. All are highly skilled and experienced. Virtually all have had seven figure verdicts and some of them have had many such verdicts. Of the 16 we contacted, all of these lawyers responded to the survey. The average number of years of practice of these lawyers is 34. The average hourly rate claimed by these lawyers is \$368. The rates claimed by these lawyers ranged from \$250 to \$500.

WSAJ/WSTLA Presidents

No one ever got to be a WSTLA/WSAJ president without being a fine trial lawyer. Some of these presidents were also Trial Lawyers of the Year. Of the 16 former Presidents we contacted, 13 of these lawyers responded to the survey. Four of these lawyers have been either clients of mine or their firm or partners have been clients of mine. The average number of years of practice of these former Presidents is 35. The average hourly rate claimed by these lawyers is \$369. The rates claimed by these lawyers ranged from a low of \$230 to a high of \$500.

Other Highly Competent Trial Lawyers

I identified over 55 other WSAJ trial lawyers who I knew to be highly competent and successful trial lawyers and asked them to respond. These lawyers selected were mostly WSAJ EAGLE members, but only a small number of the total number of EAGLE members were solicited with the survey request. These are people who I knew personally as superb and successful tort trial lawyers. Approximately twenty of this group are former clients of mine or their firm or partners have been clients of mine. Of this number, 46 did in fact respond. The average number of years of practice of these lawyers is 30. The average hourly rate claimed by these lawyers is \$333. The rates claimed by these lawyers ranged from a low of \$250 to a high of \$500.⁵

Spence Trial College Experience

I sampled lawyers for participation in the Spence Trial College programs, both those at the regional level as well as the three week program at the Spence Ranch near Lander, Wyoming. Attendance at these programs is indicative of a personal commitment by the attending lawyers to move their trial skills to the next level and to develop a better manner of connecting with jurors at the personal level. I have had several Spence graduates as clients either as their counsel in disputed fees or as an expert witness. I found that Spence College graduates are true believers in the Spence approach to jury trials and virtually all have experienced much better results after applying the Spence approach to trials. Of the 112 substantive responses I received, 15 were from Spence graduates. The average number of years of practice of these Spence graduates is 24. The average hourly rate claimed by these lawyers is \$343. The rates claimed by these lawyers ranged from a low of \$250 to a high of \$450. The rates for Spence College graduates were not markedly different from those of highly qualified trial lawyers who did not attend the Spence College programs.

Overall Conclusions from the Survey

This survey was not conducted in a scientific manner, and the sample was relatively small as compared with all lawyers who do some plaintiff's personal injury work. My original intention was not to get data from a representative sampling of all lawyers doing personal injury work, but to identify what is the reasonable range of hourly rates of highly qualified and successful plaintiff's trial lawyers. No effort was made to determine the reasonable range of hourly rates for given levels

of experience, nor to determine rates for specific communities or regions of the state. I believed that less experienced and qualified lawyers should command lesser rates than the top tort trial lawyers.

Given the limited goals of this informal survey, I reached these conclusions:

1. Plaintiff trial lawyers generally do work almost exclusively on a contingency fee basis and do not have established hourly rates. A small number of the lawyers surveyed did a small amount of hourly work and had an established hourly rate for that work, but this hourly rate was usually not for basic plaintiff's tort trial work.
2. The very best trial lawyers in this state do not seek fee shifting awards in excess of \$500 per hour, and most of this very exclusive group ask for fee shifting at hourly rates from \$350 to 450. The average fee for this group, which included former WSAJ Trial Lawyers of the Year, former WSAJ presidents, and Spence College graduates, was \$342.
3. The highest rate identified by any lawyer in the survey was \$500/hr, and only two lawyers claimed that rate. One such lawyer is both a Trial Lawyer of the Year and a former WSAJ president. His only recent fee shifting experience involved his fees approved at the rate of \$425/hr. I would heartily approve of the \$500 rate for this lawyer.
4. The lowest rate of any lawyer who participated in the survey was \$200/hr. Several highly skilled lawyers with superb reputations and around 30 years experience valued their time at \$250/hr.
5. The average hourly rate charged by WSAJ members who were not Trial Lawyers of the Year, former WSTLA/ WSAJ Presidents or among the very top tort trial lawyers, was \$334 per hour, with a low figure of \$230 per hour.
6. Of the 114 lawyers who responded to the survey, the average claimed as a reasonable hourly rate for fee shifting purposes was \$327 per hour.
7. Some very highly talented, skilled and experienced trial lawyers have set hourly rates lower than might be reasonable, and would be justified in asking fee shifting awards at higher rates.
8. Only a handful of lawyers who responded claimed an hourly rate of \$400 or more, and these lawyers would probably be considered by consensus of those who know them as the very best and most successful tort lawyers in Washington.
9. For those who do not fall into the category as among the very best tort trial lawyers in Washington, an appropriate range of reasonable hourly rates for competent and skilled trial lawyers is likely from \$225 to \$350 per hour, particularly where many of the very top such lawyers themselves would charge in the \$350 - 375 range themselves.
10. Below is a table summarizing the results of the survey.

