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February 2014 Bar Bulletin

The Effect of Success on Attorney Fee Awards

By David C. Burkett and Michael R. Caryl

(First of two parts)

A prospective client wants to discuss a claim involving a modest sum of money. The claim is against a party with deep pockets, who can be expected to fight hard and will want to teach a very painful lesson and deter future claims.

You reasonably believe that the fees and costs for this fight will greatly exceed the amount in controversy. A fee-shifting contract or statute exists, but you are concerned that a modest recovery on the

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underlying claim may serve to restrict the fee recovery. If that happens, either the client or you may suffer a severe loss, depending on whether the client is paying fees by the hour or on a contingency.

Even if the client has agreed to pay by the hour, you still might lose badly because the client may have fallen behind and ultimately cannot or will not pay your fees. Even worse, the client might challenge the fees already paid to you, or fees charged by you but not yet paid, as being unreasonable in light of the amount recovered.

You should be concerned about a Pyrrhic victory. In the ordinary lawsuit with fee-shifting potential, Washington law favors proportionality between the amount in controversy, the prevailing party's degree of success and the amount of the fee award.¹

The good news is Washington recognizes substantial exceptions to the proportionality rule. Washington courts have frequently applied those exceptions, sometimes with surprising results.

Part I of this article will discuss the ordinary rule of proportionality. It will also discuss one of the most significant exceptions to it (industrial insurance appeals). Part II will discuss other significant exceptions (unpaid wages, Consumer Protection Act, civil rights and employment discrimination cases).

Proportionality Is the Norm

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21 Feb

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