What does this Mean for Most of Us

Most of us do not even think about hourly rates until we are faced with throwing together a fee shifting application with very little time to complete it. Most of us may not be aware that choosing

an unreasonably low hourly rate both impacts our client's overall recovery, not to mention our own fees. Selecting an hourly rate of only \$25/hour too low, when combined in a lodestar with some 1,500 hours of work to get the successful results, would result in a lodestar fee of \$37,500 too low. When we factor in a *Lindy/Bowers* multiplier of possibly 1.5 to 2.0, we might shortchange our client and ourselves by as much as \$75,000 in recovery. I often serve either as counsel for or as an expert in fee shifting matters outside the plaintiff's personal injury/employment discrimination area (including construction, commercial, family law and other areas), and I have found that lawyers who practice in these areas are not the least bashful about asserting high hourly rates in fee shifting applications. While often the hourly rates demanded are obviously excessive and unreasonable in my humble opinion, nonetheless they are asserted and often are what these lawyers are charging the clients on an hourly basis.

The plaintiff's contingency fee bar should reconsider (or consider for the first time, as the case may be), the hourly rate selected as valuing his or her tort work, so that a truly reasonable fee shifting award might be obtained. Hopefully the results of this informal survey will provoke some thought and discussion and be of assistance in your practices when fee shifting fees are available. The value of a survey such as this depends on the number of respondents. It is also important that data be kept up to date to reflect changes over time. We would appreciate your input. If you are willing to share your information, please send an email to michaelc@michaelcaryl.com and we will send you a short form to use in submitting your data.

Endnotes:

1. Many lawyers who anticipate the possibility of fee shifting fees specifically provide in the contingency fee agreement for what happens with the fee shifting fees. Some lawyers provide that the court awarded fees become part of the overall "pot" to which the contingency fee applies. A fee agreement may provide that the lawyer is entitled to the court awarded fees only. Yet others provide that the lawyer may elect between the contingency fee on the total award or the court-awarded fees. Of course, the lawyer's fee agreement is only as good as his/her disclosure and explanation to the client in the intake interview and the overall rule of reasonableness as to all fees under RPC 1.5(a), and in tort cases, under RCW 4.24.005.
2. If the lawyer had not made a recent fee-shifting motion, the lawyer was asked how he or she would value time by the hour in a fee-shifting context.
3. The average years of experience of all of the lawyers who responded to the survey is 28 years.
4. While not true in every case, lawyers who practiced in King County tended to have higher rates than lawyers in most of the rest of the state. Lawyers who practiced in decidedly rural communities tended to have the lowest hourly rates.
5. Some former WSTLA Presidents were also Trial Lawyers of the Year, so there is some overlap.

Michael Caryl, former *WSAJ EAGLE* for 15 years and plaintiff's personal injury lawyer for over 30 years, now focuses his practice on issues and disputes relating to lawyer's fees. He represents lawyers and lay clients in fee shifting motions and as an expert witness in fee shifting proceedings, among others.

	All Survey Responses	Trial Lawyers of the Year	WSTLA/WSAJ Presidents	Lawyers Specifically Selected	Spence College Graduates
Number of Responses	114	14	13	46	15
Average years experience	28	34	35	30	24

Average Hour Rate Reported	326	368	369	333	343
Lowest Hourly Rate	200	250	250	230	250
Highest Hourly Rate	500	500	500	500	450